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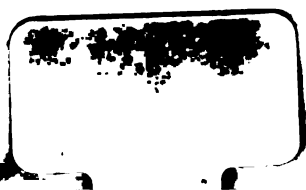
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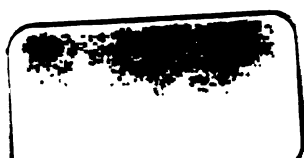
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THE  
LEGAL GUIDE.

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VOL. III.

FROM NOVEMBER 2, 1839, TO APRIL 25, INCLUSIVE.



25

L O N D O N :

PUBLISHED FOR THE PROPRIETORS, BY

JOHN RICHARDS & CO.

LAW BOOKSELLERS AND PUBLISHERS, 194, FLEET STREET.

1840.

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G. NORMAN, PRINTER, MAIDEN LANE, COVENT GARDEN.



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# The Legal Guide.

VOL. III.]

SATURDAY, NOVEMBER 2, 1839.

[No. 1.

## NEW LAWS OF REAL PROPERTY.

### ESSAY II.

3 & 4 Wm. IV. cap. 74.

*An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.*—[28th August, 1833.]

OF all the changes that have been recently made in the practice of Conveyancing, this statute is the most important, and requires the strict attention of the practitioner and the student, who, in order to well understand it, must make himself acquainted with the old law of settlement, and the assurances which it has abolished.

The ancient fiction of a COMMON RECOVERY for enlarging an estate tail into a fee simple, first arose in *Taltarum's* case, so long back as the 12 Edw. 4. (a), in which J. B. being seised, in fee of the lands in question, gave them to one Wm. Smith, to hold to him and the heirs of his body, by force of which he was seised. Wm. Smith died, leaving Humphrey, his eldest son, on whom these lands descended, who entered and was seised *per formam doni*. Humphrey enfeoffed one Tregos, of the lands in fee, who rendered them to Humphrey, and

Jane his wife, and to the heirs of their two bodies, remainder in fee to Humphrey, by force of which they were seised. Some time afterwards Jane died, on which Humphrey became sole seised of the lands in tail, and being thus seised, one Taltarum brought a writ of right against Humphrey, and counted of his possession against him. Humphrey made defence, and vouched to warranty one R. King, who entered into the warranty, and joined the demise on the mere right. Afterwards R. King, the vouchee, made default, and departed in contempt of the Court; in consequence of which final judgment was given, that the demandant, Taltarum, should recover the lands against Humphrey, and that Humphrey should recover lands of equal value of R. King, the vouchee. Humphrey afterwards died without leaving heirs of his body, and the question was, whether Richard, the brother of Humphrey, who was heir in tail to the lands, should be barred by this recovery. It was determined by all the judges, that the estate tail was not barred by the recovery, because the tenant in tail was not seised of the estate tail at the time of the recovery, but of another estate; and as the recovery in value goes according to the estate whereof the tenant was seised at the time of the recovery, and not in recompense of the estate he had not, the issue in tail would have no recompense in this case, and therefore was not barred by the recovery. It follows hence,

(a) See Year Book, 14. 19.

that if Humphrey had been seised of the estate tail of the gift of J. B. at the time of the recovery, Richard, who, it should be observed, was tenant in tail in remainder, would have been barred, so that by a recovery duly suffered, not only the estate tail of the recoveree, but all ulterior estates tail in remainder, would also be barred, and as by force of the judgment the recoveror was in of an estate in fee, it follows that all ulterior remainders and reversions would be also barred, and that consequently all charges and incumbrances created by persons in remainder or reversion would be also barred. (a)

Thus was the fiction of a Common Recovery established in opposition to the statute *donis conditionalibus*, (b) (the *gentilitium municipali* (c) as it has been named) called the Statute of Westminster, which enacted the mischief of an indestructible entail (d), and by which fiction *an estate tail was enlarged* into a fee simple, and it became a common assurance, and so remained until the passing the present statute. Although it is said that a recovery suffered by tenant in tail passes a *fee simple derived out of the estate tail*—a larger estate got out of a smaller—yet we find this nonsense or ignorance in some of the books which are looked up to as containing golden opinions.

But even this assurance was found not effectual to enable a tenant in tail in remainder to bar the estate tail without the concurrence of the owner of the immediate freehold. The common law then stepped in, and by another artificial assurance called a *FINE* completed the work that was after-

wards sanctioned by the Legislature (e), which established proclamations, and subsequently (f) gave to the fine of a tenant in tail the effect of absolutely excluding the issue in tail as such from the succession, and of diverting the land for the time of the continuance of such issue, into the ordinary channels of descent and alienation, and this in the face of its own previous Act (g). Thus was established the old effectual method of barring an entail.

*Taltarum's Case* is the model and foundation of all *Common Recoveries*, and it were, we submit, only waste of time and space here to enlarge upon either the machinery or its working from that time. This Essay would, however, be incomplete without such an introduction, in which we have, in as few words as possible, explained the old Law as to barring of estates tail and in remainder or reversion after estates tail—*springing uses* and *executory devices*, and other eccentric schemes for the disposal of real property followed. "Each step, subsequent to the statute *de donis*, was an effort to recover the liberty of alienation, but by pursuing that object without method, by employing different devices, in the various kinds and degrees of operation, the law became entangled among subtleties and forms hardly less injurious than the perpetuity which it abhorred. The wrong assurance was adopted, or the technical requisites were not duly observed, and the effect upon the title of the blunder or omission, was overlooked or misconceived."

At length came the statute 3 & 4 W. 4. c. 74. by which it is enacted,

(a) *Capel's Case*, 1 Rep. 62.; *Cholmeley's Case*, 2nd Ed. 59.; *Hudson v. Benson*, 2 Lev. 28.

(b) 13 Edw. 1. c. 1.

(c) Co. Litt. 392. b.

(d) See also *Mary Portington's Case*, 10 Rep. 37. b. and *Lumbard's Case*, 44 Ed. 3. Year Book, 21.

(e) 4 Hen. 8. c. 24, called the STATUTE OF FINES.

(f) 32 Hen. 8. c. 36.

(g) As under the Statute *de donis*, an estate tail became a particular estate, so under these statutes a base or determinable fee, derived out of the estate tail, became also a particular estate, and thus the common law, which prohibited a remainder after a fee, was infringed.

That in the construction of this Act the word "Lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments of any tenure (except copy of Court Roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of Court Roll, shall extend to manors, messuages, lands, tenements, and hereditaments of that tenure, and any undivided share thereof; and the word "Estate" shall extend to an estate in equity as well as in law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands; and the expression "Base Fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; and the expression "Estate Tail," in addition to its usual meaning, shall mean a base fee into which an estate tail shall have been converted; and the expression "actual Tenant in Tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right; and the expression "Tenant in Tail," shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "Tenant in Tail entitled to a Base Fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression

"Money subject to be invested in the Purchase of Lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of Court Roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "Person" shall extend to a body politic, corporate, or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private Act of Parliament, or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement; and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: Provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this

clause in those cases in which there is any thing in the subject or context repugnant to such construction.

Section 2. That after the thirty first day of December, one thousand eight hundred and thirty-three, no fine shall be levied or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery; and any fine or common recovery which shall be levied or suffered contrary to this provision shall be absolutely void.

(To be continued.)

#### PROBLEM I.

Vol. 3.

CHATTEL INTERESTS.

What is a CHATTEL?

#### Law Reports.

#### CONSISTORY COURT OF LONDON.

LLOYD v. PETITJEAN, CALLING HERSELF  
LLOYD.

MARRIAGES ABROAD.—*As to the validity in England of marriages of British subjects with the subjects of other nations at the hotel of the British Embassy by the Chaplain to the Ambassador.*

FIRST JUDICIAL CONSTRUCTION of the statute 9 Geo. 4. c. 91. *whether a marriage in the house of a British Ambassador, in which one of the parties only is a British subject, is or is not excluded from the operation of that Act.*

This is a subject of considerable importance at the present day, and it may be as well, before entering upon the case, to shew

what is the LAW of FRANCE previous to the celebration of a marriage.

*Civil Code.* tit. 2. ch. 3. 63.

“Avant la célébration du mariage, l'officier de l'état civil fera deux publications, à huit jours d'intervalle, un jour de dimanche, devant la maison commune. Ces publications et l'acte qui en sera dressé, énonceront les prénoms, noms, professions et domiciles des futurs époux, leur qualité de majeurs ou de mineurs, et les prénoms, noms, professions et domiciles de leurs pères et mères.”

“Le fils qui n'a pas atteint l'âge de vingt-cinq ans accomplis, la fille qui n'a pas atteint l'âge de vingt-un ans accomplis, ne peuvent contracter mariage sans le consentement de leurs père et mère: en cas de dissentement, le consentement du père suffit.”—*Ibid.* tit. v. ch. i. 148.

“Il n'y a pas de mariage lorsqu'il n'y a pas de consentement.”—*Ibid.* tit. v. ch. i. 146.

In this case, *Mr. George Lloyd* was born in the East Indies, on the 17th October, 1815, and baptised in England, on the 28th April, 1821. He was a natural son of *Sir Wm. Lloyd*, and married *Athalie Pulcherie Clotilde Petitjean*, an actress at Paris, who was born there, 29th December, 1812. The marriage took place, in the first instance, by civil contract, before the Mayor of the second arrondissement of Paris, on the 26th October, 1837, an entry being duly made in the registry of the acts of marriage; and on the same day, the parties were married at the hotel of the British Ambassador at Paris, by the Chaplain of the Embassy, and being described as *George Lloyd*, of Wrexham, in the county of Denbigh, bachelor, and *A. P. C. Petitjean*, of the parish of St. Roch, Paris, spinster. *Mr. Lloyd* was at this time a domiciled subject of England, and the lady a domiciled subject of France. The suit was promoted for a nullity of the marriage, on the ground that at the time of the contract, *Mr. Lloyd* was but 22 years and nine days old, and that, although a certain act of declaration, dated 30th or 31st August, 1837, signed by *Sir Wm. Lloyd*, specifying the age of his son, and containing a legal acknowledgment of him as such, was produced to the French authorities and accepted as a consent to the marriage, in conformity to the requisites of the Civil Code, such act of declaration was not made or intended to convey a consent to the marriage on the part or

Sir Wm. Lloyd, who was not acquainted with his son's design previous to the marriage; but under an idea that he was about to enter into a literary engagement with a Frenchman, and that it was necessary to prove his birth according to the law of France. It, therefore, alleged that the first marriage was null and void, through want of consent of the father. With respect to the second marriage, the libel pleaded, that neither of the parties was a member of the household or in the retinue of the British Ambassador, by reason whereof, a marriage so celebrated between such parties was null and void to all intents and purposes.

*Haggard, Dr.*, for the wife, contended that the libel was inadmissible. The object of the suit is to annul a marriage, because the husband is incompetent by the law of France to contract marriage; asking the Court to say that a British subject, competent to contract marriage according to the law of this country, may set aside a marriage in France, unless he fulfils all the requisites of that law applicable to its own subjects. There is no case in point, and I am not prepared to say that the marriages of British subjects abroad, valid according to the law of the country where celebrated, would be necessarily held to be valid according to the law of this country. I do not mean to say, that Huber is correct in laying down as universally true, that *personales qualitates, alicui in certo loco jure impressas, ubique circumferri et personam comitari*,—that, being of age in his own country, a man is of age in any other country, be their law of majority what it may; yet it is not to be laid out of the case, that the Dutch law would impose in this respect a very unfavourable disability upon the British subject. Whether Huber's doctrine be correct, has been much discussed by jurists. The question is, if there is a personal disqualification, how far it extends. Here the parties are not both British subjects, one being a subject of France. This marriage has not been called in question in the Courts of the country where it was had; but the aid of this Court is invoked by a party, *sui juris*, to annul a marriage because all the requisites of the French law as regards himself, a British subject, have not been complied with. But the validity of the marriage does not rest on the civil contract; the parties were re-married, according to the rites of the church of England, in the chapel of the British Embassy. The question, in this part of the case, may turn on the construction of the Act of 1823 (4 Geo. 4. c. 91); and we have no case directly applicable. In *Pertreis v. Tondear*, 1 Cons. Rep. 136, which was in 1790, the marriage took place in the chapel of the Bavarian Ambassador, the party proceeding to annul it being in the suite of the

Spanish Ambassador, and the other party (the female) not being in the suite of any Ambassador. In that case, Lord Stowell said: "Taking the privilege to exist in Ambassadors' chapels (which, perhaps, has not been formally decided), I may still deem it a fit subject of consideration, whether such a privilege can protect a marriage where neither party is of the country of the Ambassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shewn that she had been living in a house entitled to privilege during her residence in England."

In *Ruding v. Smith* (1821), Lord Stowell, speaking of marriages in the English factories abroad, says, "There is a *jus gentium* upon this matter—a comity, which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say, *a priori*, how far the general law should circumscribe its own authority in this matter; but practice has established the principle in several instances, and where the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign country to which they belong: I am not aware of any judicial recognition upon the point; but the reputation which the validity of such marriages has acquired, makes such a recognition by no means improbable, if such a question was brought to judgment." To remove all doubts, the Legislature, in 1823 (the same year in which the present Marriage Act passed), passed the Act, 4 Geo. 4. c. 91, which is entitled, "An Act to relieve his Majesty's Subjects from all doubts concerning the validity of certain Marriages solemnized abroad;" and it accordingly enacts, that "whereas it is expedient to relieve the minds of all his Majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing in such factory, &c.; be it enacted, that all such marriages as aforesaid, shall be deemed and held to be as valid in law as if the same had been solemnized within his Majesty's dominions, with a due observance of all forms required by law."

*Nicholl, D.*—According to the law of England, the husband was of age to marry without the consent of his father. If there is any incapacity by the municipal law of France, it is on the ground of an invasion of the father's rights. The remedy is sought by the husband, an Englishman, not by the wife, who is a foreigner



and the remedy is sought in an English Court, on the ground of a disability not existing under the law of England. The husband does not seek a remedy in the courts of France, where the wife is resident, but drags her here. The father is an Englishman, resident in this country. If the marriage had been in Scotland, or any part of the British dominions, he could not have interfered to prevent the marriage. The Court will not impose a legal disability on the husband for his own advantage—a disability intended to protect his father, who is not entitled to such protection, and to the prejudice of the wife, who was of age to contract marriage. I do not deny that the *lex loci contractus* must govern the marriage. What is it? The parties resort to and are married at the British ambassador's house, and I submit that, for that purpose, the British ambassador's house is by law part of the British dominions, and it is just as if the parties had come from France to Scotland or Dover. The *lex loci contractus*, therefore, is the general law of England before the Marriage Act (since that Act extends to England only), and by that law the marriage is good. Lord Stowell says, in *Ruding v. Smith*, that in the English factories abroad, marriages are regulated by the law of the original country to which they are still considered to belong: "an English resident at St. Petersburg does not look at the ritual of the Greek church, but to the rubric of the church of England." If the English ambassador's house be, for this purpose, part of the British dominions, it makes no difference whether both or one of the parties have a British domicile. No tribunal would set aside the marriage if it had been solemnized in Scotland; and what is the difference, if the house of the ambassador be a part of this kingdom? The Act of Parliament was passed to relieve the doubts of "all" her Majesty's subjects; will it do so, if it do not apply to British subjects who marry foreigners?

The *Queen's Advocate*, for Mr. Lloyd. The first marriage depends on the law of France, and must be decided by that law. The law of England adopts, generally speaking, the law of the country where the marriage was solemnized, and holds it good or bad, according to the *lex loci contractus*. That is the general rule and doctrine laid down by Lord Stowell. There may be exceptions to the rule, and where there is an essential difference of religion, as in the Turkish dominions, and in other instances, in which British subjects resident in a foreign country cannot contract marriage. The first point then is, whether we have sufficiently pleaded the invalidity of the marriage before the mayor of the arrondissement, according to the law of France. We have pleaded this law (which is a fact to be proved),

and that by it a son under 25 cannot contract marriage without the consent of his father, and we plead this to be the law generally, in all cases, there being no distinction between natural and lawful children. By the law of France, after children have attained their majority, they are required before marriage to ask the advice of their parents, by a respectful act (*acte respectueux*) which is expressly made applicable to "natural children legally acknowledged;" and *à fortiori* the rule would apply to such children under 25. It is said that this law, as to the minority of Mr. Lloyd, cannot apply in the present case, and was not applied in *Ruding v. Smith*. But that case is distinguishable from the present. Here the question is as to the validity of a marriage in the civil form between a British subject and a French subject in the territory of France. The civil contract must be according to the general law of the land, which is applicable to all contracts, whether the parties be subjects of that kingdom or foreigners. Suppose a bill of exchange, drawn in France, a British subject being a party to it, to come before a British Court; would such a case be decided by the law of England or of France? In *Trimhey v. Vignier*, 1 Bingh. 151. (N. S.), the marginal note is: "By the law of France, an endorsement in blank does not transfer any property in a bill of exchange; Held, that the holder of a bill drawn in France, and endorsed there in blank, cannot recover against the acceptor in the courts of this country." L. C. J. Tindal held that the law of France must prevail, and govern the contract. (1)

The COURT.—That was on the doctrine of the *lex loci contractus*.

The *Queen's Advocate*.—Yes; it is the general law. The point is clear as to all civil contracts; if invalid according to the law of the foreign country, they are invalid according to the law of England. It is said, "how unjust it is for Mr. Lloyd, being major in this country, to bring a suit of nullity here, and plead his minority in France!" But, being a resident here, he has a right to institute a suit in this court if he thinks fit. With respect to the marriage in the British ambassador's chapel, it is said that such marriage is good and valid under the Act Geo. 4. c. 91. There has been no decision on that Act which affords a construction of it, as to its effect where one or both of the parties be not British subjects.

Dr. LUSHINGTON. (a)—It will presently be seen, that it is unnecessary for me to enter into a consideration of the validity of the first marriage. I think it most expedient, therefore, to consider, in the first instance, the validity of the second

(a) See Monthly Law Mag. vol. 6. p. 48.

marriage in the house of the British ambassador at Paris.

The validity of this marriage must depend, either on the law as it existed anterior to an Act of Parliament, passed in the year 1823, for the purpose of relieving his Majesty's subjects "from all doubt concerning the validity of certain marriages solemnized abroad," or on the law as it exists subsequent to the passing of that statute.

With respect to this Act itself, I am not aware that it has ever received (after deliberation and discussion) any judicial construction whatever. I do not know that in any case, in this or any other Court, this question has been submitted to judicial consideration; namely, whether a marriage in the house of a British ambassador, in which one of the parties only is a British subject, is or is not excluded from the operation of the Act. All I can find on the subject is, that a case, that of *O'Connor v. Omminey*, occurred in the Court of Chancery under precisely similar circumstances. A party was entitled to a sum of money in Court, but it was necessary to shew that there had been a valid marriage; and it appeared that a marriage *de facto* had taken place between the parties, one being a British subject and the other a Swiss, and that they were married in the house of the British ambassador at Paris in 1816. It was referred to the Master of the Rolls to report whether the party had proved the marriage; he reported that a valid marriage had taken place; the report was not objected to, and was confirmed by the Court, and a decree passed which declared the marriage to be good and valid. I was informed that, when this case came under the consideration of the Court of Chancery, the matter underwent much discussion, which brought the facts and the law fully to the attention of the Court. I have, however, made inquiry of the present Lord Chancellor and of the Master of the Rolls, as to whether they have any recollection of having decided the point in question, and I am informed by both these learned lords, that they have no recollection of having decided it. I mention this, because whatever decree may have been actually made, it is possible that I can consider it as a ruling decision, unless the question had been deliberately argued and decided on consideration. I am, therefore, under the necessity of applying myself to a consideration of the question without the benefit of any authority of a decided case in any one of those Courts, which are entitled to great respect at my hands.

I now proceed to consider the statute itself, and I shall consider its effect with reference to the words of this statute alone, and without reference to any other statute *in pari materia* before or since.

There is one observation which strikes me at the first perusal of this statute; that is, that it is a remedial statute, intended for the redress of what in the judgment of the Legislature was a grievance and hardship. It is an Act "to relieve his Majesty's subjects from doubt concerning the validity of certain marriages solemnized abroad." I apprehend that there can be no doubt that this is a remedial statute, and, according to all legal principles of construction, it is to receive such an interpretation as will meet the evil intended to be remedied, and is therefore to have an extended, not a restricted, construction. And it begins by saying, "Whereas, it is expedient to relieve the minds of *all* his Majesty's subjects"—these words must be construed in an ample, not a confined sense,—“from any doubt concerning the validity of marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador or minister residing within the country to the Court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory,”—and it goes on to include marriages within the lines of a British army serving abroad;—and it enacts, "that all such marriages as aforesaid, shall be deemed and held to be as valid in law as if the same had been solemnized within her Majesty's dominions, with a due observance of all forms required by law."

Now, certainly the statute is not expressed in very satisfactory terms; because not a word is said as to whether it applies to marriages between British subjects alone; or to marriages in which one party is a British subject and the other a foreigner; or whether it applies to all marriages whatsoever, had and solemnized in a British ambassador's chapel. It is not very satisfactorily worded, so as to convey a definite and specific idea on this point. On the other hand, there are no words of exclusion, which shew that it was the intention of the Legislature that the Act should apply exclusively to British subjects, and not to marriages where one party was a British subject and the other a foreigner; it only declares that the marriage itself so had shall be good, without any specification as to the parties: "that all such marriages as aforesaid shall be deemed and held to be valid," without any words of exclusion. It is clear that a marriage between two British subjects is valid by this Act; and I cannot see on what principle I can put a construction upon it which should exclude a marriage where one party is a British subject and the other a foreigner; because, if I were to do so, I should not carry the Act into full effect, for I should not relieve the minds of *all* his Majesty's subjects from doubt. I am, therefore,



was charged with causing the death of one of the seamen by striking him several times with a piece of stick. The other charge of murder was against the steward of the vessel, who was alleged to have stabbed the captain with a knife as he lay in bed, the latter being wholly unprepared for the attack, and could obtain no assistance, as it appeared that the crew were intimidated, and the fire-arms and other weapons of defence had previously been hidden. With regard to the case of the mate, it appeared that after the death of the captain he assumed the command of the ship, and, the weather being boisterous, the assistance of all hands was required on deck, and it would appear that one of the sailors, the unfortunate deceased, being unable from disease to quit his hammock, was consequently unable to take that active part in the ship which the exigencies of the case required. The mate, who was not at the time aware of the man's illness, supposed that he was making from his duty, and under that impression he chastised him in the manner described. Now certainly, if the mate, having the command of a ship under the circumstances, had good reason to suppose that the deceased was flinching from his duty, was justified in compelling him to work, but he would not be justified in using unnecessary violence, and the question for the grand jury would be, whether the death of the man was occasioned by the alleged ill-treatment he met with from the mate, or whether the disease under which he laboured might not have caused his dissolution independently of the personal violence he was said to have received. The learned judge then observed, that having looked carefully into the depositions in the case, his own opinion was that there was no ground for the charge of murder, but the grand jury would judge for themselves. As regarded the other case—namely, the alleged murder of the captain by the steward, he did not think it necessary to trouble them with many observations, because, the assault having been committed under the circumstances stated, and the weapon used on the occasion being a knife, there could be but little doubt as to the intention of the party charged, and therefore he had no hesitation in recommending that the case should be submitted to the consideration of the petty jury, who would judge, when the whole of the facts were placed before them, how far the charge of murder was sustained. Reverting once more to the other case, he would just suggest that the undue severity exercised by the mate over the deceased might have been produced without any intention to cause death, or the mate might have been at the time so completely under the control of the crew as to place his own safety in jeopardy

if he did not act in such an emergency with the vigour and determination which his men required of him. It should not be forgotten that the vessel was buffeted about by foul weather at the time, and if the illness of the deceased was not known to the mate, he would have been justified in compelling him to work like the rest of the crew, although he had no right to use undue violence. The learned Recorder called the attention of the grand jury to two cases of rape which appeared in the calendar. The circumstances which attended one of the cases were rather peculiar. The prosecutrix, it appeared, was bar-maid in a public-house, and the party charged with violating her person was her master. From the evidence of the young woman, it would appear that the prisoner entered her bed-room, and while there she swooned twice away from the effects, as she alleged, of previous illness. Her statement was, that while she was in a state of insensibility her master had violated her person, but she was not aware of the fact until the following morning, when certain symptoms, coupled with the recollection of what had passed, convinced her that the prisoner had been guilty of effecting her ruin. There was one circumstance which certainly tended strongly to strengthen her statement, and that was, that on the following morning she mentioned what had occurred both to her mother and another person, and then immediately left the house. Now, in all charges of this description, it was essential to the ends of justice that the jury should be satisfied that the prosecutrix had taken the earliest opportunity to make known her wrong, which appeared to have been done in this instance, and under all the circumstances, the charge being one of a very serious description, his Lordship was of opinion that the grand jury would do well to send the case into this Court for trial. The second charge of rape was alleged to have been effected on a young girl only 14 years of age, and the party charged was alleged to have entered her bedroom, as in the last case, and, taking advantage of the absence of her sister, effected or attempted to effect, his object. From the evidence of the surgeon, however, the grand jury would probably see that the capital charge could not be supported in this instance, but that was a question solely for them to consider. There were no less than nine cases of cutting and wounding in the calendar, and one of attempting to stab with a knife, making in all ten charges of this description within little more than a month. The learned judge then proceeded to read the clauses applicable to offences of this kind in the 1st of Victoria, cap. 85, and after adverting at some length to the provisions of the Act in question, which gave power both to

Judges and juries to mitigate the severity of the previous law, the Recorder observed, that offences of this serious description had within the last two years become so numerous, that it became all persons to whom the administration of the law was intrusted to endeavour to repress a species of crime which, if unchecked, would remain as a lasting stigma and disgrace on the national character. The grand jury would therefore do well to put all such cases in the course of further inquiry; and, in order to effect that object, it was most desirable that they should examine all the witnesses in such cases, so as they should not ignore bills upon light or insufficient grounds. It too frequently happened that relatives were desirous of softening down their evidence when they came before grand juries, in order to screen their connexions by blood or marriage from the consequences of their violence; but the ends of justice required that the law should be vindicated in all such cases, and that offences of this unmanly and un-English description should be put down with a strong hand.

#### KENSINGTON PETTY SESSIONS.

October 28.

##### POOR LAW AMENDMENT ACT.

*Whether under the Statute 3 Vict. c. 62, the Board of Guardians are entitled to a Summons against Overseers of a Parish to shew cause why a distress should not issue against their goods and chattels, for non-payment of the calls made upon them by the Board, for the maintenance of the Poor.*

Yesterday Mr. Robert Gunter, the Chairman, and Messrs. Hawkes and Runkil, two of the guardians of the Kensington Union, attended before Sir JOHN STURT LUTHE and Mr. BARTON the sitting magistrates, for the purpose of making the following application.

Mr. Gunter said, he attended before their worships for the purpose of making an application of considerable importance, not only to the magistrates sitting the Kensington Union, but also to all other parishes under the operation of the Poor Law Amendment Act. From the commencement of the Kensington Union the board of guardians had experienced the greatest difficulty in obtaining from the ward of St. John, Chelsea, payments of the various calls made upon them by the board in the maintenance of the poor in that parish; and he to ascertain the board had been compelled to apply to the court of Queen's Bench for writs

of *mandamus* against the parochial authorities to compel the payment. To remedy that evil, and to prevent the difficulties to which the board of guardians had consequently been subject, a bill was introduced last session of Parliament for the purpose of empowering boards of guardians generally to proceed against the officers of parishes in default by a more summary process than the tedious mode of writ of *mandamus*, which was always evaded by the parties paying the amount the day previous to the writ being returnable. That bill, however, met with a strong opposition, more particularly from Lord Lyndhurst, and he believed he might say it was in fact only owing to the conduct of the Chelsea authorities being adduced that the bill was ever passed into a law. It was under that statute (2nd and 3rd of Victoria, cap. 82) that he and the other members of the deputation applied, by direction of the board of guardians, to the bench for a summons against the four overseers of Chelsea, calling upon them to shew cause why a distress warrant should not issue against their goods and chattels for the amount in arrear, £361. 11s. 6d.

Mr. Hawkes trusted the Bench would grant the application, and would appoint an early day, as it was most important that the amount should be got in as speedily as possible, it being unfair that the other parishes should be compelled to support the poor of Chelsea, which was absolutely the case. There was at that moment a writ of *mandamus* in existence against Chelsea, which, however, was not returnable until November term. Every obstacle that could be thrown in the way of that board was thrown for the purpose of obtaining a dissolution of the union, it being contended by the Chelsea authorities that the rates had been greatly increased in that parish by the formation of the union.

The BARNES said they had heard of such statements, and they believed also that there was a large number of defaulters on the rates, between 1,000 and 2,000 summonses having been recently issued for their recovery.

Mr. Gunter observed that the parish of Chelsea was governed by what was called a parochial committee, which consisted of forty members, who had the power in their own hand of making whatever amount of rates they pleased; yet, strange to say, although the last rate they had made was one of £. 1000. in the pound, and the whole amount of the arrears for which the summonses had been issued had been collected in, it would not have been sufficient to pay the arrears due to the board of guardians. The parochial committee had recently made another rate of £. 500. in the pound, which would be far from sufficient to pay the necessary demands upon it.

The BENCH inquired how it was that the parochial committee did not make rates large enough, especially as they had the power in their own hands.

Mr. Rymill replied, that it was owing to the rental of the parish having been reduced under the General Assessment Act, while the rental of the other parishes had been raised. While, therefore, the other parishes raised rate sufficient for a moderate poundage, that of Chelsea was unable to raise enough, for fear of the rate appearing too exorbitant.

The BENCH, on examining the Act of Parliament, said they saw it was necessary that the summonses should be heard before a special sessions of the magistrates for the whole of the parishes within the division of the county; it would therefore be necessary that some days should elapse before that could be accomplished, the chairman himself being in Sussex.

Mr. Cornell said it was most necessary that every magistrate should be summoned, for even if only one was omitted, the whole proceedings would be informal.

Mr. Rymill suggested, that, in addition to the four overseers, the names of five (being a quorum) of the parochial committee should be likewise inserted in the summons, the Act saying "the parochial and other officers."

After considerable further discussion,

The BENCH decided on issuing the summonses, and directed that the divisional clerk should be required to issue a precept to the high constable of the division, to summon a special meeting of the justices at the earliest day possible.

## ARTICLED CLERKS RELIEF BILL.

### 2 & 3 VICT. CAP. XXXIII.

*An Act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and for extending the time limited for those purposes respectively until the twenty-fifth day of March one thousand eight hundred and forty; and for the relief of Clerks to Attornies and Solicitors in certain cases.* [29th July, 1839.]

(Concluded from p. 415, vol. 2.)

VII. And be it enacted, that in case the attorney, solicitor, proctor, or notary to whom any

person shall have duly served his clerkship under articles in writing for that purpose shall after such service of the clerk be struck off the roll in consequence of some defect in the service under the articles of clerkship or of the admission and enrolment of such attorney, solicitor, proctor, or notary, the person who has so duly served his clerkship shall not be prevented or disqualified from being admitted and enrolled as an attorney, solicitor, proctor, or notary, nor liable to be struck off the roll if admitted, by reason of any such defect as aforesaid, provided that such clerk or person be otherwise entitled to be admitted and enrolled according to the laws now in force relating thereto.

VIII. And be it enacted, that no person who has been admitted and enrolled, and in actual practice as an attorney, solicitor, proctor, or notary, shall be liable to be struck off the Roll for or on account of any defect in the articles of clerkship, or the registry thereof, or the service under such articles, or of his admission and enrolment, unless the application for striking him off the Roll be made within twelve months from the time of his admission and enrolment.

IX. Provided always, and be it enacted, that in any case in which the original articles of clerkship shall have been or shall hereafter be lost or destroyed before or after payment of the duty, it shall be competent to either of her Majesty's Superior Courts at Westminster, to direct the enrolment of a copy of such articles, upon being satisfied, by such evidence as shall appear to the Court sufficient to prove the loss of such original articles, the authenticity of the paper proposed for enrolment, and that the duty has been duly paid upon such articles or upon the copy thereof, to be shown by the denoting or other appropriate stamp, as the case may require, and provided such Court shall be satisfied that the clerk has duly served under such articles from the time of the execution thereof, or for such time as shall appear satisfactory to the Court under the circumstances of the case.

X. And whereas by an act passed in the seventh year of the reign of his Majesty King George the Fourth, to allow, until the 10th day of October, one thousand eight hundred and twenty-six, the enrolment of certain articles of clerkship, and for other purposes therein mentioned, it was enacted, that it should not be lawful for the Commissioners of Stamps, or any of their officers, to stamp, under any pretence whatever, after the expiration of six months from their date, any articles of clerkship to attornies or others, as therein specified: and whereas the using of the word "Months" in the said last-mentioned act, in this respect, without the addition of the word "Calendar," occasioned mis-

takes and inconveniencies; be it enacted, that from and after the passing of this act the word "Months" used in the said last-mentioned act, so far as the same relates to the stamping of articles of clerkship to attornies and others therein specified, shall be understood to mean calendar months.

XI. And whereas several persons bound to serve as clerks or apprentices to attornies or solicitors have applied to have the indentures or contracts of such clerkship stamped after the expiration of six lunar, and before the expiration of six calendar months from the date thereof; be it enacted, that it shall and may be lawful for the Commissioners of Stamps and Taxes, or any of their proper officers, at any time before the last day of Michaelmas Term, one thousand eight hundred and thirty-nine, to stamp any articles of clerkship, contract, indenture, or other instrument whereby any person hath become bound to serve as a clerk or apprentice, in order to his admission as an attorney or solicitor in any of the courts of law or equity, although the period of six calendar months from the date thereof hath now elapsed, upon payment of the proper duty payable in respect of the same, and of the further sum of five pounds by way of penalty, provided it shall be proved to the satisfaction of the said commissioners, that application was made to them or to their proper officer to have such articles, contract, indenture, or instrument, stamped within six calendar months from the date thereof.

XII. Provided always, and be it enacted, that this act or any thing herein contained shall not extend or be construed to extend to restore or entitle any person or persons to any office or employment, benefice, matter, or thing whatsoever, already actually avoided by judgment of any of her Majesty's Courts of Record, already legally filled up and enjoyed by any other person; but that such office or employment, benefice, matter, or thing, so avoided or legally filled up and enjoyed, shall be and remain in and to the person or persons who is or are now, or shall at the passing of this act, be legally entitled to the same, as if this act had never been passed.

XIII. And be it enacted, that in case any action, suit, bill of indictment, or information shall from and after the passing of this act be brought, carried on, or prosecuted against any person or persons hereby meant or intended to be indemnified, recapacitated, or restored, for or on account of any forfeiture, penalty, incapacity, or disability whatsoever, incurred, or to be incurred, by any such neglect or omission, such person or persons may plead the general issue, and upon their defence give this act and the special matter in evidence upon any trial to be had thereupon.

## REVIEW OF NEW BOOKS.

*PRECEDENTS IN CONVEYANCING, adapted to the present State of the Law. Illustrated with Notes, Practical and Critical.* By THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. *In continuation of the Precedents by S. VALLIS BONE, Esq.* Vol. III. Part 3. London: John Richards and Co. Law Booksellers, 194, Fleet-street—Nov. 1839.

Another number of this ORIGINAL WORK upon CONVEYANCING is before us, and like its predecessors is calculated to be of great benefit to the profession. Such a work has long been wanted. The present Number contains what may be termed COMMERCIAL PRECEDENTS, and among them we find the Author has stamped his work with originality by introducing a NEW FORM of Limitation applicable to POWERS of SALE. Much has been written upon the legality of these Powers now in use. The Author in a note to the New form he has introduced, says—

This is a New Form of Limitation, and is considered by the author as one of great simplicity, and well calculated to effect the intentions of the parties to such a trust, without involving them in any difficulties. The legal fee is vested (or supposed to be, with the aid of the incumbancers, who may convey that fee to the trustees, without any further concurrence of the mortgagor) in the trustees, their heirs and assigns; and the powers are to be executed by the trustees, or the survivor of them, his executors, administrators, or assigns. Since the case of *Bradford v. Belfield* (2 Sim. 264.) it has become of importance that the limitation should be to the assigns of the donee of the power. See also *Townsend v. Wilson*, 1 Barn. and Ald. 608.

It is said that a power of sale to a mortgagee, his executors or administrators, or his or their appointees or assigns, is objectionable, as tending to a perpetuity; and various new forms have been suggested to meet such a difficulty.

The only serious difficulty that has yet appeared is in the case of an infant heir, which is now remedied.

Sir Edward Sugden, in his *Treatise on Powers* (Vol. ii. p. 494, ed. 6.) says, as to the validity of powers of sale and exchange not re-

trained to lives in being, and twenty-one years afterwards, the general practice had been not to define them, and that half the titles in the Kingdom depended on the validity of such powers. That if the power were within the rule of perpetuities, the line could always be drawn, and there appeared to be no reason why it should be deemed void in its creation. Such powers appeared to be valid on the same ground that a shifting use may be limited to take effect at any period, however remote, where the estate is regularly limited in tail, because the tenant in tail may destroy the shifting use by a common recovery; yet there the estate of a tenant in tail not having suffered a recovery may be defeated altogether, whereas under the exercise of a power of sale and exchange, there is merely a change of title, and not a destruction of interest. On point of fact such a power enables the alienation of property without affecting the interest of the person beneficially entitled to the property; and that in the case of *Boyce v. Hanning*, (2 Crompt. and Jew. 334.) it was determined that such a power is valid. Upon the observation made by Sir Edward, that the power of sale did not tie up property, but enabled the alienation of it, Bayley, B. observed, (2 Crompt. and Jew. 339.) that it enabled the trustees to sell; but the owner in fee, who would otherwise be able to sell, was incapacitated. But of course this applies only to the reversioner or remainderman; and his power of alienation is not fettered, although the subject of his transfer is still liable to the conditions in the settlement (or instrument creating the trust). Sir Edward proceeds to say, that the same decision has been made in several other cases where the power was general and unrestricted; but in all of them the sale was actually made in the lifetime of the tenants for life, who were in esse at the date of the settlements. (See *Biddle v. Perkins*, 4 Sim. 135.; *Powis v. Capron*; *Waring v. Coventry*, ib. 138. 140. n.) The general point is set at rest; but it may still be a question during what period the power is capable of being exercised. That the power, although unlimited as to time, is good for the lives of parties living at the date of its creation; and it may be now that the power might be held further to exist for twenty-one years from the death of the survivor of the lives.

In the New form the Author has drawn the line.—Upon TRUSTS for SALE, he says—

A trust for sale was considered by Mr. Fearn to be ministerial, for the price is not arbitrary, or at the trustee's discretion, but to be the best that can be gotten for the estate, which is a fact

to be ascertained independently of any discretion in the trustee. (F. P. W. 313.) A trust to sell for the payment of debts is a special trust, (as distinguished from a simple trust, which corresponds with the ancient use, or where property is simply vested in one person upon trust for another, and the nature of the trust, not being qualified by the settlor, is left to the construction of law; the trustee, in such case, being a mere passive depository,) where the trustee is bound to exert himself, so to use his best exertions, not only to dispose of the trust property, but to do so to the best advantage, and obtain the best price that can be had for the benefit of the creditors. Uses, by the statute 27 Hen. 8. c. 10., became merged in the legal estate; but special trusts and trusts of chattels are not within the act;—the former, because the use as well as the legal interest was in the trustee; the latter, because the termor is said to be possessed, and not seised. Lord Hardwicke describes interests in land as being of three kinds; viz.—1st, the estate in the land itself, the ancient common law fee; 2dly, the use, which was originally a creature of equity, but since the Statute of Uses it drew the estate in the land to it, so that they were joined and made one legal estate; and 3dly, the trust, of which the common law takes no notice, but which carries the beneficial interest and profits in a court of equity, and is still a creature of that court, as the use was before the statute. (Willett v. Sandford, 1 Ves. 186.; *Coryton v. Helyar*, 2 Cox, 342.) Lord Mansfield said that trusts were not on a true foundation, till Lord Nottingham (who, from the sound and comprehensive principles upon which he administered trusts, has been called the father of equity) held the great seal; but by steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has been raised; so that trusts are now made to answer the exigencies of families and all purposes without producing one inconvenience, fraud, or private mischief, which the statute of Hen. 8. meant to avoid. A use or trust, his lordship observed, was theretofore understood to be merely as an agreement by which the trustee, and all claiming from him in privity, were personally liable to the *cestui que use*, and all claiming under him in like privity; nobody in the post was entitled under or bound by the agreement; but now the trust in this court is the same as the land, and the trustee is considered merely as an instrument of conveyance. See *Burgess v. Wheate*, 1 W. Blackst. 123., 1 Eden. 223. 226. In that case Lord Northington said, "This court has considered trusts as between the trustee, *cestui que trust*, and those claiming under them,



as imitating the possession; but it would be a bolder stride, and, in my opinion, a dangerous conclusion, to say therefore this court has considered the creation and instrument of trust as a mere nullity, and the estate is in all respects the same as if it still continued in the seisin of the creator of the trust, or the person entitled to it. For my own part, I know no instance where this court has permitted the creation of the trust to affect the right of a third person." (Id. 250. 251.) Under the law as it stood before the passing of the statute 4 & 5 W. 4. c. 23. (1834), intituled "An Act for the Amendment of the Law relative to the Escheat or Forfeiture of Real or Personal Property holden in trust," if a trustee of the legal estate in the fee died without an heir, the land was escheated (*excidit*, fell away) to the lord, who, being in title paramount, was not bound by the trust; so where a mortgagee of the legal fee died without an heir, the mortgagor lost his estate, unless restored by the performance of the condition if no breach had been made in it; so where a trustee or mortgagee had been attainted.

Now, by statute 11 Geo. 4. & 1 W. 4. c. 60. s. 8., where any person seised of any land upon any trust shall be out of the jurisdiction of, or not amenable to, the process of the Court of Chancery; or it shall be uncertain, where there were several trustees, which of them was the survivor; or it shall be uncertain whether the trustee last known to have been seised be living or dead, or, if known to be dead, it shall not be known who is his heir; or if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same;—the Court of Chancery is empowered to direct any person in the place of the trustee or heir to convey such land to such person and in such manner as the Court shall think proper, and every such conveyance is to be as effectual as if the trustee so seised, or his heir, had made and executed the same; and in *ex parte Foley*, 8 Sim. 295., where a person had been ordered to convey in the place of a refusing

trustee, it was held not to be necessary that he should execute a new deed that should recite the order, but that such person might execute the deed tendered to the trustee, and that the attestation should express that such person had executed it in the place of the trustee, in pursuance of the order.

The Notes also contain a very copious interpretation of *Sir Edward Sugden's* Trustee Act and *Lord Langdale's* Amendment, and the Author shews the conflicting opinions held by the Judges upon the construction of the former Act. He also continues to animadvert upon the UNSETTLED STATE of the Law, and gives another illustration, in the want of any defined character for a *Mortgagor in possession*, the whole Law upon which subject will be found in this part.

Some Judges have maintained that he is a *tenant at will*, others that he is a *tenant at sufferance*, and others again have called him a *receiver*, a trustee, and a *disseisor*: the latter surely cannot apply, because his possession is not properly his own, but that of the mortgagor (2 Mer. 360). What is his proper character at this day is to be determined by the next decision that shall be made upon the question.

THE PRECEDENTS are really USEFUL, and are well adapted for practice. The TRUST DEEDS for CREDITORS, and the instructions for their application, and the DUTIES of TRUSTEES, as well as the precautions to be taken by purchasers on the purchase of property from Trustees for Sale, will be found of great service to practical men, and we do not hesitate in recommending the work to general notice.

# CIRCUITS

OF THE

## COMMISSIONERS FOR THE RELIEF OF INSOLVENT DEBTORS.

1839.	Northern Circuit.	Midland Circuit.	Home Circuit.	Southern Circuit.
in Circuits.	H. B. Reynolds, Esq., Chief Commissioner.	J. G. Harris, Esq. Commissioner.	T. B. Bowen, Esq. Commissioner.	W. J. Law, Esq. Commissioner.
Wed. Oct. 23	Oakham . . .	. . . . .	Dover . . .	
day . . 24	. . . . .	. . . . .	Canterbury . .	
day . . 25	Sheffield . . .	. . . . .	Maidstone . .	
day . . 28	Wakefield . . .	. . . . .	. . . . .	Reading
day . . 29	. . . . .	Chelmsford . .	Horsham . . .	Oxford
day . . 30	. . . . .	Colchester . . .	. . . . .	
day . . 31	. . . . .	Ipswich . . . .	. . . . .	Worcester & City.
day, Nov. 2	Kingston-upon- Hull . . . . .	Yarmouth . . .	. . . . .	Hereford
day . . 4	. . . . .	Norwich & City.	. . . . .	Presteigne
day . . 5	York and City	. . . . .	. . . . .	Brecon
day . . 6	. . . . .	Lynn . . . . .	. . . . .	
day . . 7	Richmond . . .	Bury St. Edmunds	. . . . .	Cardiff.
day . . 8	Durham . . . .	Cambridge . . .	. . . . .	Monmouth.
day . . 9	. . . . .	Huntingdon . . .	. . . . .	Gloucester & City
day . . 11	Newcastle-upon- Tyne and Town	Peterborough . .	. . . . .	Bristol.
day . . 12	. . . . .	Lincoln & City	. . . . .	Bath.
day . . 13	Carlisle . . . .	. . . . .	. . . . .	Wells.
day . . 14	. . . . .	Nottingham & Town	. . . . .	Exeter and City.
day . . 15	Appleby . . . .	. . . . .	. . . . .	Plymouth.
day . . 16	Kendal . . . . .	Derby . . . . .	. . . . .	Bodmin.
day . . 18	Lancaster . . .	Lichfield . . . .	. . . . .	
day . . 19	. . . . .	Stafford . . . .	. . . . .	Dorchester.
day . . 20	. . . . .	. . . . .	Hertford . . .	Salisbury.
day . . 22	. . . . .	Shrewsbury . . .	. . . . .	Southampton.
day . . 23	. . . . .	. . . . .	. . . . .	Winchester.
day . . 25	. . . . .	Oldbury . . . . .	. . . . .	
day . . 26	Preston . . . .	Birmingham . .	. . . . .	
day . . 27	. . . . .	. . . . .	. . . . .	
day . . 28	Liverpool . . .	Warwick . . . .	. . . . .	
day . . 29	. . . . .	. . . . .	. . . . .	
day . . 30	. . . . .	Coventry . . . .	. . . . .	
day, Dec. 2	Chester and City	Leicester . . . .	. . . . .	
day . . 3	. . . . .	. . . . .	. . . . .	
day . . 4	Mold . . . . .	Northampton . .	. . . . .	
day . . 5	Ruthin . . . . .	Bedford . . . . .	. . . . .	
day . . 6	. . . . .	Aylesbury . . . .	. . . . .	
day . . 7	Beaumaris . . .	. . . . .	. . . . .	
day . . 9	Carnarvon . . .	. . . . .	. . . . .	
day . . 10	. . . . .	. . . . .	. . . . .	
day . . 11	Dolgelly . . . .	. . . . .	. . . . .	
day . . 13	Welch Pool . . .	. . . . .	. . . . .	

**EXAMINATION OF ARTICLED CLERKS.**  
*Michaelmas Term, 1839.*

We beg to call the attention of those gentlemen who are desirous of passing their Examinations to the following observations.

**EXAMINERS.**

One of the Masters of the COMMON PLEAS.

Mr. Austen,  
 Mr. Harrison,  
 Mr. Metcalfe,  
 Mr. Ranken,

} *Attornies.*

The Examination must take place within ten days of the Term, and it is considered that it will take place on Monday the 18th November, but of this due notice will be given in this Journal. The Rule of Court does not entitle the Candidates to such notice, or to a copy of the Questions which are annexed to the regulations made by the Judges. The Candidates will find in the two volumes of this paper just published ALL THE QUESTIONS PUT BY THE EXAMINERS AT EVERY EXAMINATION, and by reference to our Problems and the Answers, much useful information will be gained by Students of such a solid nature as by application will go far towards enabling them to pass the *ordeal* with little difficulty. It may not be inaptly termed a thumb screw with the screw worn out, and will not do much harm to any Candidate of small pretensions to legal knowledge.

We shall publish the Questions for the next Examination immediately after they are promulgated.

**NOTICE TO ARTICLED CLERKS**

SO AS TO OBTAIN ADMISSION BEFORE THE END OF THE TERM.

It is of importance that Candidates should take notice, that where the Articles of Clerkship will expire during the Term, but not until after the first seven days of Term, such articles should, nevertheless, be left at the Law Society, with answers to the questions

as to due service up to the time of leaving them, and proof of the completion of the service may be given afterwards so as to obtain admission before the end of the term.

Where Candidates are out of time required by the Rule of Court for leaving their Testimonials, instead of moving the Court for leave, as hath been so often unnecessarily done, they should apply to the Examiners who have power to interfere.

**NOTICE TO CORRESPONDENTS.**

H. D. M.—We are much pleased with your communication.—You must order 25 copies of No. II., and we will meet the rest of the expense.

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# The Legal Guide.

[III.]

SATURDAY, NOVEMBER 9, 1839.

[No. 2.]

## LAW OF REAL PROPERTY.

### ESSAY II.

3 & 4 Wm. IV. cap. 74.

*Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.*—[28th August, 1833.]

(Continued from p. 4.)

may be as well here to call the attention of our readers to the fact, that sec. 4. of Mr. Pigott's Act (14 Geo. 2. c. 20.) is applicable to existing titles. That where a person or persons hath or have purchased, or shall purchase for a valuable consideration any estate or estates, in lands, tenements, or hereditaments, whereof a recovery or recoveries is, are, or were necessary to be effected, in order to complete the title, such person or persons, and all claiming under him, her, or them, having been in possession of the purchased estate, or estates, from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed or deeds, making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or recoveries, and declaring the uses of a recovery or recoveries: and the deed or deeds so produced (the execution thereof being duly proved) shall, in all

Vol. III.

Courts of Law and Equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record. Provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries. (a)

With this observation we will proceed with the new Statute.

Sect. 3 enacts, That in case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery

(a) See s.s. 8. 10. & 11. of the new Statute post.

can be effected by a disposition under this Act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant and agreement to make or to procure to be made such a disposition under this Act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this Act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make, or procure to be made, such a disposition under this Act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this Act; and in those cases where the purposes intended to be effected by such fine or recovery, or any of them cannot be effected by any disposition under this Act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable under such covenant or agreement to execute, or to procure to be executed, some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by

a disposition under this Act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this Act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this Act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.

Sec. 4 enacts, That no fine already levied in a superior Court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the Lord of the Manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this Act may be brought by the Lord of the said Manor, be reversed as to any person except the Lord of the said Manor; and the Court shall order such fine to be vacated only as to the Lord of the said Manor; and every such fine which may be reversed as to the Lord of the said Manor upon such writ of deceit as aforesaid shall still remain as good and valid against all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid, and no common recovery already suffered in a superior Court of Lands of the Tenure of Ancient Demesne which hath not been reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall, upon a writ of deceit already brought by the Lord of the Manor, of which the lands were parcel, the proceedings in which are now pending, or upon a writ of de

which at any time after the passing of this Act may be brought by the Lord of the said Manor, be reversed as to any person except the Lord of the said Manor; and the Court shall order such recovery to be vacated only to the Lord of the said Manor; and every such recovery which may be reversed as to the Lord of the said Manor upon such writ of deceit as aforesaid shall still remain as good and valid against and as binding upon the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid.

Sec. 5 enacts, That if at any time before or after the passing of this Act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior Court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the Court of the Lord of the Manor of which the lands have been previously parcel, and the fine or common recovery levied or suffered in such superior Court shall not have been reversed previously to the levying of the fine or the levying of the common recovery in the Lord's Court, then and in every such case the fine or common recovery levied or suffered in the Lord's Court shall, notwithstanding any alteration or change of the tenure by the levying of the fine or common recovery previously levied or suffered in the superior Court, be as good, valid, and binding as the same would have been if the tenure had not been altered or changed; and that in every other case where a fine or common recovery shall at any time before the passing of this Act have been levied or suffered in a Court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such Court,

and such Court shall be deemed a Court of sufficient jurisdiction for all the purposes of such fine or recovery; and in every other case where persons shall have assumed to hold Courts in which fines or common recoveries have been levied or suffered, and such Courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this Act may have been levied or suffered in such unlawful or unauthorised Courts shall not be invalid in consequence of their having been levied or suffered therein, and such Courts shall be deemed Courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

Sec. 6 enacts, That in every case in which at any time, either before or after the passing of this Act, the tenure or ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior Court, and the Lord of the Manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not be barred by any law in force on the first day of this session of Parliament of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the Lord of the Manor of which they shall have been parcel shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January, one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents, and services, as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought

after the thirty-first day of December, one thousand eight hundred and thirty-three.

Sec. 7 enacts, That if it shall be apparent, from the deed declaring the uses of any fine already levied, or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the consor or consee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indenture, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

Sec. 8 enacts, That if it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery any error in the name of the tenant, demandant, or mortgage in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

Sec. 9 enacts, That nothing in this Act shall be construed to take away the jurisdiction of any Court in relation to any fine or recovery, or to any proceedings in such fine or recovery, or to any proceedings in relation to the same.

## THE REAL PROPERTY TREE.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,— In again intruding upon your kindness after a long silence, (but during which time I have not been an inattentive spectator of "passing events," though circumstances have prevented my being as active in the "good cause" as I could have wished,) I beg to forward for your kind consideration the accompanying "*Legal Tree*," being a sort of analysis of the Principal Estates in Real Property, and shewing at one glance their relative situations and derivations. I took the idea from the Tree of the Greek Verbs, and constructed it for my own use and convenience, while reading up the laws of Real Property this vacation, and much time and trouble has it saved me, while the thought, that it may prove of like service to many of your correspondents, has induced me to trouble you with these lines, to introduce it to your notice; and, should it meet with your approbation and not interfere with your arrangements, the insertion of this "*Tree*" (which I have never before seen applied to legal subjects) will not, I flatter myself, be without its use among the excellent matter which weekly fills your valuable Journal, while at the same time it will confer an obligation on myself.

*"Et supra adhibere nonne impune videmus  
Verba in alienum, mutuumque modo mala  
Fere pueri, et primum liquorem rubescere cortex.  
Quare agam, et propriam generatim Escabe cultra,  
Agrosque frutuosos sine molle colore:  
Sic agam, patet enim."*

VERA. Goss. 1. 2. v. 32.

Trusting you will excuse this digression.

I remain, Sir,

Your obedient servant,

E. D. M.

ALBION, 1834.  
27th Dec. 1834.

## PROBLEM II.

Vol. 3.

## CONTRACT.

When it is to be performed.

## ANSWER TO PROBLEM I.

VOL. III.

*Chattel Interests.—What is a Chattel?*

Under the word "Chattels," are included sorts of things moveable which may attend a man's person wherever he goes; nor such a regard paid to them by the law as things which are in their nature more permanent. It was originally derived from the Latin word "catalla," signifying beasts of husbandry, but in its more extended sense, is used to signify all sorts of moveables. Chattels are of two kinds, real and personal. Chattels real are such as issue out of, or are annexed to, real estates, of which they are of one quality, viz. immobility, which predominates them "real;" but want the other, viz. a sufficient legal indeterminate duration, and this want it is that constitutes them "Chattels." Such are a lease for years, a Presentation to a Church, &c. Chattels personal are, properly and strictly speaking, things moveable, which may be annexed to, or attendant upon, the person of the owner, and carried about with him. They are cattle, furniture, wearing apparel, &c.—2 *Blackstone's Comm.*

J. S.

**Law Reports.**

## COURT OF CHANCERY.—Nov. 4.

## APPEAL FROM THE COURT OF REVIEW.

## Ex parte ROWE.

**PERSEDEAS—PRACTICE—***Whether the time of affixing the Great Seal to a Fiat is to be considered the time of issuing, so as to bind the property of the Bankrupt, and establish the legality of the Bankruptcy as required by 6 Geo. 4. c. 16. sec. 6.*

In this case the bankrupt, on the 5th of

March, signed a declaration of insolvency, which he inserted in the London Gazette, under the provisions of the 6th sec. of the stat. 6. Geo. 4. c. 16. The docket was struck on the 4th of May following, and the fiat was dated on that day, but it was not delivered to the solicitor to the commission until the 6th of May. The bankrupt petitioned the Court of Review for a *supersedeas*, on the ground that the fiat was not issued within two months from the commission of the act of bankruptcy, as required by the Bankrupt Act, which petition was dismissed by that Court, and the present appeal was brought. The question was, whether the commission issued within two months after the act of bankruptcy, agreeably to the direction of the Bankrupt Act.

Mr. *Swanston*, for the petitioner, contended that the commission ought to be superseded, as the petitioner had made a declaration of insolvency on the 5th of March, whereas the fiat was not issued until the 6th of May.

Mr. *Bethell*, for the respondents, contended that "sealing" was "issuing," as applied to a commission, 14 Ves. 80; and here the fiat had been sealed and bore date on the 4th of May, although it was not taken by the solicitor from the office till the 6th.

The LORD CHANCELLOR said, he was bound to take the facts to be as stated in the special case, that the fiat bore date the 4th of May, and that the docket had been struck on that day. The question was, when was the great seal applied to the fiat? There was nothing in the special case to cause him to doubt that the great seal was affixed to the fiat the day of its date. The petitioning creditor did all that he could do—he lodged the docket, and he applied for the fiat all in due time. Was he to be answerable for any delay in delivering the commission to him. From the time the great seal was applied to the fiat, the property was bound by it; suing out a commission was the application for it, and the issuing was the affixing the great seal, both of which had been done within two months. His Lordship said, he had no doubt that the terms of sec. 6. of the Bankrupt Act had been sufficiently complied with.

Petition dismissed *without costs*.

Nov. 4.

*Appeal from the Court of Review.*

*Ex parte* TERREWEST in re POYNTER, a Bankrupt.

**USURY LAWS—Purposes of the Stat. 3 & 4 W. c. 98—***Whether an Agreement to pay £10. per cent. for money for a period not*



*exceeding 18 months upon Bills, to be renewed every 3 months during that time, is Usurious.*

The petitioner, Mr. Reuben Terwest, a solicitor, claimed to be a creditor of the bankrupt for £1,137. the balance of principal and interest upon a promissory note due at the date of the fiat against the bankrupt. The note was dated in August, 1835, and was for the sum of £1,600. payable three months after date. The appellant petitioned the Court of Review to be allowed to prove for the said balance with interest. That court decided that the note in question was given as a security for a pre-existing debt, and that no money was in fact advanced thereon, but that the debt mentioned in the note was for money lent long before for an indefinite time, but not to exceed 18 months, the borrower agreeing to pay interest at the rate of £10. per cent. per annum, and that a series of such notes should be given and renewed every three months, and the note in question was the last of the series, and that the notes so given were a contrivance to evade the laws against usury. The Court of Review, having so adjudged, dismissed the petition. (a)

Mr. Wigram, for the appellant, contended that the note in question was protected by the act 3d and 4th Geo. IV. c. 98, which allowed any interest, however large, to be taken on bills of exchange and promissory notes, not exceeding three months from their date. There was no agreement to bind the petitioner to renew the bill. It did happen that he did renew three or four times, at the request of the bankrupt. There was a verbal understanding that he would so renew, if requested, but there was no agreement binding on either party.

Mr. Swanston, for the respondents, submitted that the note was void, and was merely colourable to evade the statutes against usury. The special case found that the bankrupt, being in want of money, agreed with Mr. Terwest for the advance at 10 per cent., with an understanding that a bill should be given for the amount, and renewed every three months for an indefinite period, not exceeding 18 months. The bill in question was the last of the series, and was not rendered valid by the recent statute, which only applied to discounting or negotiating bills, and not to securities for antecedent debts.

The LORD CHANCELLOR said he had no doubt either upon the case or the law. If the argument of the respondents prevailed, the statute would not protect one of the most ordinary of mercantile transactions—namely, renewing a bill, if more than 5 per cent. were taken. He thought this was just the case the Legislature had in

view, and they had appeared carefully to extend the protection to all bills not having more than three months to run. There was nothing in the agreement which prevented the plaintiff from suing upon the first bill, if he had not felt disposed to renew it according to the understanding. The case stated that the arrangement was for the purpose of evading the usury laws, but the very object of the recent statute was to relieve against them. There was no intention here to evade the law of the land, and he found no contract for a loan independently of the bill, which was perfectly legal. Perhaps the party who wished to renew a bill which he was unable to pay was one of those who needed the assistance of the statute most. The decision of the Court of Review must be reversed.

#### VICE-CHANCELLOR'S COURT.—Nov. 2

HALES v. DAY.

*Act for abolishing Arrest for Debt on mesne process, s. s. 14. and 18.—Judgment at law made available against assets in the Court of Chancery.*

Mr. C. Barker applied to the Court *ex parte* for a rule to shew cause why a sum of money, standing in the name of the Accountant-General of the Court to the separate account of the defendant Day, should not be charged with the amount of a judgment at law obtained against him in the Court of Exchequer. The learned counsel stated, that he made this application to the Court under the powers given to the Court by the 14th and 18th sections of the Act for the Abolition of Imprisonment for Debt upon *mesne process*.

The VICE-CHANCELLOR, having minutely perused the provisions of the act, said he considered the Court had the power to make the order, and granted the rule *nisi*.

In re MRS. TAYLOR.

CUSTODY of INFANTS' BILL, 2 & 3 Vict. c. 54. (a)—*First application under this new Act.—PRACTICE.—Whether the Court will order substitution of service of the Petition on the Husband's Solicitor.*

Mr. K. Bruce said, that he was instructed to apply to the Court on behalf of a married lady, for an order of access to her children, under the provisions of an Act of Parliament, passed last session, namely, the 2nd and 3rd of Vict. 1.

(a) See this case reported ante, Vol. ii. p. 12.

(a) See post, p. 28.

54. intituled, "An Act for Amending the law relating to the Custody of Infants." The circumstances under which the present petition was filed were these:—The lady in question, about two years ago, left her home and separated from her husband, under an impression—of the accuracy of which he would say nothing—of her misconduct on the part of her husband, which had been communicated to her by a person who was then supposed to be very friendly to her. Circumstances afterwards came to the lady's knowledge, which induced her certainly to doubt the accuracy of the representations made to her to their full extent, and she, therefore, being painfully anxious about her children, was anxious to return home to her husband, and to be reconciled to him. With that view she wrote him several letters of submission, declaring therein her anxious desire to return to her family. None of these communications did she receive an answer, with the exception of a suggestion that all further communication should be addressed to his solicitor. The lady had addressed similar communications to her husband's solicitors, but the only answer she received from them was that they had received no instructions to act in the matter. Prior to the Act passing under which this application was made to the Court, the lady instituted a suit in the Consistory Court against her husband for the restitution of conjugal rights, to which the husband put in an allegation, alleging that his wife had voluntarily left her home, and had made false charges of misconduct against him. The Judge of the Consistory Court dismissed the husband's allegation, being of opinion that the lady was fully entitled to be restored to her home. That sentence was appealed against in the Court of Arches, but the sentence of the Court below was affirmed. Subsequently, the husband had appealed to the Privy Council, and that appeal was now pending; so that up to the present moment the lady had obtained no relief under the decree of the Consistory Court; and during the whole of this time she had suffered the greatest pain and anxiety in being kept from seeing her six children, four of whom were young. It was under these circumstances that the present petition was presented to the Court under the new Act.

The VICE-CHANCELLOR asked if the husband had been served with the petition.

Mr. K. Bruce said that he had mentioned the matter now for the purpose of asking the Court to allow substitution of service of the petition upon the husband's solicitors. The husband was a gentleman of large fortune, and had a dwelling-house at Southgate, in the vicinity of London. He was also a partner in a brewery at Limehouse, and had a country-seat at Gilsborough, in Northamptonshire. He had been seen

at his house at Southgate about the 10th of October last; since then inquiries had been made by the lady's solicitor at the various residences of her husband, with a view of serving him with the petition, but neither he nor the children were to be found anywhere. It was supposed that he had gone abroad, and the affidavits stated, that he kept out of the way on purpose to avoid being served with this petition. The husband's solicitors had been applied to to accept service, but they declined, saying they had received no instructions.

The VICE-CHANCELLOR asked if he had any jurisdiction under the new Act to make an order to substitute service.

Mr. K. Bruce.—The Court had jurisdiction according to its own rules of practice, but the Act in question said nothing about service of the petition, so that the Court might make the order upon the petition itself *ex parte*.

The VICE-CHANCELLOR said, that would not be altogether consistent with justice. He could easily conceive that there might occur such a gross case as might induce the Court to make an order *ex parte*, on the ground of necessity; but he could not at present say that this was such a case as that, until he had had an opportunity of reading through all the affidavits. When he had done so, he would state what his opinion was.

The matter was then ordered to stand over for the present.

This is the first application which has been made under the new Act.

#### Nov. 2.

#### MEINERTZHAGEN v. DAVIS AND OTHERS.

PRACTICE—NEW ORDERS of the Court of Chancery, issued under the Stat. 1 & 2 Vict. c. 110.—CONSTRUCTION of the 5th ORDER. (a)—TRUSTEES' liabilities.

Mr. K. Bruce applied for an order of reference to the Master to inquire into the validity of the appointment of new trustees in this case in substitution of the original trustees, and also for the Master to inquire as to whether the trust fund comprised in the settlement was now invested in any government stock or securities in America or in this country, according to the trust declared in the deed of settlement; and the notice of motion further asked that the defendant Davis should within a certain time transfer into Court the sum of £5,000. exchequer bills, which by the answer was admitted to be in his possession. This motion was made in pursuance of the terms

(a) See ante, Vol. ii. p. 78.

of the fifth order of the last "new orders in chancery." The learned counsel stating that those preliminary inquiries were rendered absolutely necessary under the circumstances of this case, in order that the Court might thereby be better enabled to decide upon the respective rights of the parties, when the cause should come before the Court for hearing. It appears that by the marriage settlement of a Mr. and Mrs. Warwick, a sum of £7,000. stock was vested in a trustee, to be laid out in government stock or securities, or upon real estate, as it was alleged, in this country. Some time after the marriage, Mr. and Mrs. Warwick, being connected with America, were desirous of having the trust fund invested in the government stock of the United States. To that transfer of the fund the original trustee declined to accede, and in 1831, at the request of Mr. and Mrs. Warwick, the original trustee relinquished the trust, and a new deed appointing three American trustees, was executed, one of whom only, it was alleged, had executed the deed, and the trust fund was subsequently transferred to America and invested in the government stock of that country. The original trustee, who was a defendant to the suit, being some time after this transfer of the trust fund by the new trustees, advised that he might be rendered liable to make good the trust fund, in case of loss, as there existed great doubts as to the validity of the deed of substitution of new trustees under which he had parted with the trust fund, applied to Mr. Warwick to remit him a sum of money to be invested by him as an indemnity in case he should be called upon to restore the trust fund. Mr. Warwick deposited with him accordingly certain tobacco warrants to be held by him as an indemnity, and those warrants he had since sold, and had invested the proceeds in a sum of £5,000. exchequer bills. Mr. Warwick, it was alleged, had since become a bankrupt, and his assignees had filed this bill with a view of having the £5,000. exchequer bills paid over to them by the original trustee. Under those circumstances it was submitted that the rights of the parties could not be properly decided upon at the hearing, unless those preliminary inquiries as to the validity of the substitution of new trustees and the present position of the trust fund were had.

Mr. Jacob opposed the motion, contending that no clear case for the necessity of such preliminary inquiries had been made out; besides, the new trustees, although defendants to the suit, were out of the jurisdiction. They had no objection to that part of the motion which asked for the transfer of the £5,000. exchequer bills into Court.

The VICE-CHANCELLOR said that it appeared to him that the notice of motion was certainly

made in a manner not consistent with what was expressed in the 5th of the late new orders. Having read the 5th order, his Honour said that he was of opinion that no case had been made out, either showing the necessity for those preliminary inquiries, or that they would be useful to the Court at the hearing of the cause. Upon a fair construction of the object of the 5th of the late new orders, he was of opinion that that order was made to apply only to clear cases, and not to cases like the present. The Court, in granting such a reference, had to see that the result would not only be useful at the hearing, but would also bind all the parties to the suit. It was quite obvious that those defendants who were out of the jurisdiction might, in the mean time, if the order of reference were granted, come within the jurisdiction, and, by answering, render all that might be done under the reference useless. It certainly appeared to him that the fair and legitimate object of the order was, that the Court should only grant those preliminary inquiries in cases in which the Court should be satisfied that if the cause was actually at the hearing, those inquiries would be necessary. Upon this notice of motion he was of opinion he could make no order, under the terms of the 5th order, against those defendants who had not appeared, and who were out of the jurisdiction. He must, therefore, refuse the motion as to the order of reference.

Mr. Jacob then consented to the £5,000. exchequer bills being transferred into Court.

#### ROLLS' COURT.—Nov. 5.

##### HICKS v. KEAT.

*SOLICITOR'S LIEN for Costs upon DEEDS in his custody, distinguished as between Deeds belonging to the person that employed him, and Deeds belonging to another party.*

In this case, which came on upon exceptions to the Master's report, it appeared that in December, 1833, Henry Gray Keat, who was possessed of several leasehold houses, died intestate, leaving his widow and one son, Ebenezer, surviving, and that Ebenezer alone took out letters of administration. Mrs. Keat, who as widow was entitled to one-third of the intestate's property, died soon after the death of her husband, leaving a will, dated January 8, 1834, by which she bequeathed various legacies, amounting to about £1,200, and appointed the plaintiff her executor, who proved the will. Ebenezer Keat employed Homfray as his solicitor in the affairs of the intestate, and in completing the sales of se-

of the leasehold houses of the intestate, the deeds of these houses came into the possession of Homfray as such solicitor. In December, 5, Ebenezer Keat became bankrupt, being at time indebted to Homfray in £400. and upwards for costs. The plaintiff, as executor of Keat, the widow of the intestate, filed a bill for the administration of the estate of Henry Keat, the intestate, to one-third of which plaintiff, as executor, was entitled, and in course of the suit an application was made to the Court for an inquiry into the lien which Homfray claimed on the deeds, and a reference directed, on which the Master reported that Homfray had no lien, to which report exceptions were taken.

The plaintiff's solicitor had applied to Ebenezer Keat for money to pay the legacies given by Keat's will, and Homfray deposited with the plaintiff the leases of two houses of the intestate, one in Albany and the other in Cleveland-street. The house in Albany-street was afterwards sold, and the purchase money, £500., was paid to the plaintiff's solicitors in part of Mrs. Keat's debts, and the lease of another house in Brook-street was deposited with the plaintiff's solicitors, in part of the legacies bequeathed by Mrs. Keat's will, which remained unpaid. It was argued for the exception that Homfray, as solicitor to Ebenezer Keat, had a lien for his costs on all the deeds deposited with him by his client. For the plaintiff it was contended that there could be no lien against Homfray as he never employed Homfray, or deposited the deeds with him.

Lord LANGDALE said, Homfray being possessed of the deeds as solicitor of Ebenezer Keat, could not have a lien upon them, but that lien could be upon the interest of the person who employed him; a solicitor could not have a lien upon any thing to which other parties were entitled. The right of Homfray was narrowed by transactions which had taken place. There was a deposit of some of the documents with the plaintiff's solicitors to secure what the plaintiff was entitled to a right to recover, and this deposit was made through the agency of Homfray. Homfray had no right to derogate from the security given by the deposit, nor had he any right to withhold the documents tending to make that security available, or to retain any deeds which he afterwards acquired relating to the same security, for he had deposited them upon them as against the plaintiff. With regard to the documents respecting the houses in Cleveland-street and Brooke-street, Homfray had no lien whatever. As to the other property, the plaintiff had no interest in it. It was, however, a different question whether Homfray had a lien against the assignees of Ebenezer Keat. The plaintiff's solicitors were to secure their share of the property to which the plaintiff

was entitled as executor of Mrs. Keat, but, subject to that interest of the plaintiff, Homfray had a lien. The plaintiff was right in maintaining that there was no lien against him, but he was not satisfied that the Master was right in reporting generally against the lien, and he would consider whether Homfray had not such a lien as would be good against Ebenezer Keat or his assignees, after satisfying the claim of the plaintiff Hicks.

#### Nov. 6.

Lord LANGDALE said, that as against the plaintiff Hicks Mr. Homfray had no right to retain the deeds; but that as against Ebenezer Keat or his assignees there must be reserved to Homfray any lien he might have. The exceptions to the Master's report with respect to the plaintiff must be overruled; but the lien of Homfray against Ebenezer Keat or his assignees must be reserved.

#### COURT OF QUEEN'S BENCH.—Nov. 2.

##### REGINA v. STEWARD OF THE MANOR OF RICHMOND.

**COPYHOLDS—MANDAMUS PRACTICE**—*Where the Queen is Lady of the Manor, whether this Writ should be directed to the Steward or the Lady of the Manor.*

The *Attorney-General* showed cause against a rule calling upon the steward of this manor to show cause why a writ of *mandamus* should not be directed to him commanding him to admit a party to some copyhold property within the manor; he would, however, take a preliminary objection. This was a *mandamus* directed only to the steward, whereas it should have been a *mandamus* to the lord or lady of the manor. In the present instance, Queen Victoria was the lady of the manor, and therefore, as her Majesty could not be served with a *mandamus*, the remedy was by petition of right. Upon this ground he submitted the rule must be discharged.

Sir W. Follett, in support of the rule, contended, that as the Queen was lady of the manor, no one could admit but the steward; it was a ministerial, not a voluntary act; the Crown could not interfere; it was in the power of the steward to exercise a discretion, and the writ, therefore, he submitted, was properly directed to the steward.

#### Nov. 4.

Lord DENMAN gave the judgment of the Court. His Lordship said, that in ordinary cases it had been then held that it was not enough to serve the writ upon the steward, and

it must be served upon the lord of the manor as well as upon the steward; but with respect to a Crown manor there might be a difference to that general rule, and in this case the Court considered the steward to be a statutable officer, which made such a difference that the writ ought to go.

Writ ordered accordingly.

#### ULLITHORNE v. CASS.

**PRACTICE**—NEGLECT OF AN ATTORNEY, *not being in Court when cause called on, and Plaintiff called. Whether relief will be granted under special circumstances.*

Mr. *Humfrey* moved for a rule to show cause why the nonsuit which had been entered in this case should not be set aside and a new trial had. The facts were these:—This case was set down No. 8 in the common jury list, on the last day of the sittings, there being four special jury cases also entered. The clerk to the attorney seeing this, and thinking he was safe until the after part of the day, went to receive a considerable sum of money to which he was entitled in right of his wife before he repaired to Westminster-hall. On his arrival at the court he found, that although two counsel had been employed, neither had been present; and as he himself was also absent, the plaintiff had been called. The learned counsel hoped that under these circumstances the Court would grant his application.

Lord DENMAN said that the Court felt that it ought not to listen to applications of this nature; neither the two counsel who had been employed nor the attorney's clerk were in attendance. The party must bring another action.

Rule refused.

#### COURT OF COMMON PLEAS.—Nov. 5.

##### ADCOCK v. FISKE.

**OUTLAWRY**.—*Whether the Court for relief of Insolvent Debtors has the power to reverse an Outlawry, in discharging an Insolvent under the Act for the Abolition of Arrest for Debt, without the consent of the Court.*

Mr. *Serjeant Wilde*, for the defendant, applied to the Court for an order that he might be discharged from custody, instead of his being charged in execution at the suit of the plaintiff, who had obtained a judgment of outlawry against the defendant, and had brought him up in custody to be charged in execution in the usual manner, on the ground that the defendant had been discharged from the judgment by the adjudication of the Insolvent Debtors' Court, where

he had been heard upon his petition and discharged under the Act.

Mr. *Kelly*, for the plaintiff, contended that the Insolvent Debtors' Court had no power to reverse an outlawry, at all events without the consent of the Crown, which had an immediate interest in the goods of the outlaw. The question was whether the outlawry was reversed by the decision of the Insolvent Court, for if not, there could be no doubt that the plaintiff was entitled to charge the defendant in execution.

The COURT observed, that this was an application, in the ordinary course, to bring a party up to have him charged in execution upon a judgment; but it appeared that he had been already discharged in respect of this action, so far as his person was concerned, by the Insolvent Debtors' Court. The answer given to that was that the defendant was an outlaw; but that point was disposed of by the case of "*The Queen v. The Commissioners of the Insolvent Debtors' Court.*" The words in the Act, "any process whatsoever," were large enough to include the process of outlawry.

Ultimately the defendant was discharged, the Court being of opinion that he being brought before them on writ of *habeas corpus*, and there being no ground for detaining him, he was entitled to his discharge.

#### BAIL COURT.—Nov. 2.

##### GIBBS v. GREGG.

**OUTLAWRY**—*previous to the Act for abolishing Arrest for Debt on mesne process.*—**PRACTICE**—SHERIFF LAW.

Mr. *Watson* moved for an attachment against the Sheriff of Bristol for not taking bail of the defendant when in custody under a writ of *capias utlagatum*. The outlawry of defendant had taken place before the act of the 1st of Victoria, c. 110, and the application was made under the 4th and 5th of William and Mary, c. 18, s. 5, which requires that when, according to practice, an action is bailable, the sheriff, upon a *capias utlagatum*, must take the defendant's bail, double the sum at issue, for his appearance in court; but where the action is not bailable, he might take the attorney's bail as for a common appearance. This was a bailable action, as the sheriff was aware; but he was satisfied to take the bail of Mr. *Bevan*, an attorney of Bristol. The learned counsel cited a case in point from the 3d Bur. p. 1482.—Granted.

Nov. 4.

TICLED CLERKS.—*Notices for Admission.*

ANONYMOUS.

Mr. *Humfrey* applied, on the part of a gentleman who desired to be called as an attorney in court, to obtain an indulgence to the following purport, and under these circumstances:—It was necessary that any person desirous of being an attorney should give notice to that effect three days before the commencement of the term preceding that on which the examination call were intended to take place. In this instance such notice had been served before the term last past, but, unfortunately, his client had been compelled to leave town, in consequence of the severe and dangerous illness of a relative; and he now begged of the Court to allow the notice given to serve for his call in Hilary, instead of this term.

Mr. Justice LITLEDALE observed, that it was of importance that the rules of the court, in relation to such matters as this, should be adhered to as closely as possible. There did not appear to be any part of the applicant's case made out to sustain his object. Why could he not wait up for a couple of days for the examination, which took place towards the end of term? The law in the case did not state how the illness of the applicant's sister could keep him till then out of town, or hinder him from coming up.

Mr. *Humfrey* said that he should inquire into the circumstances to which his lordship alluded, and for the present declined pressing his application.

## SOLVENT DEBTORS' COURT.—Nov. 5.

## HENRY WHITEMAN'S CASE.

*Whether an Insolvent out upon Bail, and having petitioned the Court is discharged by his detaining Creditor while so out of custody, can be heard upon his Petition.*

This insolvent had been out on bail: last night the discharge at the suit of the detaining creditor was lodged at Whitecross-street Prison. The insolvent, however, appeared this morning to pray his discharge under the Act.

The COURT said, they could not assist the insolvent. It was a hardship upon him, after the expense to which he had been put, that the creditor should send his discharge, instead of appearing to oppose him; but, as he had been out on bail when the discharge was lodged, they could not assist him.

In cases where the parties have been actually in prison, the Court, under similar applications,

have, under the new Act, afforded the assistance prayed.

## BRENTFORD PETTY SESSIONS.

Nov. 2.

RANGERSHIP OF BUSHY PARK—*Right of the Ranger (HER MAJESTY THE QUEEN DOWAGER) to pursue and kill game upon Hounslow Heath, now become private property. (a)*

This case was again heard by adjournment from October 12, before COLONEL CLITHEROW (CHAIRMAN), and MESSRS. POWNALL, BAILLIE, and ARMSTRONG, the sitting magistrates.

Colonel CLITHEROW inquired if any answer had been received from the office of the Commissioners of Woods and Forests, as to whether it was the intention of the law officers of the Crown to maintain the claim which had been set up.

Mr. Kirby replied that he had communicated with the Commissioners on the subject, but had, up to his leaving town that morning, received no answer from them.

Mr. Rees apprehended, from a communication he had received from Mr. Kirby, that the Queen Dowager had no intention to interfere at all in the matter. It also would appear that the Commissioners of Woods and Forests did not intend to interfere, or some person would have attended to maintain the claim on the part of the Crown. The case, therefore, resolved itself into a common trespass. It had been contended that it came under the 35th section of the act:—Be it enacted, that the aforesaid provisions against trespassers, and persons found on any land, shall not extend to any person found hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox, already started upon any other land, nor to any person *bund fide* claiming or exercising any right, or reputed right, of free warren or free chase, nor to any land or any steward of the Crown, of any manor, lordship, or royalty, nor to any gamekeeper lawfully appointed by such lord or steward, within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty." He would, however, contend, that gamekeepers could only be protected in their just rights while they were acting legally. Gamekeepers were bound to know the limits of their deputations, and not to trespass beyond them as the defendants had done. That clause of the act was not intended to apply in cases of common trespass, but only to the cases of gentlemen

(a) See the two previous hearings of this case, reported ante vol. ii. pp. 379, 384.

who had it in their power to repay any damage they might commit. It was clear from the loose manner in which the letters patent stated the right of free warren to exist—viz. from Staines-bridge to Brentford-bridge, that the Crown would not and could not set up a claim. It was also clear that Isleworth, in which parish the *locus in quo* was situated, was not mentioned in the letters patent, and that the free warren of the manor of Isleworth Sion is vested in his Grace the Duke of Northumberland. He must, therefore, for the protection of the gentlemen in that portion of the county of Middlesex and of their property, apply to the Bench for a conviction against Mr. Sawyer, there being no evidence that he had any right on the premises in question.

Colonel CLITHEROW differed in opinion. The letters patent had been produced, and evidence given that the gamekeeper had been in the habit of shooting over the limits therein named for the last thirty years.

Mr. Rees contended that had not been proved. What had been said was, that they had shot there. But there was no proof that their doing so was not a trespass. They had also said they had shot over Hanworth, where they had clearly no right at all.

Mr. Clark (clerk to the magistrates) said, it was evident from the arguments adduced, that two claims had been set up, and he would put it to the parties whether it was possible the justices could decide where there were conflicting rights?

Mr. ARMSTRONG said—The defendant Sawyer was charged with a trespass, in answer to which he declared he had a right to shoot on the property in question, and his solicitor contended that the Bench had no power to interfere in the case. In his (Mr. Armstrong's) opinion, the 42d clause bore that out, and that the exemption was clearly proved.

Mr. Rees contended that the clause quoted by the worthy magistrate told against the defendant.

Mr. ARMSTRONG considered it told in favour of the defendant. At any rate, he had proved that he had the colour of an authority, and such an one as clearly gave him the colour of a right. He therefore was of opinion that the Bench could not interfere in the matter, and that the summons must be dismissed.

Mr. Rees said, if that was the intention of the Bench, he must say he wished it to be properly stated, as he must consequently apply by *mandamus* to the Court of Queen's Bench.

Mr. ARMSTRONG said he was only expressing his individual opinion.

Mr. POWNALL considered if the matter appeared before them as a question of right, there could be no difficulty in deciding it. It was clear that the Duke of Northumberland had a

right to the free warren of the manor of Isleworth Sion, and it was only in the Hampton Enclosure Act that the right of free warren was reserved to the Crown. The Isleworth and Heston Enclosure Acts contained no such reservations, while that of Bedford gave a clear right of free warren to the Duke of Northumberland; part of which ground abutted on the road from Staine's-bridge to Brentford-bridge. The 35th section, in his (Mr. Pownall's) opinion, clearly shut out the Bench from deciding on such a case; for, a clear colour of claim of right having been proved on the part of the defendant Sawyer, it was the duty of the Bench to send the case to a higher tribunal. With regard to the defendant Nichol, it appeared to him that the defendant Sawyer said, "I have a right, and Mr. Nichol being my friend, I took him with me."

The BENCH then having shortly conferred together, decided that they had no jurisdiction in the case, and dismissed the summons.

The case of Mr. Nichol was then called on, and his name being called without any answer being returned,

Colonel CLITHEROW said, Mr. Nichol had pleaded guilty on his first appearance.

Mr. Rees said, that fact proved that the Queen Dowager's gamekeeper was in his (Mr. Nichol's) opinion a trespasser.

Mr. POWNALL could not take that as a proof. Mr. Dawe said, he had no wish to press for a heavy penalty against Mr. Nichol, whom he did not doubt had been misled by Mr. Sawyer.

The BENCH then inflicted a nominal fine of 5s. with costs.

The question, it was understood, will be carried immediately to the superior courts, as the decision will be of considerable importance to the landowners and inhabitants of that portion of Middlesex.

## CUSTODY OF INFANTS' BILL.

2 and 3 Vict. Cap. LIV.

*An Act to amend the Law relating to the Custody of Infants.* [17th August, 1839.]

Whereas it is expedient to amend the law relating to the custody of infants: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That after the passing of this Act it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father

of or of any person by his authority, or of guardian after the death of the father, if shall see fit, to make order for the access of petitioner to such infant or infants, at such and subject to such regulations as he shall convenient and just; and if such infant or ts shall be within the age of seven years, to e order that such infant or infants shall be erred to and remain in the custody of the oner until attaining such age, subject to e regulations as he shall deem convenient just.

II. And be it enacted, That on all complaints e under this Act it shall be lawful for the d Chancellor or the Master of the Rolls in land, and for the Lord Chancellor or the ter of the Rolls in Ireland, to receive affi- s sworn before any Master in Ordinary or ter Extraordinary of the Court of Chancery; that any person who shall depose falsely corruptly in any affidavit so sworn shall

be deemed guilty of perjury, and incur the penalties thereof.

III. And be it enacted, That all orders which shall be made by virtue of this Act by the Lord Chancellor or the Master of the Rolls in Eng- land, and by the Lord Chancellor or the Master of the Rolls in Ireland, shall be enforced by pro- cess of contempt of the High Court of Chan- cery in England and Ireland respectively.

IV. Provided always, and be it enacted, That no order shall be made by virtue of this Act, whereby any mother against whom adultery shall be established, by judgment in an action for criminal conversation at the suit of her husband, or by the sentence of an Ecclesiastical Court, shall have the custody of any infant or access to any infant, any thing herein contained to the contrary notwithstanding.

V. And be it enacted, That this Act may be amended or repealed by any Act to be passed during this present Session of Parliament.

## EQUITY SITTINGS IN MICHAELMAS TERM, 1839.

### COURT OF CHANCERY.

Before the LORD CHANCELLOR at Westminster.

Saturday, Nov. 2	-	-	Appeal Motions and Adjourned Petitions.
Monday, „ 4	-	-	Petition Day.
Tuesday, „ 5	-	-	} Appeals.
Wednesday, „ 6	-	-	
Thursday, „ 7	-	-	Appeal Motions and Ditto.
Friday, „ 8	-	-	} Appeals and Causes.
Saturday, „ 9	-	-	
Monday, „ 11	-	-	
Tuesday, „ 12	-	-	
Wednesday, „ 13	-	-	} Appeal Motions and Ditto.
Thursday, „ 14	-	-	
Friday, „ 15	-	-	} Appeals and Causes.
Saturday, „ 16	-	-	
Monday, „ 18	-	-	
Tuesday, „ 19	-	-	
Wednesday, „ 20	-	-	} Appeal Motions and Ditto.
Thursday, „ 21	-	-	
Friday, „ 22	-	-	} Appeals and Causes.
Saturday, „ 23	-	-	
Monday, „ 25	-	-	Appeal Motions and Ditto.

### VICE-CHANCELLOR'S COURT.

Before the VICE-CHANCELLOR at Westminster.

Saturday, Nov. 2	-	-	Motions.
Monday, „ 4	-	-	Petition Day.
Tuesday, „ 5	-	-	} Pleas, Demurrers, Exceptions, Causes, and Fur- ther Directions.
Wednesday, „ 6	-	-	
Thursday, „ 7	-	-	Motions.
Friday, „ 8	-	-	} Short Causes, Unopposed Petitions, and General Cause Paper.



*Equity Sittings in Michaelmas Term, 1839.*

Saturday, Nov.	9	-	-	{	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Monday, „	11	-	-		
Tuesday, „	12	-	-		
Wednesday, „	13	-	-		
Thursday, „	14	-	-		Motions.
Friday, „	15	-	-	{	Short Causes, Unopposed Petitions, and General Cause Paper.
Saturday, „	16	-	-	{	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Monday, „	18	-	-		
Tuesday, „	19	-	-		
Wednesday, „	20	-	-		
Thursday, „	21	-	-		Motions.
Friday, „	22	-	-	{	Short Causes, Unopposed Petitions, and General Cause Paper.
Saturday, „	23	-	-	{	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Monday, „	25	-	-		Motions.

## ROLLS COURT.

Before the Right Hon. the MASTER OF THE ROLLS, at Westminster.

Saturday, Nov.	2	-	-		Motions.
Monday, „	4	-	-		Petitions in General Paper.
Tuesday, „	5	-	-	{	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Wednesday, „	6	-	-		
Thursday, „	7	-	-		Motions.
Friday, „	8	-	-	{	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday, „	9	-	-		
Monday, „	11	-	-		
Tuesday, „	12	-	-		
Wednesday, „	13	-	-		Motions.
Thursday, „	14	-	-	{	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Friday, „	15	-	-		
Saturday, „	16	-	-		
Monday, „	18	-	-		
Tuesday, „	19	-	-		Motions.
Wednesday, „	20	-	-	{	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Thursday, „	21	-	-		
Friday, „	22	-	-		Petitions in General Paper.
Saturday, „	23	-	-		Motions.
Monday, „	25	-	-		Short Causes after swearing in the Solicitors.
Tuesday, „	26	-	-		

Consent Causes, Short Causes, and Consent Petitions every Tuesday, at the sitting of the Court.

## COURT OF EXCHEQUER.

## SITTINGS IN MICHAELMAS TERM, 1839.

				<i>Banco.</i>	<i>Equity.</i>	<i>Nisi Prius.</i>
					Before Lord Abinger.	
Saturday, .	Nov. 2	.	.	.	Petitions and Motions	.
Monday . . .	4	.	.	.	.	.
Tuesday . . .	5	.	.	.	.	.
Wednesday . . .	6	.	.	.	Paper of general business	Middlesex 1st sitting.
Thursday . . .	7	.	.	.	.	Ditto by adjournment.
Friday . . . .	8	.	.	.	Petitions and Motions	.
Saturday . . .	9	Errors & Lord Mayor sworn			.	.

Monday	Nov. 11	Special paper	.	.	.	London 1st sitting.
Tuesday	12	Errors and Sheriffs sworn	.	.	.	.
Wednesday	13	Special paper	.	.	.	.
Thursday	14	.	.	.	Petitions, Motions, and Short Causes	.
Friday	15	.	.	.	.	Middlesex 2nd sitting.
Saturday	16	.	.	.	.	} Ditto by adjournment
Sunday	18	.	.	.	.	
Tuesday	19	.	.	.	Petitions and Motions	.
Wednesday	20	Special paper	.	.	.	.
Thursday	21	.	.	.	.	London 1st sitting.
Friday	22	.	.	.	Paper of general business	Ditto by adjournment.
Saturday	23	.	.	.	Petitions and Motions	.
Sunday	23	.	.	.	.	.

**DEMURRER PAPER.**

*Michaelmas Term, 1839.*

Monday	Nov. 2	} Motions in Arrest of Judgment.
Tuesday	4	
Wednesday	5	
Thursday	7	

*Special Arguments.*—Wednesday, Nov. 13.

Doe (Marchant) v. Errington.  
Hill v. White and others.  
France and another v. Same.  
Byers and others, assignees v. Southwell.  
Steanes and others, assignees v. Wainwright.  
Beesley v. Dolley.  
Pisani v. Lawson.  
Devaux and another v. Steinkeller.  
Belcher and others, assignees v. Oldfield.  
Hill v. White and another.  
Lohmann v. Rougemont and another.  
Brook & others, assignees v. Mitchell & others.  
Samson v. Rhodes.  
Dulley v. Linnell.  
Smith v. White.  
Cockburn & another v. Wright & others, ex.  
Carswell, admor. v. Farncomb.  
Doe d. Capes, executors v. Walker.  
Pogson v. Thomas.  
Jenner v. Nash.  
Hunnybun v. Mitchell and another.  
Bruce the younger v. Waite and another.  
Low v. Stocken.  
Thornton v. Jenyns, clerk and others.  
Pilbeam v. Briggs.  
Lucas v. Eastes.  
Poulters v. Phillips.  
Houlditch and another v. Duthie.  
Gale v. Davis.  
Chew and another v. Eldridge.  
Hinde and others v. Gray.  
Houlditch and another v. Duncombe, M. P.  
Middleton v. Chambers.

Hodges v. Same.  
Waller v. Lacy.  
Ashdown v. Burgess.  
Bristow v. Fairclough.  
Thompson and another v. Farden and others.  
Walbancke v. Allen the younger.  
Smith and others v. Nicholls.  
Billing v. Kightley.  
Crawshay and others v. Barry.  
Drummond and others v. Lowther.

**Business of the Courts.**

**COURT OF CHANCERY.**

Attorney-General v. Wilson, for judgment—  
Harding v. Harding, to be spoke to—Jennings  
v. Newman, petition, by order.  
Appeal motions—Warden v. Robins—Busk  
v. Beetham—Ranger v. Great Western Railway  
—Dearman v. White—Wiggins v. Peppin.  
Cause Petitions—Sharp v. Manson—Mills  
v. Finlay—Jennings v. Newman.

**VICE-CHANCELLOR'S COURT.**

In re Taylor, petition for judgment.  
Short causes and unopposed petitions.  
After the unopposed petitions—Kelsey v.  
Larkins, motion, by order—Leicester v. Leices-  
ter, ditto—Bryan v. Twigg, petition by order—  
Sowerby v. Sowerby, ditto—Higham v. Howes,  
ditto—Attorney-General v. Ludlow, ditto—Nye  
v. Maule, ditto—Lane v. Oliver, to be spoke to.  
After which his Honour will proceed with the  
list of adjourned petitions.

**ROLLS' COURT.**

In re Rugby School, petition.  
After which motions continued.  
Causes after the motions—Hemming v. Pin-  
kerton, part heard—Jones v. Maurice—Du  
Hourmehn v. Sheldon, exceptions, further direc-  
tions, and costs.

## COURT OF QUEEN'S BENCH.

Sittings in Banco.

## BAIL COURT (Queen's Bench)

Middlesex Common Juries—Meredith v. Simons, part heard—Kent v. Hayes—Nicholls and others v. Newbery.

## ORDER OF THE COURT.

If the Motions for New Trials ended yesterday, the Court will take the business in the following order:—

Friday, Nov. 8, Monday the 11th, Thursday the 14th, the peremptory paper.

Tuesday, Nov. 12, Friday the 15th, Tuesday the 19th, the special paper.

Saturday, Nov. 9, Wednesday the 13th, Saturday the 16th, the Crown paper.

Monday, Nov. 18, Wednesday the 20th, the new trial paper.

Thursday, Nov. 21, Friday the 22nd, Saturday the 23rd, Monday the 25th, motions.

The remaining five days of the week after the 25th, two days will be taken for the new trial paper, and three days for the special paper.

The four last days of the term for motions.

## COURT OF COMMON PLEAS.

Middlesex Common Juries—Doe v. Gass—Dent v. Harrison—Clarke v. Treherne—Casson v. Law—Fletcher v. the Same—Berry v. Latham—Saxe v. Welsh—Kislinbury v. Day—Roberts v. Meux, Bart.—Staniland v. Harper—Reeves v. the Same—Crew v. Sewell—Ashdown v. Grant—Meux, Bart. v. Roberts—Wright v. Paulton—Richmond v. Davis—Davies v. Nookham—Warren v. Anderson—The Same v. the Same—Finden v. Blyth—Chapman v. Matthews—Tipper v. Burr—Smith v. Wilkinson—The Same v. the Same—The Same v. Goudge—The Same v. Morgan—The Same v. Dempsey—Green v. Duckett—Seymour v. Eckford—Hammond v. Plaskett—Allen v. Graham—Denton v. Thompson.—The Court will also sit in Banco.

## COURT OF EXCHEQUER.

Sittings in Banco.

## EQUITY EXCHEQUER.

Petitions—Re Bristol and Exeter Railway; petition of Tuckett—Re Newcastle and Carlisle Railway; petition of Richardson—Re Great Western Railway; petition of White—Re the Same; petition of the Corporation of Chippenham—Re Manchester and Birmingham Railway—Ex parte Christ's Hospital (2)—Re Great Western Railway; petition of Large—Re Same; petition of Ripley—Re Same; petition of Freke—Re Birmingham and Gloucester Railway; petition of Sargeant—Price v. North—Archer v. Berkeley.—After the Petitions, Motions.

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# The Legal Guide.

[III.]

SATURDAY, NOVEMBER 16, 1839.

[No. 3.]

## LAW OF REAL PROPERTY.

### ESSAY III.

3 & 4 Wm. IV. cap. 74.

*Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.*—[28th Aug., 1833.]

(Continued from p. 20.)

EVIOUS to the passing of this statute, fines and recoveries were liable to errors than any other species of Common Law assurance, and the Court of Common Pleas (to which Court alone all applications for relief could be made) was at all backward in interfering, as when the assessor wished to change the term (which amounted to levying a new fine) (*a*), or change the names of the parties (*b*), except the Christian names required change (*c*), a case occurred (*d*) where, after a lapse of 50 years, the Court ordered the names to be transposed. So where the assessor of the county was required to be assessor (*e*), or where two counties were re-

quired to be inserted to cover one parish (*f*), but where the amendment required was mere matter of form or detail, and the Court was satisfied that it was an error, the amendment was generally allowed (*g*). Most of the cases are now, however, provided for by this statute, and titles are made much more secure by its provisions. S. s. 7 (before cited) cures all defects occasioned by errors in names, and by the misdescription or omission of parcels without further amendment (unless any Court of competent jurisdiction shall have refused to amend); but notwithstanding this enactment an application was made to the Court in 1834 (*h*) to amend a fine by substituting for the parish of Burton Latimer, which was mentioned by mistake in the fine, the parish of Isham, in which according to the deed to lead the uses the premises were situated, on the ground that sec. 7 (before cited) did not exclude the jurisdiction of the Court in matters of amendment; and that by sec. 9 (also before cited) the jurisdiction was expressly reserved in cases not provided for by the Act, and in that case a purchaser had refused to accept the title unless the amendment was sanctioned by the Court. This misdescription, however,

*Heath v. Wilson*, 2 Black. 788.

*Ex parte Motley*, 2 Bos. & Pul. 455.

*Bro. & Bing.* 16; 4 Bing. 97.

*1 Bing.* 10.; 1 M. & Sc. 43.

*1 Taunt.* 855.

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(*f*) 8 Taunt. 87.

(*g*) 1 Hen. Black. 73; 6 Taunt. 73; 4 Id. 155; Id. 226; Id. 708; Id. 738; Id. 708; 5 Id. 207; 1 Bing. 22; 2 Id. 93; Id. 386; 3 Bing. 176.

(*h*) *Lockington and Shipley*, 1 Ring. N. C. 355.

being apparent on the face of the instrument was held to be within the meaning of the Act. TINDAL, C. J. said, "Here is a misdescription apparent on the face of the instrument, within the meaning of sec. 7. If we accede to your application, we shall be in the same situation as before the Act—called on to amend, upon every conveyancer's doubt, and all the expense will be incurred which the Act was passed to prevent." Without deciding the question of jurisdiction, the Court considered that under sec. 7 there was no need for its interference.

Secs. 10 and 11 cure defects occasioned by the non-inrolment within due time of a bargain and sale to make a tenant to the *precipe*, or by the non-concurrence of the owner of the legal freehold in making the tenant, provided the beneficial owner of the freehold in possession shall, within the time limited for making the tenant, have conveyed to the tenant. The non-inrolment clause applies to the single case of a bargain and sale, being within the statute of Hen. 8. and purporting to make the tenant; it does not cure non-compliance with any other statute requiring inrolment or registration, nor extend to any case in which the deed to make the tenant is insufficient by reason of the non-inrolment of a *previous* bargain and sale.

The inrolment of a bargain and sale, under the last-named statute, has relation to the execution of the instrument. That statute denies effect to the assurance, "except it be made in writing, indented, and sealed, and be inrolled within six (lunar) months after the date." The condition being complied with, the same statute imparts legal efficacy to the use from its inception. But a bargain and sale under an act of Parliament is, in general, merely the execution of a naked authority, given to A to dispose of the estate of B, and has no other title to the appellation of a bargain and sale than that which it may derive from the occurrence of the words

"bargain and sale" in the statute which confers, and in the instrument which executes the authority. The same observation applies to every instrument assuming the form of a bargain and sale, by which lands are disposed of in pursuance of a power or authority, whether created by statute or by other means. If the power or authority requires the deed to be inrolled, but does not limit the time, the inrolment is wholly independent of the period fixed by the statute of inrolment (*a*), but until inrolment the power or authority remains unexecuted at law. The inrolment of a bargain and sale under the statute of Uses, relates back to the creation of the use which springs on the execution of the deed from the seisen of the bargainer.

Sec. 10. And be it further enacted, That no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to enrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly inrolled.

Sec. 11. And be it further enacted, That no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry, or other writ for suffering such recovery, provided the person who was the owner of, or had the power to dispose of an estate in possession, not being less than an estate for a life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain

(a) *Ingram v. Parker*, T. Raym. 239, cited.

not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of the estate in possession to the tenant to such effect; and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for years or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

Sec. 12. Provided always, and be it further enacted, That where any fine or common recovery shall before the passing of this Act have been wholly reversed, such fine or recovery shall not be rendered valid by this Act; and where any fine or common recovery shall before the passing of this Act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this Act, so long as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery if made, shall before the passing of this Act have had any dealings with the lands comprised in such fine or recovery on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this Act, and this Act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this Act be in possession in respect of any estate which the fine or common recovery, if made, would have barred, nor any fine or common recovery which, before the passing of this Act, any Court of competent jurisdiction shall have refused to amend; nor shall this Act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this Act, in which the validity of any fine or recovery shall be in question between the party claiming under such fine or recovery and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invali-

date the same, shall not be rendered valid by this Act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this Act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

Sec. 13. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, the records of all fines and common recoveries levied and suffered in his Majesty's Court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said Court of Common Pleas shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in his Majesty's Court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as his Majesty's Justices of Assize for the County Palatine of Lancaster for the time being shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the Court of Pleas of the County Palatine of Durham, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said Court of Pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this Act had not been passed; and while the said records and proceedings respectively shall be kept by such persons respectively, searches may be made and extracts and copies obtained as heretofore, and on paying the ac-

customed fees; and when any of the records and proceedings shall, by the order of the court or Justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made and extracts or copies obtained at such times and on paying such fees as shall from time to time be ordered by the court or Justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this Act had not been passed.

(To be continued.)

### PROBLEM III.

VOL. 3.

#### DESCENT—LOCAL CUSTOMS.

What are the principal modes of descent derived from Local Customs?

### Law Reports.

#### COURT OF CHANCERY.—Nov. 7.

STURGIS v. CHAMPNEYS.

#### APPEAL FROM THE VICE-CHANCELLOR.

**HUSBAND and WIFE.**—*Whether a Married Woman, Tenant for Life of real estates, has a right to a Settlement out of the rents and profits when her Husband takes the benefit of the Insolvent Act.*(a)

The Bill in this cause was filed by the plaintiff as the official assignee under the *first insolvency* of Sir Thomas Champneys on behalf of the creditors for a Declaration of the Court that he was entitled to the rents of certain estates to which his wife, Lady Champneys, was tenant for life during her coverture, and that the receiver should account to him accordingly. Lady Champneys insisted that she was entitled to a provision out of her life estate.

It was admitted that during the filing of the bill the creditors under the *first insolvency* had all accepted a composition in satisfaction of

their debts, so that the claims of the plaintiff were fully satisfied. The question therefore was between Lady Champneys and the creditors of the *second insolvency*.

The facts of this case we have before fully reported; (a) at the hearing before the VICE-CHANCELLOR in July last, when his Honour was of opinion that he ought not to do so dangerous a thing as to countenance the claim made on behalf of Lady Champneys to the creditors under the *second insolvency* of her husband, against this decision the present appeal was brought.

The LORD CHANCELLOR in giving judgment said, this was one of those cases which were argued last summer, and in which his Lordship had, during the vacation, delivered his judgment to the solicitors for the parties. He now gave his reasons for that decision. The matter had come before his Lordship upon the petition of Lady Champneys, praying that the assignees of the estate of her husband, Sir T. Champneys, who had taken the benefit of the Insolvent Debtors' Act, might be ordered to pay to her a reasonable sum for her maintenance out of certain property of great value, which had been bequeathed to her by her father, but which had been taken possession of by her husband's assignees for payment of his debts. The Vice Chancellor was of opinion that the Court had no power to order payment out of this property for the maintenance of Lady Champneys; but his Lordship said, that he was of a different opinion, and thought that the assignees, in coming to this Court for the purpose of enforcing equitable rights against this property, should themselves do equity by allowing a reasonable sum for the support of Lady Champneys. His Lordship cited the cases of *Mitford v. Mitford*, 9 Ves. Jun. 87.; (a) *Stackpole v. Beaumont*, 3 Ves. J. 98.; *Moody v. Mathews*, 7 Ves. J. 174. The common law gave the husband the wife's estate, because it threw upon him the obligation of maintaining her. In the present case the Court would not interfere on behalf of the assignee until a proper provision was made for Lady Champneys. His Lordship had thought it proper to examine the authorities, out of respect to the opinions of other Judges, and not from any doubt he felt either at the argument or now. He should reverse the decree of the Vice-Chancellor. The property, which was estimated to be worth £10,000. a year, came by will to the lady, without any settlement upon her out of it. His Lordship directed a reference to the master to settle the proportion that ought to be appropriated to the maintenance of the petitioner. Upon application by the counsel for Lady Champneys for payment to her of a certain sum pending the re-

(a) See Fiat against — Peters, post No. IV.

(a) Ante Vol. 2. p. 232.

nce, stating that there was a sum of £10,000. into Court from the property, the Lord Chancellor ordered £1,000. to be at once paid to

2) **SIR WM. GRANT, M. R.**, entered at length upon the various distinctions applicable to the property of a married woman where her husband becomes bankrupt; that case *Mrs. Mitford* during coverture entitled to a legacy, her husband became bankrupt and died. The assignees claimed the fund, and the bill was filed by the trustees upon the opposite claims set up by the widow of Mr. Mitford and by the assignees. *Mrs. Mitford* contended that as she had outlived her husband, who never received the legacy into possession, and that she was entitled by survivorship. The assignees stated that *Mrs. Mitford* had a settlement made upon her on her marriage, so that the bankrupt became the purchaser of her fortune; and therefore they submitted whether they were not entitled to the whole of the money; but they contended that, at all events, they were entitled to it subject to a proper settlement to be made upon her. That the settlement was, that was made by the bankrupt upon his marriage, is not denied by the assignees. *Sir W. Grant* said, it is a mere fact that there was a settlement, and by no means prove, that the husband became a purchaser of all the fortune that might afterwards come to her. This settlement appears to be in consideration of her fortune, as specified and described in the deed, the part of which was settled and part left to the husband, so he cannot be considered a purchaser of anything more than the fortune she then had; for *Lord Hardwicke* in *Garforth v. Bradley* (2 Ves. I. 677), said if a man marries, and in consideration of that marriage makes a settlement upon his wife by way of jointure, and in consideration of such portion as she is or may be entitled to, if any thing comes afterwards during the coverture to the wife, he is consid-

ered as a purchaser: and shall take it. If, on the other hand, the settlement on the wife is in consideration of her present portion or fortune, without reference to what comes afterwards, and the husband does not reduce it into possession, it will survive to the wife in equity, as well as by the rule of law.

Even if it were otherwise, it is contended, and I think with justice, that, while the obligations of the husband remain unperformed, as it is said they do to the extent of £3000, which in the case *ex parte Mitford* (1 Bro. C. C. 398) was held not proveable under the commission, neither he nor any person claiming under him could be permitted to receive any part of her fortune upon any other condition than that of making good the settlement. But upon that supposition, not the wife, but the trustees under the settlement would be entitled to the fund, or to so much as may be necessary to make good the deficiency: for the husband or his assignees, if purchasers, would have the right, subject only to the equity of the trustees to have the settlement made good. But if the husband be no purchaser, as I am of opinion he is not, the trustees have no claim whatever upon it, but the question lies entirely between the assignees and the wife. The question depends on the effect, that an assignment under a Commission of Bankruptcy has upon the choses in action or equitable interest of the wife of the Bankrupt. Of the many cases cited it is necessary to examine those only, in which the contest has been between the surviving wife and the assignees of the bankrupt husband. What may have been determined as to a particular assignment for valuable consideration, or an assignment under a Commission of Bankruptcy, where the husband was living, when the question between the wife and the assignees has arisen, cannot furnish a precise rule for such a case as this: for between a particular assignment for valuable consideration, and an assignment



by operation of law, such a distinction has always been made, that the effect of the one is not necessarily to be inferred from that produced by the other: and it is only, where the husband is dead, that the question between the wife's right by survivorship and the right of the assignees under the Commission can arise.

In four of the cases that have been referred to, the question has been of the nature I have described: that is, between a surviving wife and the assignees of a Bankrupt husband.

Two of these, viz. *Boswil v. Brander*, (1 p. Will. 458.) and *Pringle v. Hodgson*, (ante, 1st ser. vol. 3. 617.) were relied upon by the assignees, and two, viz. *Grey v. Kentish*, (1 Atk. 280. corrected from the register's book in Mr. Cox's note, 1 p. Will. 459.) and *Gayer v. Wilkinson*, (before Lord Bathurst, 1 Bro. C. C. 50. 2 Dick 492.) were cited for the widow. Though all, that is directly determined by the first of those cases, was that the wife should not have the aid of equity to take the writings out of the hands of the assignees of her deceased husband, yet that is founded upon the opinion formed ultimately by Sir Joseph Jekyll, that the right to the debt was vested in the assignees; and in *Pringle v. Hodgson*, Lord Rosslyn lays down the same doctrine, that the assignee at law has a right to the chose in action of the wife; and the law reduces it into possession; the Bankrupt Laws give over all, that the husband had, or could dispose of, to the assignees; the property is vested by law in them; and the question of survivorship is quite laid aside by the Bankruptcy. *Miles v. Williams*, (1 p. Will. 249.) does not belong to this class of cases. But Parker, Chief Justice, afterwards Lord Macclesfield, delivering the opinion of the Court of King's Bench, notices this point; and expresses himself strongly in favour of the assignees against the claim of the wife. But, on the other hand, in *Grey v. Kentish*,

Lord Hardwicke decided in favour of the surviving wife against the assignees, and so did Lord Bathurst, in *Gayer v. Wilkinson*. The case of *Saddington v. Kinsman*, (1 Bro. C. C. 44.) in which this question was argued, never was determined. But Lord Thurlow's inclination is manifest by the question put by him, whether the counsel knew any case contradicting *Gayer v. Wilkinson*, Lord Thurlow himself not recollecting any.

Where such authorities are opposed to each other, it is necessary to examine the principles, on which the decision of the question depends. What interests survive to the wife in equity in general is determined by analogy to the rules of law. As at law her choses in action, not reduced into possession by the husband, survive to her, so do her equitable interests in the same case survive to her in equity. But there are some legal interests, which do not admit or stand in need, of being reduced into possession, being in possession already, and not lying in action, as terms for years, and other chattels real, of which the legal title is in the wife. They will survive, if no act is done by him; but he may assign them; which passes the legal interest, whether with or without consideration. The analogy is followed in equity. Equitable interests of the same description may be transferred in the same manner. Therefore, in *Lord Carteret v. Paschall*, (3 p. Will. 197.) an interest in the nature of an equitable estate was bound by the voluntary assignment of the husband. With respect to choses in action, they are not assignable at law; consequently the husband's assignment cannot prevent their legally surviving to the wife. In strict analogy, therefore, equitable interests, of the nature of choses in action, ought not to be affected by his assignment. But in equity a distinction seems to have been made between a voluntary assignment and an assignment for valuable considera-

The wife surviving is not bound by voluntary assignment. That was determined in *Burnet v. Kinnaston*, (2 Vern. 417.) Lord Hardwicke says, it is clear if the husband makes a voluntary assignment of the wife's portion, the volunteer must stand in the place of the husband: and there is the same equity as to assignees of bankrupts; for it is the law that casts it upon them: and in *Worral v. Marlar* (1 p. Will. 459. Mr. Cox's note) Lord Thurlow says, a court of equity has much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law; for as to the latter, when the equitable interest of the wife was transferred to the creditor of the husband by mere operation of law, he stood exactly in the place of the husband, and was subject precisely to the same equity with respect to the wife; and accordingly, although it has been much agitated, and is not yet perhaps perfectly determined, whether a particular assignee be liable to make a provision for the wife out of her fortune, it has been long settled, that assignees under a commission of bankruptcy, coming into a court of equity to reduce the interest of the wife into possession, are bound to make such a settlement as the husband would, in the same case, have been compelled to make. But if the assignment has the effect of reducing the wife's interest into possession, how could this equity ever have prevailed? Out of that, of which the husband has obtained possession, no settlement can be compelled. If the assignment, therefore, put the assignees in possession, it would completely extinguish all the claims of the wife, as the possession of the husband himself certainly does. They ought, on that principle, to be considered as coming here to claim what had by the assignment ceased to be a trust for the wife, and become wholly a trust for the creditors. But the Court considers the assignment as doing nothing more than to place the assignees in the room of the husband. So far from treating the assignment

as equivalent to possession, it is upon the very ground that the assignees want its assistance to reduce the property into possession, and this Court imposes on them the condition, on which alone it would have assisted the husband to obtain the possession. It seems to me, the decisions in favour of the wife's claim by survivorship are most consonant to acknowledged principles, with regard to the operation of assignments under the bankrupt laws. It is to be observed with respect to the cases, in which contrary doctrines have been advanced, that in *Boswil v. Brander*, Sir Joseph Jeykell had at first decided against the assignees; and at last only refused to interfere against them to take the deeds out of their hands, expressing great doubt whether, if they had come into equity to enforce a claim against the surviving wife, they would have received its assistance; that in *Miles v. Williams* (1 p. Will. 249.) the question was not directly before the Court; the point decided being only, that the certificate of the husband would, if well pleaded, have been a bar to an action brought against him and his wife, on a bond given by her before the marriage; and that in the case of *Pringle v. Hodgson* the question related to a species of property, which the Court seems to have thought not to be of the nature of a chose in action, or an equitable interest, being stock that at the time of the marriage stood in the wife's name; it cannot, therefore, be said, that the question before the Court has been directly and explicitly decided in either of these cases.

With regard to the authorities on the other side it may, perhaps, be observed, that the case of *Grey v. Kentish* is not precisely the same in circumstances as the present; for there the husband died before the tenant for life of the legacy, of which the wife had the remainder, and consequently there was no period of his life at which it was in the power of him or his assignees to have reduced it into possession. A good deal of stress was

laid upon the same circumstance in the argument of the case of *Saddington v. Kinsman*; but it does not appear that the decision in *Grey v. Kentish* at all turned on that circumstance, or that Lord Hardwicke doubted about the wife's having an assignable interest at the time of the bankruptcy. In *Bates v. Dandy* (2 Atk. 207.), and *Hawkins v. Obyn* (2 Atk. 549.), his Lordship held, that even a possibility of the wife might be assigned by the husband for a valuable consideration. It must, therefore, have been because the assignees did not claim under an assignment of that description, and not because the interest was not assignable, that the claim of the widow prevailed. In *Gayer v. Wilkinson* the tenant for life died before the bankrupt. In that case, therefore, as in this, the interest of the wife vested in possession before the husband's death; but that circumstance was not held to make any difference in favour of the assignees.

On the whole I am of opinion, both on principle and authority, that Mrs. Mitford, having survived her husband, is entitled to the £1355. 16s. 8d. mentioned in the pleadings, together with the dividends thereon from the time of her husband's death; and that the same ought to be transferred and paid to her by the plaintiff, the surviving trustee.

#### COURT OF EXCHEQUER.—Nov. 6.

CROWFORT v. SIR FRED. FOWKE, BART.(a)

CONTRACTS—NUISANCE—*Whether a House of ill fame is a sufficient nuisance to relieve a party from an Agreement for taking adjoining premises, of the ill fame of which he was ignorant at the time of making the Contract.*

Mr. Thesiger moved for a rule nisi for a new trial in this case, on the ground of misdirection by Lord Abinger, before whom the trial came on at the sittings after last term, in this Court, on

(a) Ante Vol. 2, p. 123.

occasion a verdict passed for the defendant. An action was one brought to enforce the performance of an agreement for the lease of a house in York-place, Baker-street, Portman-square, to which the defendant had pleaded that he had induced to enter into it by fraud and misrepresentation. At the trial it appeared that the case was grounded on the fact that, though the agent of the plaintiff had told the defendant, in answer to a question, that there was "nothing objectionable about the house," yet that the house was not one to it, in an adjoining cross-street, was a house of ill fame, the house in question being at the corner of York-place.

*Thesiger* now contended, that as there was no imputation on the agent, who did not know of this fact, the agreement could not be set aside, as it had been obtained fraudulently by him on the part of the defendant; besides which, as he had authority to pledge the house of his employer to an extent, it was clear that he had exercised his instructions in so warranting the house, and that the defendant was not to be held answerable for such an excess of authority. The Court granted on both grounds.

#### COURT OF COMMON PLEAS.—Nov. 12.

##### SQUIRES v. EDWARDS.

*Issue*—*Pleading Power of the Court to quash FRIVOLOUS PLEAS.*

There was an action on a bill of exchange, to which the defendant pleaded that it had not been paid for non-payment.

*Humfrey* moved for a rule to show cause why the plea should not be quashed, on the ground of frivolity, and why the plaintiff should be at liberty to sign judgment. It had been so often over and over again, that this plea was a nullity, furnishing no answer whatever to the action; and in a late case the Court of King's Bench had declared their intention to treat all such pleas as nullities as were clearly manifestly on the face of them trifling with the Court.

The Court granted the rule.

Justice BOSANQUET observed, that he entertained doubts as to the power of the Court to set aside pleas of this description, if they were regularly pleaded; but having considered several of his brother judges on the subject, he had come to the conclusion that they had the power, and would hereafter act upon it.

Sergeant *Wilde* expressed a hope that as the opinions of the learned judges upon the point were all to be contradictory, the Court would kindly consider it, and lay down some fixed rule on the subject for the guidance of the profession.

Lord Chief Justice TINDAL said that was a very easy matter, seeing that the word "frivolous" was a very wide term.

The learned Sergeant then moved for a rule to show cause why an order of Mr Justice Maule, setting aside a plea for frivolity under similar circumstances, should not be rescinded.

Mr. Justice MAULE said, that as the point appeared to him to be doubtful, he had deemed it right not to allow the judgment to be entered up until the defendant should have an opportunity of applying to the Court, and having the question argued. It was his own opinion, that where a plea was on the face of it bad, and manifestly pleaded for the mere purpose of delay, a judge at chambers had the power to set it aside.

The LORD CHIEF-JUSTICE observed, that if it turned out that the judges had that power, it was one which might be exercised most beneficially for the ends of justice.

The COURT granted the rule.

#### BAIL COURT.—Nov. 9.

##### STOCKDALE v. HANSARD.

*Sheriff Law*.—*Power of the Court under circumstances to stay the execution of a Writ of Inquiry on the application of the Sheriff.*

Mr. Kennedy moved, on the part of the Sheriff of Middlesex, for a rule calling upon the plaintiff to show cause why the execution of the writ of inquiry issued in this case should not be stayed until the further orders of the Court. The present action was altogether different from that in which the Court had already given judgment. The action was brought for the very same cause, for the very same libel, as the former one, but was brought since the prorogation of Parliament. The defendants (the Messrs. Hansard) had allowed judgment to go by default, and a writ of inquiry had been issued, and the Sheriff was commanded to have it executed by the 12th of this month, which would be Tuesday next. Such was the state of facts as stated on the affidavit of the Under-Sheriff of Middlesex. The position in which the Sheriff was then placed was of the most embarrassing description, and might entail upon him the most serious evil, unless he should be considered entitled to the relief of the Court.

Mr. Justice LITLEDALE said, that in the absence of any precedent he felt great difficulty in entertaining such a motion as the present. The party upon whose behalf the application was made was no party to the action. He was merely an officer of the Court, and he (Mr. Justice Littledale) did not see what power he had to

make such a rule as that which was moved for on the part of a person who was no suitor of the Court, nor in any other manner connected with the action than that he was the person by whose agency part of the proceedings were to be effected.

Mr. *Kennedy* said, it was true that the Sheriff was but an officer of the Court. It was, however, the case, that he was also the officer of another body—namely, of the House of Commons, and the conflict which must result from his desire to perform his duty to the Court, and his liability, in the event of his performing it, to the most serious punishment from the other quarter,—it was this peculiarity of his condition that constituted his danger, and induced him to entreat this Court to throw the shield of its protection before him. He could not adduce a precedent in support of his motion, but hoped that when the case had been fully considered by his Lordship, it would be found to justify the Court in that extension of its protection to the Sheriff which was sought for. Here the attorney for the plaintiff had thought proper to cause a writ of inquiry to be issued from this Court, and the Sheriff was to inquire through a jury of twelve men, on oath, what damages the plaintiff had suffered from the libel complained of. On the other hand, the Sheriff was served with the following notices on the part of the attorneys for the defendant Hansard :

“ *Westminster, 21, Great George-street,  
October 31, 1839.* ”

“ STOCKDALE *v.* HANSARD AND OTHERS.

“ SIR,—Having been instructed by the defendants that the action in which you have caused to be served a notice of declaration, on the 26th inst., is brought for the alleged publication of certain papers by order or under the authority of the House of Commons, we deem it right to give you a formal notice of the Resolutions of the House of Commons in relation to publications by its authority (of which we send you a copy on the other side), and to warn you, that, in the event of your promoting or carrying on such proceedings, your conduct in that respect will be represented in due manner to the said House, and that you will become amenable to its authority, as expressed in the said Resolutions.

“ We are, Sir, your obedient servants,

“ PARKES & PRESTON.”

“ To Tho. France, Esq., Under-Sheriff, &c.”

“ *Resolutions of the House of Commons,  
30th of May, 1837.* ”

“ 1. That the power of publishing such of its reports, notes, or proceedings, as it shall deem

necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially of this House, as the Representative portion of it.

“ 2. That by the law and privileges of Parliament, this House has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit, or other proceeding, for the purpose of bringing them into discussion or decision before any court or tribunal elsewhere than in Parliament, is a high breach of such privilege, and renders parties concerned therein amenable to its just displeasure and to the punishment consequent thereon.”

“ *1st of August, 1839.* ”

“ 1. That Messrs. Hansard, in printing and publishing a Report and Minutes of Evidence on the present state of the islands of New Zealand, communicated by the House of Lords to this House on the 7th of August, 1838, acted under the orders of this House: and that to bring or assist in bringing any action against them for such publication would be a breach of the privileges of this House.

“ 2. That Messrs. Hansard be directed not to answer the letter of Charles Shaw, mentioned in their petition, and not to take any step towards defending the action with which they are threatened in the said letter.”

The Sheriff, therefore, had reason to fear, not only for himself, but for every officer or assistant acting under him in this matter, that they would become liable and subject to the severe animadversion of the House of Commons. In this state of things he was without remedy, unless the Court would graciously interfere as he now prayed. If he were sent to prison by the House of Commons, there was no power by which he could be released for an indefinite period. If he refused to execute the writ, he was liable to an action on the part of the plaintiff, and to pay all the damages declared, although not proved to have been incurred, and, in default of payment, he would be subjected to imprisonment. The present action was brought for a libel published on the 20th of June, 1839; that the damages on the declaration were laid at the sum of £50,000.; and that the libel complained of was contained in a letter addressed to Lord John Russell by Messrs. Crawford and Russell, Inspectors of Prisons, in reply to a Report by a Committee of the Court of Aldermen upon the same subject. This letter was dated in 1836, and ordered to be printed in May, 1837. In the former action, which was brought against the present defendants for the same subject, they had pleaded two Resolutions of the House of Commons

asserting their privilege of publishing such &c., as they might think fit, and declare the next place, that they were themselves exclusive judges of their own privileges. In this judgment was given for the plaintiff a term last for £100. Upon the 17th the House of Commons resolved, that in all circumstances of that case it was not to adopt any further proceedings in relation to it. They resolved, moreover, that the publication was essentially necessary for exercise of their constitutional privileges, and that they would adopt measures for complete establishment and inviolability as the Committee which had been appointed to make a full report to the House upon the subject. The learned counsel went on to state that a person named Polack having threatened to commence an action against Messrs. Hansard for another publication of papers relating to the colony of New Zealand, the defendants presented a petition to the House of Commons for protection, and that the House thereupon resolved that the publication by Messrs. Hansard had been under the orders of the House, and that any proceeding by action against them for a publication was a breach of the privileges of Parliament. The House resolved further that Messrs. Hansard be directed not to answer the letter which they had received from the attorney of Mr. Polack, and not to take any step for the defence of the action. The defendants' attorneys, Messrs. Parkes and Wills, who were also the attorneys of the House of Commons, transmitted to Mr. Shaw of these resolutions, accompanied with a statement stating that in the event of his being a party to any proceedings against Messrs. Hansard, both himself and every other person aiding or abetting would become amenable to the jurisdiction of the House of Commons, and liable to punishment for a breach of the privileges of the House according to the tenor of the resolutions. In these circumstances, the Sheriff, who was the present applicant, was under an apprehension that if he took any step which might tend to the execution of the writ of inquiry, he would incur the serious displeasure of the House of Commons, and be exposed to great and manifold evils in his person and property, whilst he which he feared would admit of no mitigation or redress. True it was that the majority of the public and of the bar approved of the decision which that Court had already given upon the subject in question. It was, however, certain that a powerful minority disapproved of it; that the House of Commons had expressed their determination to oppose and to enforce it by every means in their power; and that they would not fail to visit with the severest

punishment any person who might be instrumental in carrying the principle of the decision into effect in any other case. What, then, was the Sheriff to do? If he should become liable to an attachment out of this Court for not executing the writ, he could not obtain his discharge from prison until he had paid the whole amount of the damages in the declaration, which was £50,000.; and if he should comply with the writ, he would be imprisoned by the House of Commons during the remainder of the present Parliament, which would be a period of five years. In support of the position that the Sheriff could not be released from an attachment without paying the whole debt in the declaration, the learned gentleman referred to *Heppel v. King*, 7 T. R. 371, *Fowles v. Mackintosh*, 1 Hen. Black. 1986. With regard to the final execution in the case, it was impossible to contemplate it without the most awful apprehensions. It was quite certain that the Sheriff had authority to call to his aid the whole power of the country, and that he could summon to the *posse* every man above fifteen years of age. It was equally certain, however, that the Government would unite with the House of Commons, and as they could command the services of the military and the police, it was not impossible that a conflict might take place of the most awful description. This course of calling out the military and the police was that which had been actually recommended already to the Government by an eminent member of the House of Commons, who was also a most distinguished member of the bar. This had been the course recommended by that eminent person, and such would be the fearful consequences which in all probability would afflict the metropolis if the sheriff should attempt to carry the proceedings in this case into complete effect. To avoid this terrible conflict, he had no other alternative, except to commit a contempt of this Court, for which he would be sent to prison, out of which he could not obtain his release without the payment of fees, the amount of which alone was perfectly ruinous, and such as ought not to be tolerated in a free country; and he (Mr. Kennedy) hoped that the time would come when the inhabitants of this country would be able to go into prison and come out of it gratuitously. Supposing the sheriff then to be imprisoned, what remedy could he have? The only one to which he could at all have recourse would be a *habeas corpus*, and that would be altogether ineffectual for his purpose. The learned gentleman then laid down the position, that whenever the House of Commons commits a person to prison, expressing generally in the warrant of committal that the party is committed for a contempt of the privileges of the House, without specifying what the

particular privilege may be, every court in Westminster Hall will, upon *habeas corpus*, be obliged to remand such prisoner. The cases to which he referred in support of this position were Captain Streater's case, 5 Howell's State Trials, 366; Lord Shaftesbury's case, 6 Id. 1269; Murray's case, 1 Wilson, 299; the King v. Peyton, 2 Lord Raymond; the case of Brasse Crosby, Lord Mayor of London, 19 Howell, and 3 Wilson, 188; the King v. Flower, 3 Term. Rep. 314; and the case of Sir Francis Burdett v. Abbott, 5 Dow, 105; in which last case all the judges and the House of Lords were unanimously of opinion that no prisoner could be discharged on *habeas corpus* from an imprisonment by the House of Commons, if the warrant upon the face of it expressed nothing more than a general contempt; and he thought it might be assumed as a certainty, that the House of Commons would take care that their warrant should, upon the face of it, be such as, according to the doctrine laid down by all the cases, would be sufficient to insure that the prisoner be remanded. It was, moreover, to be observed, that the statute of *Habeas Corpus* did not apply to a case like the present; and that the granting of a *habeas corpus* at common law was by no means a matter of course, as had been decided in *Hobhouse's case*, 3 B. and A. 420. If the present application should, therefore, not be successful, the case of the sheriff would be the only one known to the law of a wrong without a remedy, and of a right which there existed no means of enforcing. The learned gentleman concluded this part of his speech by referring to the judgment of this Court in the case of *Stockdale v. Hansard*, already decided, and which judgment, as he contended, gave additional authority to the position for which he had been contending,—namely, that if the House of Commons abstain from setting forth in the warrant of commitment any special breaches of privilege committed by the prisoner, he must, as a matter of course, be remanded upon *habeas corpus*.

#### Nov. 11.

Mr. Kennedy resumed his application, and went on to cite a great variety of cases in support of the position, that the Court was continually in the habit of exercising an equitable jurisdiction for the protection of the sheriff, where he acted *bona fide*, and was placed between two parties who possessed conflicting rights. In such cases it was usual for the courts even to suspend vested and important interests, in order that the sheriff, who was the ministerial officer of the court, might not be exposed to injury or inconvenience as long as he faithfully performed his duties to the court and the public.

In most of the cases to which he referred, the parties whose proceedings had been stayed, or whose rights had been set aside, or who had been obliged to indemnify the sheriff for the performance of his duty, were persons against whom no impropriety was alleged. If the Court, then, was in the habit of protecting the sheriff, even against those who had only asserted in a legal and regular manner the rights to which they were entitled by law, how much more ought such protection to be accorded to the present defendant against a plaintiff, who had so abused the process of the Court as actually to bring three actions in respect of the very same subject matter, and who in the last of them had laid his damages at £50,000, an amount which was perfectly monstrous? It was, moreover, quite possible that the plaintiff might derive no benefit from the proceeding, even if the sheriff were compelled to execute the writ of inquiry. The jury would certainly be summoned, but they were exposed to no higher penalty for non-attendance than a fine of £5, whilst it was in the power of the sheriff to reduce that sum even to a farthing if he pleased; and considering the consequences which would hang over the jurors themselves for participating in the proceedings, he (Mr. Kennedy) thought that they would consider themselves to have got very well out of the matter upon the payment of even the highest fine to which they could be made liable in the Sheriff's Court for a default. But even the default of the jury would be of no advantage to the sheriff. He would still have incurred the grievous displeasure of the House of Commons for at least moving towards the execution of the writ. If, on the other hand, he refused to do it, he would be liable to an attachment from that Court, and the attachment must be addressed to the two coroners for the county of Middlesex. One of those gentlemen was a member of the House of Commons, and there could be no doubt of the part which he would take, and as both the coroners must act together, the attachment could not be executed. But if Mr. Wakley should act in opposition to the resolution of the House of Commons, and be by them committed for contempt and breach of privilege, there could be no doubt but that Lord Holt himself, if he should return to the bench, would hold that upon *habeas corpus* Mr. Wakley must be remanded. To avoid these and the many other dangers which must result from a perseverance in the present course, there seemed no way, except by suspending the proceedings until such time as there could be an adjustment of the matters in question, which would probably be effected upon the sitting of Parliament by a conference between both Houses. The learned gentleman mentioned two instances of the success of such con-

namely, that of *Skinner v. the East India Company*, in which the Lords unsuccessfully claimed a right to entertain original suits; that of *Shirley v. Fagg*, in which they had failed in establishing the right of appellate jurisdiction. The learned gentleman, in anticipation of the perils which would be incurred by himself, adverted to the manner in which the House of Commons, *augustissimum orbis terrarum concilium*, had manifested their power upon such occasions, and he particularly instanced the case of Lord Strafford and Bishop Mordaunt, the latter of whom was committed by the House for publishing a book which was construed to be a contempt. He drew a picture of the probable convulsion which must shake the metropolis, and which would even reach the very majesty of the Crown, if the insolvents were executed; and concluded by convincing the learned judge, while there was yet time for interposition, to prevent the occurrence of such a crisis, and of consequences so detrimental to the tranquillity of the empire. Justice LITTLEDALE immediately delivered judgment of the Court in the following terms:—"I think that in this case there are no grounds for the Court to interfere. The result will be no rule."

#### INSOLVENT COURT.—Nov. 7.

OF RICHARD BLENCOWE, JOHNSON,  
AND WILLIAM HARRIS.

**JUDGMENT**—*Insolvents out on Bail, when heard remanded—The time they out upon Bail is EXCLUDED from the computation of the Court.*

The insolvents were partners, and had been leather-sellers at Coventry. They commenced business in October, 1837, and discontinued in November last. Mr. Johnson had a capital of £586, and the other insolvent £190. Their joint partnership debts were about £350. It appeared that the insolvents were indebted to Messrs. Goodall, the bankers at Coventry, in the sum of £600, which was secured by Mr. Latham, the father-in-law of Harris. An assignment of the book-debts and stock was made to a Mr. Perkins, under which the property was sold. The bankers were paid, and Mr. Latham received £157 of his debt. Some property was sold at a loss. The insolvents resided in London, and with a sum of money they were offered 10s. in the pound. The composition was accepted by some of the creditors and refused by Mr. Burbury and Mr.

Hudson. Before the insolvents were taken to prison a considerable sum had been expended; they had, however, paid those who accepted the composition. They had been discharged on bail.

Mr. Hudson stated that his debt was upwards of £20, contracted in September, 1838. It was the first transaction. His clerk had refused to pay 10s. in the pound, expressing a determination not to take a shilling less than the money owing.

The insolvents stated that they were advised to make an assignment of the book-debts, &c. by their attorneys, and by the professional advisers of the bankers.

An affidavit was read, in which it was stated that there were several witnesses at Coventry to be examined; that the majority of the creditors resided in the country, where the insolvents should have been heard.

It was contended, that the insolvents had made away with their property to two particular creditors, and that an application would have been made to send them to Coventry to be heard, but the expense must have been paid by the party applying, and it was therefore abandoned.

Mr. Commissioner BOWEN, on hearing counsel on both sides, said, he had a clear impression that the payment to Mr. Latham of the £157 was voluntary, without the slightest pressure, and he was prepared to give judgment, without the learned counsel for the insolvents asked for an adjournment. He should give his opinion on the other part when he adjudicated.

Mr. Woodroffe declined asking for an adjournment.

Mr. Commissioner BOWEN gave judgment. He said the bankers were entitled to be paid, and no complaint could be made on that ground, because there was a pressure against the insolvents. But why Mr. Latham was to be paid he could not tell. It was a clear preference to him to the injury of the creditors, for which the insolvents would be remanded. They had made a fair offer to the creditors, and everything had been done to get them to accept the composition. Still that did not get rid of the payment to Mr. Latham, which was as clear a preference as he (Mr. Commissioner Bowen) had ever heard. The insolvents had been some time out on bail, which would, of course, be excluded in the remand. The judgment was, that the insolvents should be discharged when they had been in custody nine calendar months from the vesting order, for making away with their property by giving a preference to Mr. Latham.



**ATTORNIES APPLYING TO BE RE-ADMITTED ON THE LAST DAY OF  
MICHAELMAS TERM, 1839.**

**COURT OF QUEEN'S BENCH.**

<p>Baly, Charles, Canonbury Terrace; and Blackbrook, Kidderminster.          Beardshaw, Thomas, Worksoy.          Bubbs, Benjamin, Cheltenham.          Borlase, James John Grenfell, Gloucester and Truro.          Conolly, James, 3, Raven's Place, Hammer-smith; and Parliament Street.          Cole, William, Sudeley Street, City Road; and 64, Shepperton Cottages.          Chadwick, James William, Long Ashton.          Chester, Edward Matthew, Liverpool.          Downes, Peter Joseph, 42, Primrose Hill, Salisbury Square.          Evans, William Martin, Gloucester.          Garratt, James, Ely Place, Holborn; Sidmouth; and Peckham Rye.          Grover, John Logan, 9, Weston Street, Pentonville.          Gore, Arthur, 51, and 31, Oxford Street.          Hingeston, George, Lyme Regis.          Heywood, William Henry, Poulton.          Hall, James Tarbutt, 13, Clarence Place, Pentonville; and 12, Spencer Street.          Jackson, William, Kexborough; and Bank End; both near Barnsley.          Knight, Joel, Haverfordwest.          Monkton, John, 7, Barrett Street, Vauxhall; and Brook Street.</p>	<p>Price, Liscombe, Red Lion Street, Wapping.          Rippon, John, 5, Great Union Street; Kennington Causeway; and Walnut Tree Walk.          Rowles, George Samuel Serjent, Richard Street Star Street, Islington.          Simpson, William Robert, 8, Red Lion Street Clerkenwell.          Seaman, Lewis, Otley.          Swinford, Henry Knott, Margate; France; and Belgium.          Saunders, Joseph, George Greenham, near Newbury.          Taylor, David Passmore, 9, Stringer's Buildings Bridge Road, Southwark; and Hercule Buildings.          Williams, Benjamin Price, Luton.          Wynne, Llewellyn, Manchester Street, Manchester Square.</p> <p><i>Affidavit filed at the Master's Office on the 2nd of November.</i></p> <p>Parsons, Henry, North Petherton.</p> <p><i>Affidavit filed nunc pro tunc, pursuant to a rule of Court.</i></p> <p>Forrester, Gilbert Davis, Lincoln's Inn Fields Brentford Butts; Greenhithe; Robert Street and St. James's Place, Hampstead Road.</p>
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**COMMON PLEAS.**

Hodgson, Edward, 6, Symond's Inn; 5, Cecil Street, Strand; 13, Hatfield Street, Blackfriars.

**NEW POSTAGE ACT.**

*Treasury Minute, Dated 12th Nov. 1839.*

My Lords read the Act, 2d and 3d Vic. cap. 52, for the further regulation of the Duties on Postage until the 5th October, 1840.

Since the prorogation of Parliament my Lords have turned their unremitting attention to the measures necessary for carrying into effect the intention of the Legislature.

The powers with which this board are invested by the Act were recommended to Parliament, not only for the purpose of enabling my Lords to adopt such mode of payment as might, on consideration, appear the most advisable, but also to enable my Lords to carry into practical effect this great alteration in the manner which might be least liable to derange the regularity and the de-

spatch of the correspondence of the country, as now executed by the Post-office.

My Lords have always been aware that the cotemporaneous adoption of the charging letters by weight, and the reduction of postage to a uniform rate of one penny, would be attended with much practical difficulty. The time occupied now at the large offices and at the forward offices in charging and sorting the letters has been reduced, for the public convenience, to as narrow limits as possible. To alter the mode of charging from that to which the officers of the Post-office have been long accustomed must of itself, for time, be accompanied with some inconvenience and my Lords apprehend it would be imprudent to increase that difficulty by adding at the same moment so large a number of letters as must naturally arise from the immediate reduction to the penny rate. My Lords fear that, for a time

great irregularities would prevail, and public inconvenience result. However satisfactory, therefore, and however desirable, in points of view, it might be to carry into effect contemporaneously the complete plan, Lordships, upon a full consideration, have come to the conclusion that, by adopting some immediate measure, and bringing into operation the mode of charging the letters by weight, thus to the entire reduction of the rate of postage, their Lordships will not only avoid the objection which the other course is liable, but mainly facilitate the introduction of the remaining part of the plan.

With these opinions their Lordships have, in communication with the Post-office, turned their attention to the framing such regulations as may be necessary, with as little delay as possible, to be put in force by weight.

Their Lordships propose to accompany this arrangement with such reduction of postage as may be a material relief to the public, and not interfere with the proper discharge of the duties of the officers of the Post-office as at present regulated.

The regulations which, in conjunction with the Post-office, have been matured, and which the Board propose to sanction, my Lords apprehend material advantages will be secured. A considerable relief will be given to the public as regards the charge of letters. One of the great practical difficulties in introducing the penny will be removed, and such information be secured as will enable my Lords to adopt with security, and consequently at an earlier date, the remaining part of the system.

By giving their sanction to the proposed arrangement, my Lords consider it as a temporary one only, and as a step to the introduction of a uniform penny charge, and their Lordships continue their anxious efforts to give effect to the whole of the intentions of the Legislature with as little delay as is consistent with the due consideration of the public convenience. Their Lordships are pleased to direct that all letters sent on or after the 5th December next shall be subject to the following regulations:—

General post letters shall be charged by weight as follows:—

Letters not exceeding $\frac{1}{2}$ ounce, one postage.	
Ditto	1 ounce, two postages.
Ditto	2 ounces, four postages.
Ditto	3 ounces, six postages.

Also on, adding two postages for every ounce to sixteen ounces, beyond which no packet letter to postage shall be received.

All single postage rates between places within the United Kingdom which now exceed

4d. shall be reduced to that sum; inferior rates to remain undisturbed, but letters to be charged by weight. Additional charges to which general post letters are now liable, if posted or delivered beyond the limits of the general post, free delivery; as also the additional halfpenny on Scotch letters, and the additional penny for passing the Menai and Conway bridges, to cease.

3. All letters and packets exceeding the weight of one ounce to be prepaid and delivered in at the window; if not so prepaid and delivered, to be charged double postage.

Foreign letters and packet letters will be charged according to the preceding scale of weight.

Letters to and from the British West Indies to be charged 1s. per single rate; the same charge to attach to letters from and to Gibraltar, Malta, and the Ionian Isles, conveyed by packet and not transmitted through France.

My Lords reserve for future consideration the whole question of the rates on foreign letters, as their Lordships consider that it will be a proper subject for communication with foreign powers, in the hope that such foreign powers may be induced to make a corresponding reduction in their charges on letters to and from this country.

All ship letters between parts of the United Kingdom, including the Channel Islands and the Isle of Man, to be charged by weight and according to the rates chargeable on inland letters. Other ship letters to be charged by weight, according to the foregoing scale, the single sea postage rate remaining as at present, and the inland rate being regulated as for inland letters.

London district post, including twopenny and threepenny delivery:—

1. All letters not exceeding  $\frac{1}{2}$  ounce, provided the postage be prepaid, to be charged 1d.

2. The 2d. charge on general post letters delivered in the London district to cease.

3. No further alteration to be made in the charges leviable in the London district post. My Lords have no intention, by the present arrangement, to make any alteration with respect to newspapers, franked letters, or Parliamentary papers, which will still continue to enjoy the same privileges and be subject to the same charges as at present.

Transmit copy of this minute officially to the Postmaster-General, and desire his Lordship will give the necessary instructions to his officers to carry the directions of my Lords into effect.

Desire also that he will direct the Solicitor of the Post-office to prepare a draft of a warrant, in conformity with the provisions of the Postage Acts, to be signed by My Lords, and inserted in the *Gazette*.

**Business of the Courts.****COURT OF CHANCERY.**

Chapman v. Severne, appeal for judgment—  
Collard v. Allison, motion for judgment—Gompertz v. Ansdell, cause, part heard—Sainsbury v. Jones, appeal.

**VICE-CHANCELLOR'S COURT.**

Short causes and unopposed petitions.

After the petitions—Tilt v. Tilt, petition, by order—Pytches v. Revett, ditto—St. John v. Champneys, ditto, and exception, by order—Livesey v. Livesey, exceptions, two sets, by order—Russell v. Buchanan, motion, part heard—Bentley v. Forster, motion—Earle v. Wicks, ditto—Bridle v. Slade, demurrer, part heard.

**ROLLS' COURT.**

Cullingworth v. Lloyd, part heard—Collins v. Johnson, further directions and costs—Maw v. Hill—Stubbs v. Liston—Farmer v. Dunnebar—Stead v. Nelson—Palmer v. Lord Kensington—Drake v. Drake—Farhall v. Farhall—Wormald v. Mackintosh, exceptions, further directions, and costs—Curtis v. Holcombe, exceptions—Baring v. Bordelins.

**COURT OF QUEEN'S BENCH.**

Sittings in Banco.

**COURT OF COMMON PLEAS.**

Sittings in Banco.

**COURT OF COMMON PLEAS.**

Middlesex Common Juries—Smith and others v. Dempsey—Geils v. Hitchcock—Utting v. Carrington—Jeffrey v. Graham—Bryan v. Brandon—Lindus v. Bullock—Bicknell v. Jacob—Morrice v. King—Blore v. Flack—Guinard v. Bourn—Warren v. Price—The Same v. Saunders—Hall v. Munro—Skerrett v. Clarke.

**COURT OF EXCHEQUER.**

Sittings in Banco.

**COURT OF EXCHEQUER.**

Middlesex Common Juries—Harrison v. Warneford—Barkerv. Vaughan—Smith v. Avery—Miller and Wife v. Pain—The Same v. The Same—Pilling v. Law—Geary v. Harvey—Hampton v. Cross—Adams v. Humphries—Moss v. Cornforth, undefended—Prescott and others v. Ahrenfield—Skey v. Franks—Edwards v. Robertson, undefended—Mopsey v. Brown, ditto—Hall v. Perry, ditto—Aubert v. Morgante, ditto.

**NOTICE TO SUBSCRIBERS.**

STOCKDALE v. HANSARD.—A correct report of the trial of this issue before the Sheriff of Middlesex, on Tuesday last, will appear in our next number. We have not room this week.

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**ERRATA.**

P. 20, col. 2, quotation from *Virgil*—line 3, for "rubesce" read "rubesce;" line 6, for "jacent" read "jacent."

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, November 16, 1830.

# The Legal Guide.

III.]

SATURDAY, NOVEMBER 23, 1839.

[No. 4.

## LAW OF REAL PROPERTY.

### ESSAY IV.

3 & 4 Wm. IV. cap. 74.

*Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.*—[28th Aug., 1833.]

(Continued from p. 36.)

We have shown the origin of a Common Recovery, and in what manner that fiction became established, and we will now show the origin, the different sorts of, and the three principal uses to which they were applied.

A fine in its origin was an amicable composition, by leave of the King or his justices, in an actual suit, whereby the lands were acknowledged to be the right of one of the parties, and at Common Law all persons were barred by it who did not claim within a year and a day. The safe title acquired by this process led, it is supposed, to the practice of transferring lands by means of a fictitious suit of the same nature as the real one above alluded to. This is the origin of the fine, which, subject to certain modifications, has continued from time to time by statutes, have been in use for centuries. The bar by non-claim after a year and a day on fines at Common Law was taken away by the statute 34 Edw. 3, c. 16.

The statutes 1 Rich. 3, c. 7, and 4 Hen. 7, c. 24, have declared that a fine proclaimed in four successive terms, the first proclamation being made in the term in which the fine is engrossed, should operate as a bar by non-claim at the end of five years after the last proclamation, but with a certain limited extension of time in the cases of infancy, coverture, lunacy and absence beyond seas; and by the latter statute, and the statute 32 Hen. 8, c. 36, the further effect of barring estates tail was given to fines levied with proclamations. The two last statutes gave rise to a distinction between fines levied *with* proclamations and fines levied *without* proclamations; the latter being fines at Common Law, and having those effects only which fines had immediately after the passing of the statute 34 Edw. 3, c. 16.

There were four sorts of fines, viz. 1st. a fine "*sur conuissance de droit come ceo*," &c.; 2ndly. a fine "*sur conuissance de droit tantum*;" 3dly, a fine "*sur concessit*;" and, 4thly, a fine "*sur done grant et render*." The first and third were those in general use; the second was sometimes used, but the same purposes could be attained either by the first or third. The first was always levied with proclamations, and so it seems was the fourth fine; but the second and third were usually levied without proclamations.

The three principal uses to which fines

were applied was to bar estates tail, and enable a tenant in tail to acquire or pass a base fee, determinable on the failure of the issue in tail, to gain a title by non-claim, and to pass the estates and bar the rights of married women. For the first two objects, the first fine was usually resorted to. The last object was often accomplished by the first fine, sometimes by the second, but more frequently by the third, which was usually resorted to for conveying the life estates and interests of married women, and for creating terms of years to bind, by way of estoppel, their contingent, or executory or other estates and interests. (See Co. Litt. 121, n. 1.)

A fine, according to the sort used, would also produce the following effects;— it would operate by estoppel in other cases besides the one above noticed; it would operate as a confirmation of all prior defeasible estates or charges made by the party levying it: it would release or extinguish rights, interests, and powers: it would destroy, or extinguish contingent remainders and executory interests: it would create a discontinuance when levied by a tenant in tail possession: it would revoke devises, and when levied by a tenant for life or in tail after possibility of issue extinct, or by a tenant for years, or by a copyholder, it would produce a forfeiture; and when levied by a tenant in tail, with the immediate remainder or reversion in fee to himself, the base fee acquired by the fine would merge in the remainder or reversion, which would immediately become an estate in possession, and all the estates and charges made on the remainder or reversion not only by the tenant in tail himself, but also by those who were previously entitled to the remainder or reversion, would in consequence of the merger, be let into possession, and become immediately available.

To proceed with the New Statute.

Sec. 14. And be it further enacted, That all warranties of lands which after the thirty-

first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

Sec. 15. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made.

Sec. 16. Provided always, and be it further enacted, That where, under any settlement made before the passing of this Act, any woman shall be tenant in tail of lands within the provisions of an Act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled "Certain Alienations made by the Wife of the Lands of her deceased Husband shall be void," the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this Act had not been passed, would, under the provisions of the said Act of King Henry the

h, have rendered valid a fine or recovery levied or suffered by her lands.

17. Provided always, and be it further enacted, That, except as to lands comprised in settlement made before the passing of the said Act of the eleventh year of the reign of his Majesty King Henry the eighth, shall be and the same is hereby enacted.

18. Provided always, and be it further enacted, That the power of disposition hereinbefore contained shall not extend to estates tail who, by an Act in the thirty-fourth and thirty-fifth year of the reign of his Majesty King Henry the eighth, intituled "An Act to embarment the Recovery of Lands wherein the right is in reversion," or by any other Act, have obtained from barring their estates tail, tenants in tail after possibility of issue

19. And be it further enacted, That on the thirty-first day of December one thousand eight hundred and thirty-three, in any case in which an estate tail in any land shall have been barred and converted into a base fee, either before or on or after the death of the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have power to dispose of such lands as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the death of the tenant in tail or in defeasance of the base fee, which the estate tail shall have been converted into, so as to enlarge the base fee into fee simple absolute; saving always the rights of all persons in respect of estates in tail, the estate tail which shall have been converted into a base fee, and the rights of all persons, except those against whom no disposition is by this Act authorized to be made.

Sec. 20. Provided always, and be it further enacted, That nothing in this Act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein.

Sec. 21. Provided always, and be it further enacted, That if a tenant in tail of lands shall make a disposition of the same, under this Act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this Act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: Provided always, that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if by a disposition under this Act by a tenant in tail of lands, an interest, charge, lien, or incumbrance shall be created without a term of years absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give a full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected.

*(To be continued.)*

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## PROBLEM IV.

VOL. 3.

DISTRESS FOR RENT.

Who may Distrain?

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TO THE EDITOR OF THE LEGAL GUIDE.  
ANSWER TO PROBLEM 2. VOL. III.

CONTRACT—WHEN IT IS TO BE PERFORMED.

As it is obvious that a contract should be performed according to its legal construction, I think it would not be improper to introduce in this place a brief consideration of a few of the principal recognized rules for the interpretation of contracts.

1st. The construction of the agreement should be *reasonable*, and as near the apparent intents of the parties as the rules of law will admit. (2 Bl. Com. 379.)

2nd. It should be *favourable*. So that where the *intention* is clear, too minute a stress should not be laid on the strict and precise signification of *words*. (2 Saund. 157.) And if the words will bear two senses, one agreeable to and another against law, that sense should be preferred which is most agreeable thereto. (2 Bl. C. 379.)

3rd. Generally the *plain* and *popular* sense of the words employed by the parties must prevail, in preference to their strict grammatical and etymological meaning. (4 East, 136.) Nevertheless the usage of trade may, in respect to the subject matter, have given the language of the contract a peculiar meaning, and, in that case, the peculiar sense must prevail. (4 East, 135; Haynes v. Halliday, 5 M. and P. 572.) And,

4th. The construction should be made of the *entire agreement*, and not merely upon disjointed parts. (15 East, 421.)

With the aid of these rules, and others of perhaps minor importance, which may be found in the works of the various text-writers upon this subject, it may not generally be found very difficult to determine the legal construction of a contract; and this being determined it must be performed accordingly. But in considering the performance of contracts, they would seem to

present three distinct varieties, to which it may be of importance to attend. *First*, it is to be inquired whether the contract contains mutual and independent agreements; for if it does, then each party is entitled to claim from the other a performance of the contract, or to recover damages for the non-performance, even though he himself should have been guilty of a breach of it. Or, *secondly*, whether the acts to be done on one side are to precede the acts to be performed on the other, and are, what are technically termed conditions precedent and dependent; if they are precedent conditions, they must be first performed. *Thirdly*, whether or not the agreements be mutual, and the acts agreed to be done, are to be performed at the same time; if in the affirmative, then if one of the parties be ready at the agreed time, and offers to perform his part of the contract, and the other is not ready, he may maintain an action for such default although it is doubtful which of them is obliged to perform the first act. (Comyns Contr. 40.)

It has been said that the precedent condition must be strictly fulfilled by the plaintiff, otherwise he cannot demand the completion of the contract; and so rigidly is this rule adhered to, that where it was a part of a condition precedent to the claim of a sum of £80. in addition to the purchase money of a new house, that the pavement in front of the adjoining houses should be laid down by the 21st of April, Tindal held that the delay of four days, though occasioned by bad weather, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim. (Marye v. Carter, 4 C. & P. 295.) It seems, moreover, that the performance of a condition on which a duty attaches, is not excused even where the prevention arises from a mere stranger. (6 T. R. 710.) It must, however, be observed that the *time* for the performance of the precedent condition is not always

l in equity as at law (*Radcliffe v. Vesey* 12 Vesey Jun. 333).

ality in a contract (except in one or es) is essential to the validity of a or its performance (*Howell v. George* 1. 1.). So that a written agreement main with A. B. two years, for the of learning a trade," is not binding, t of an engagement in the same in- t by A. B. to teach—(*Lees v. Whit-* Bing. 34).

performance of a contract is some- cused by statute; but there are some which a statute will not repeal a. "The difference," says Holt, C. J. *Praym.* 321) "where an Act of Par- will amount to a repeal of a cove- a contract], and where not, is this: a man covenants not to do a thing t was lawful for him to do, and an Parliament comes after and compels do it, there the Act repeals the cove- and *vice versa*: but where a man ts not to do a thing which was un- at the time of the covenant, and rds an Act makes it lawful, the Act t repeal the covenant."

ems to be a general rule, that where , by *his own contract*, engages to do it is deemed to be his own fault and at he did not thereby expressly pro- against contingencies, and exempt 'from responsibility in certain events; i such case, therefore, that is, in the e of an absolute and general contract, formance is not excused, by inevitable at, or other contingency, although not n by, or within the controul of the (*Chitt. Junr. on Contr.* p. 273; 8. 267.). To excuse the contractor the nance of the contract must be decid- npossible, by any means, at the time stipulation (*Chit. Contr.* 14).

entire contract cannot be apportioned; f a party engage to complete a certain fore his claim to remuneration is to

accrue, he cannot recover for a partial per- formance, although the completion was pre- vented by accident, as fire, &c. (6. T. R. 320), or by the tortuous act of the person against whom he claims (*Hull v. Height-* man, 2 East, 146). But if the defendant by any act disaffirm the entirety of the contract, he renders himself liable for partial completion of the agreement. (*Bragg v. Cole* 6 Moore 114.)

In conclusion we shall notice a few of the leading rules for the rescinding of con- tracts—

The non-performance of a condition pre- cedent, especially if there be a refusal to complete it, entitles the defendent to aban- don the contract.(a)

The right to rescind a contract (except where the contract contains mutual and independent agreements) vests only in the party who has been guilty of no default. And by him it must be exercised within a reasonable time, to be determined by a jury (1 Moore 106).

A contract cannot, in general, be re- scinded by one party, unless both parties can be placed in the same situation, and can stand upon the same terms as existed when the contract was made (7 East 484). So that where a party has received a partial benefit from the contract, he cannot rescind it.

ALPHONSO.

(a) Our Correspondent refers us to *Chitty on Contracts*, p. 275, as the authority from whence he gains this RULE. Whether this reference was intended to mystify us or our readers we cannot say, but certainly no such rule is there to be found. The fact is, that *these rules* are copied altogether from *Chitty on Contracts*, p. 574, but are so mutilated and unintelligible that we find it necessary to give Mr. *Chitty's* own words.

"The general rule is, that a contract cannot be rescinded by one party so as to enable him to recover back money paid by him



thereon, as money had and received to his use, unless the other party concur in treating the agreement as abandoned *ab initio*; or unless it were part of the original bargain, that in a certain event the power of rescinding, and right to recover back such money should be vested in one of the parties.

"There are some instances in which, although an agreement of a continuing nature has been in part performed, the further performance of it may be excused, or discharged by conduct of the other party wholly at variance with the spirit of the contract. These are not cases strictly within the law relative to the abandonment or rescinding of the contract *ab initio*; when a right to recover back money paid as the consideration may arise.

"A contract cannot, in general, be rescinded in toto by one of the parties, where both of them cannot be placed in the identical situation which they occupied, and cannot stand upon the same terms as those which existed, when the contract was made, *Hunt v. Silk*, 5 East 449; *Beed v. Blandford*, 2 Y. & I. 278. The most obvious instance of this rule is, where one party by having had possession, &c. has received a partial benefit from the contract. It would be unjust to destroy a contract, in toto, where a party has derived some advantage by the other party having, to some extent, performed the agreement; in such case the agreement shall stand: the defendant must perform his part thereof, and must seek in a cross action compensation in damages for the plaintiff's default. Of late, however, the Courts, to prevent unnecessary litigation, have, in many instances, allowed a defendant, in case of a partial failure of consideration (except where the action is on a bill of exchange, and a question of unliquidated damages would be raised by inquiring into the consideration for such bill, *Moggeridge v. Jones*, 14 East, 486, *Spiller v. Westlake*, 2 B. & ad 15b;

post division 4.) instead of bringing a cross action, to reduce the damages by setting up such partial failure of consideration. This relaxation of the rule generally applies in the case of a contract for goods, or work and labour and materials; in which the defendant, when sued for the price, may shew the insufficiency of the goods, or incomplete performance of the work, &c., although a specific sum were agreed upon. *Havelock v. Geddes*, 10 East, 546; *Wilbeam v. Ashton*, 1 Camp., 78; *Bragg v. Cole*, 6 Moore, 114; *Pordage v. Cole*, 1 Saund. 320; *b. note.*"—*Chitty on Contracts*, p. 574.—Ed.

### Law Reports.

COURT OF EXCHEQUER.—Nov. 12.

Sittings in Banco.

WARD v. BYRNE.

*Bond in restraint of Trade—How far void in Law.*

Mr. Erle showed cause against the rule, on the score that the condition of the bond between the parties, for the breach of which the plaintiff sued and had recovered, was one void in law, as being in restraint of trade—not to carry on himself, or be employed in, the business of a coal-merchant, during the space of nine months after he should have left his service. This was not such a contract as was opposed to the general policy of the common law, to such an extent at least as would warrant the Court in arresting the judgment which the plaintiff had obtained. If it had been a general unlimited restraint upon trade, then the defendant might maintain his rule, but inasmuch as the restriction was only for the short space of nine months, during which the defendant might easily obtain a livelihood in other occupations beside that of a coal-merchant neither he nor the public could be said to suffer to such an extent as was contemplated by the early writers upon the subject, when they said that a general restraint upon trade was opposed to the policy of the common law, and therefore bad.

Mr. Addison replied, and distinguishing the cases quoted by his learned friend from that now before the Court, argued that this restraint was bad, because it was clearly unnecessary for the protection of the plaintiff, who it was admitted

have bound down the defendant not to take the plaintiff's trade within certain limits of space. Here, however, he had absolutely bound the defendant from carrying on any trade throughout the whole of England for a period of nine months—a contract which was necessary for his own safety, and unreasonable in its terms, on which account it ought to be allowed by the courts of law.

COURT were of opinion that the judgment ought to be arrested in this case. All limitations were against good policy, and bad in law; and there were some exceptions to it, but the present was not one. By the agreement or arrangement the defendant was prohibited from going into the service of a coal-merchant, even in the capacity of a footman or a knife-cleaner, although his employment was at Exeter or Carlisle. It ought to be said that his acceptance of even the position of a traveller and clerk at such a distance would amply indemnify the plaintiffs. The result was absolute.

#### COURT OF REVIEW.—Nov. 7.

J. JOHN GLOVER.—EX PARTE CLARE.

*SUPREDEAS—CONCERTED BANKRUPTCY sufficient to affect the validity of a Fiat—No interference under 1 & 2 W. 4. c. 56. s. 42.*

Swanston (with whom was Mr. Anderson) presented this was the petition of a creditor for a *supedeas* at the cost of Mr. William Gibbons, the petitioning creditor. The petition alleged that the act of bankruptcy was invalid, and that there was no sufficient petitioning creditor's name, and that the whole was an arrangement made for the bankrupt's benefit. The applicant had sued out a judgment, and levied execution on the defendant's goods, but was defeated on the issue of the present fiat, and consequently lost the proceeds of the sale by the sheriff to the hands of the assignees. The present question constituted the whole of the bankrupt's assets.

Mr. Temple, for the respondent, contended that this was a proper commission, sued out for the purpose of preventing one creditor from taking away the whole of the property under execution.

J. CROSS said, the petitioner was an execution creditor for a sum of £75 on a valid debt. The order was execution served than the bankrupt applied to a solicitor, who proposed an assignment, if the creditor would give up the execution. This was refused, on the ground that it would constitute an act of bankruptcy. This was the object of the bankrupt, struggling against the

execution, met the present petitioning creditor, one of the bankrupt's relatives, who consented to sue out a fiat. Knowledge of an act of bankruptcy was apparently furnished by the bankrupt himself. The petitioning creditor alleged a debt of £100 for money lent, and £75 for a sum owing to his wife before marriage. No particulars of the £100 debt were given; but for the £75 a promissory note was produced, which had been taken by this creditor two years after the alleged loan of £100. This was only an incident, but it certainly tended to diminish the credit due to the parties. The bankrupt's goods were sold under the execution for £80, and nothing remained. A fiat was sued out, which could not cost less than that sum, if worked to a certificate for the alleged purpose of preventing one creditor from sweeping off the property. Nearly all the creditors who proved were members of the bankrupt's family; having thus power to give the bankrupt his certificate at the expense of the execution creditor. He (Sir J. Cross) was of opinion that this was a fraudulent transaction, not intended for the benefit of the creditors, but contrived for the purpose of defeating the petitioner, and affording the bankrupt the protection of a certificate. The fiat must be superseded.

Sir G. ROSE, believed that this was the first interference under sec. 42, (a) of the act 1 and 2 William IV. c. 56, which was understood to have involved an alteration in the bankrupt law. The present *supedeas* was sought principally on the ground that it was a fraudulent commission; and it would be undoubtedly the duty of the Court to supersede the fiat on the ground that it was concerted, and ought not to be protected by the act of Parliament. Concert in itself was not sufficient to affect the validity of a fiat; but the Court would not allow a bankrupt to use a concerted and fraudulent commission for his own purposes. It might be right to issue a fiat to defeat an execution, but it must not be the fiat of the bankrupt. The solicitor's affidavit had not contradicted the charge of concert, but had rather confirmed it. It was answered in such a manner, that it could not be considered sufficient. This was a concerted commission, tainted by fraud, and such was not a state of circumstances which the law could cover.

Fiat superseded with costs.

Mr. Temple inquired whether the decision of the Court turned on the question of law?

The COURT said that it disposed of the matter generally. It was of opinion that the debt and act of bankruptcy had not been proved, and that the commission was fraudulently contrived.

(a) That from and after the passing of this Act, no Commission of Bankrupt shall

be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication, has been concerted by, and between the petitioning creditor, his solicitor, or agent, or any of them; and the bankrupt, his solicitor, or agent, or any of them, save and except where any petition to supersede a commission for any such cause shall have been already presented, and shall be now pending.—Ed.

Nov. 12.

Ex parte THOMAS MAY.

**PRACTICE**—*Jurisdiction of the Court under 2 and 3 W. 4, c. 114, s. 6. over the proceedings of a Fiat after Supersedeas.*

Mr. Russell said this was the petition of Mr. May, against whom a fiat was issued by the assignees under a superseded commission against a person named Malachy. The fiat against the petitioner was annulled for want of prosecution, and an action was brought against the petitioning creditor for its illegal issue. In production of this action it was requisite to produce the fiat, and an application was made for its prosecution and enrolment, but was met by a refusal. The petitioner was willing to pay the costs of enrolment, and entreated the Court to interfere and prevent the respondent from defeating the action by the omission of the requisite formality.

Messrs. Swanton and Bethell contended that the enactment in the 96th section of the 6th George IV., upon which this application was founded, had reference only to subsisting fiats. The Court had no jurisdiction to make such an order after the annulling of a fiat by the Lord Chancellor. It would be wholly without precedent.

The COURT said the 6th section (2 and 3 William IV., c. 114) directed entry of record in the Enrolment-office on application in behalf of parties interested therein. Here was an action which must fail if the fiat was not recorded, as the 8th section of the same act declares that no fiat issued, or to be issued shall be received as evidence except as entered in record. The respondent had shown no reason for refusal, except that it would give the petitioner an opportunity of trying a cause: a good reason for granting the prayer of the petition. It was the opinion of that Court that it was competent to make the order, and that this was a fit case for such an order to be made; and, as proper application had been made to the respondents before apply-

ing to the authority of the Court, the petitioner was entitled to be repaid the costs which had been occasioned by the pertinacity of his opponents.

## BAIL COURT.

In re EBENEZER JACOB.

**Abolition of Arrest for Debt Act—PRACTICE**  
—*Defendant being arrested upon affidavit that he was about to leave the Country—RULE to show cause why he should not be discharged.*

Mr. Miller applied to the Court in this case for a rule, calling upon the plaintiff to show cause why the defendant should not be discharged out of the custody of the Marshall, upon the ground that he had been improperly arrested upon mesne process. The learned gentleman first read the affidavit upon which the defendant has been held to bail, which stated only that the deponent had a conversation with a person named William Baker, in which Baker intimated that he believed Mr. Jacob was upon the point of returning to his residence at Dungarvan, in the county of Waterford, in Ireland. In support of the application the learned counsel next read the affidavit of the defendant himself, stating that he had been Member of Parliament for the borough of Dungarvan, and that he had been held to bail on the 29th of October last, upon the ground that he was about to go out of the jurisdiction. He said, that since May, 1838, he had wholly resided in this county at the Union Hotel in Cockspur-street; at the St. Alban's, in Charles-street, St. James's; at Blake's, at the Blue Posts, in the Haymarket; and at Mount-gardens, Lambeth; that he did not contemplate leaving the county at all to go anywhere, and least of all to Ireland; that he had no property in Dungarvan or elsewhere in the county of Waterford, and that he had not had any residence in Ireland for the last year and a-half. He finally denied that he knew any body of the name of William Baker, from whom the plaintiff appeared to have received his information as to the deponent's intention to return to Ireland.

Rule granted.

## COURT OF BANKRUPTCY.—Nov. 9.

FIAT AGAINST ——— PETERS.

**Husband and Wife—Whether the Wife of a Bankrupt, being entitled to a Legacy, has a right to a Settlement out of it. (a)**

In this case William Moody, by his will,

(a) See *Sturgis v. Champneys*, ante p. 36.—Ed.

he 14th of June, 1814, gave to his wife, the interest of £1400, 3 per cent. during her life, and at her decease he be divided among the children as fol-

Elizabeth Peters (the bankrupt's wife)	-	-	£200 Consols
William Moody	-	-	200 —
Peter Moody	-	-	400 —
Thomas Moody	-	-	500 —

case of the death of either of the afore-children, his or her money was to be equally among the survivors. The testator died

August, 1814, leaving his wife and the children surviving. Mr. Peters became at the 9th of June, 1827. William, one of the legatees, died the 7th of June, in the lifetime of the testator's widow. Elizabeth Moody, the testator's widow, died the 2nd of July, 1837, and on her death the Consols, and one-third of the £200 Consols, to William Moody became payable.

The assignees claimed the legacy, which arose as to the right of the bankrupt's a settlement in respect of a legacy given wife by her father, and which has become payable.

The assignees and the bankrupt and his wife to be bound by his Honour's decision, as to the right of the wife to a settlement, and if then to what extent such settlement be made.

Commissioner HOLROYD said he was of that the bankrupt's wife had an equity, she was entitled to a settlement. It was a well settled rule that a party coming into a court must do equity, and therefore if a husband was obliged to file a bill for a legacy, the court required that a settlement should be made to the wife and children as the consideration for his assistance, and the same equity applied against the assignees of the bankrupt husband and the same rule held though the property might be recovered in the Ecclesiastical Court.

These cases bore upon the point—*Ex parte Moulson*, 2 Atk. 419; *Beresford v. Morgan*, 1 Mad. 362. Then as to what proportion of the legacy the wife should have; indeed this the Court exercised a discretion, not tied down to any fixed rule. Under the circumstances of this case, he thought the wife should have half.

# REPORT OF THE SHERIFF OF MIDDLESEX.—Nov. 12.

STOCKDALE v. HANSARD.

Libel.

Writ of inquiry of damages was executed

before Mr. Burchell, the Under-sheriff in this case. Mr. Stockdale appeared in person, but no one appeared for the defendants.

The plaintiff, in stating the case, said, what they had that day to try was an action for libel contained in the reports of certain inspectors of prisons; or rather in the reply of those inspectors to the Lord Mayor and Aldermen, with respect to the prison of Newgate. The declaration began by setting forth that he (Mr. Stockdale) "was, and for a long time had been, a bookseller; and, as such bookseller and publisher of books, had published divers and very many scientific books, and particularly, in the year 1827, a certain physiological and anatomical book, written by a learned physician, on the generative system, illustrated by anatomical plates." And the libel for which the action was brought was thus set forth in that declaration:—"This last is a book," meaning the physiological and anatomical book, although the name was not given, on the generative system by John Robertson—"this last is a book of a most disgusting nature, and the plates indecent and obscene in the extreme." . . . "But we deny that that book is a scientific work (using that term in its ordinary acceptation), or that the plates are purely anatomical—calculated only to attract the attention of persons connected with surgical science; and we adhere to the terms which we have already employed as those only by which to characterize such a book. We also applied to several medical booksellers, who all gave it the same character. They described it as 'one of Stockdale's obscene books;' that it never was considered a scientific work; that it never was written for, or bought by, the members of the profession as such; that it was intended to take young men in, by inducing them to give an exorbitant price for an indecent work." On the present occasion the damages were laid at £50,000, and he had not the shadow of a doubt that when he sat down—before the Court was cleared—he would have every shilling at the jury's hands. As his counsel, on a former occasion, had observed in the Court of Queen's Bench, "The history of a cause is often of greater importance than the cause itself." And important as it might be, perhaps, to assess the damages in this cause, it was yet a cause the most essential in principle that had ever come before a British jury. He was not, however, entirely unread in the constitutional history of this kingdom, and he defied the Attorney-General or any counsel, let their knowledge be however great, to contradict him, when he said that the jury had nothing to try but the amount of damages. Still the importance of the question on which they would have to decide did not leave this as a common assessment of damages; they were not to deal with the

defendants as there set forth, but with the Commons, the representatives of the people of England in Parliament assembled, as one branch of the legislature. They were the real defendants.

The UNDER-SHERIFF: You have no evidence to prove that.

Mr. Stockdale would produce evidence.

The UNDER-SHERIFF: There is no evidence to show that the House of Commons or any other body are the virtual defendants.

Mr. Stockdale would produce the resolutions of the House of Commons itself, purchased from Messrs. Hansard, the printers to that House. The case was of such infinite importance to the country, that he would not give up any matter of form, but would take his right as he had it, whilst the jury's and his own names would be enrolled in the history of their history as having stood between despotic usurpation and the rights of the people of England. It was for the jury to say what damages he had sustained: he had laid them at £50,000; he expected that sum at their hands, and he would be satisfied with no less. This was the third judgment which he had already obtained, and he regretted to say that upon every occasion there had been the repetition of the same endeavours, the same unconstitutional endeavours, to intimidate the jury in order to defeat his claims; he had been represented as unworthy support, as being about to run away to America; but there he was: he stood on the basis of the constitution, and no Attorney-General, however contemptuously he might speak of him, either within or without the walls of the House, could succeed in intimidating him; at the hands of the jury he hoped to beat that officer for the third time on a question of the law of England. When the first verdict was obtained, he was represented by the Attorney-General as the publisher of Harriet Wilson; but he soon said that the Commons of England were on their trial, and he would have produced an effect upon the Bench if the Lord Chief Justice had not, in a burst of eloquence, declared that "it were a tyranny which no man ought to submit to." That conduct the House had continued to that very hour.

The UNDER-SHERIFF: We do not know what they are doing in the House.

Mr. Stockdale: On that first action he had got nothing, not even his costs. On that trial, the very day before the case was tried, however strange the jury might think it, and however incredible, the House of Commons had come to a resolution to intimidate the judge and jury as well as the plaintiff.

The UNDER-SHERIFF: There can be no evidence of the fact that they came to the resolution to intimidate the judges.

Mr. Stockdale had the judgment of the judges, which the Under-Sheriff had doubtless seen.

The UNDER-SHERIFF had not seen it, but he was sure that the House did not come to a resolution to intimidate the judges.

Mr. Stockdale: The jury would soon see it from the application of the Sheriff of Middlesex himself.

The UNDER-SHERIFF: The defendants could have nothing to do with any application by the Sheriff.

Mr. Stockdale: It might be the legal form that the defendants had nothing to do with it; for when a motion was made which occupied two days in order to prevent the plaintiff's right—a right to which every person was by law entitled—it was difficult for him to believe that the defendants had nothing to do with it. What reason had the Sheriff to make the motion? He had no concern in the action; but the damages were laid at £50,000; the Sheriff was frightened at the amount, and wished to back out of the responsibility. And he might refer to this, because, as the papers for three days had been filled with nothing else, it was impossible for the jury not to know what had taken place. He assured them that it was not till three days after the first verdict that he had known that there had been a petition against him in the House of Commons. The Chief Justice and three other judges—Mr. Justice Littledale, Mr. Justice Patteson, and Mr. Justice Coleridge—had all declared that that was a most "extraordinary endeavour to influence trial by jury;" and it was most extraordinary in those who were emphatically a "Whig Government." The result of his first application was, that there was a verdict, from which he got nothing. But he found certain resolutions of the House, which he understood from the newspapers were passed on the 30th of May, 1837, and of which the defendants, at least, had cognizance; for their attorney, who was in Court, had served notice on him as well as on the Sheriff; and, though it frightened the Sheriff, it did not frighten him. One of the resolutions thus passed was intended to intimidate the jury, and it ran thus:—"That the power of publishing such of its reports, notes, or proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially of this House, as the representative portion of it." He wished to draw the attention of the jury especially to this resolution; for he wished to insist on the manner in which their rights were usurped, and a prejudice raised against him. The second resolution said, "That by the law and privilege of Parliament, this House has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit, or other proceeding, for the purpose

ging them into discussion or decision in any court or tribunal elsewhere than in parliament, is a high breach of such privilege, and renders parties concerned therein amenable to just displeasure and to the punishment of parliament thereon." So that all parties—the Justice, the counsel, the attorney, the defendant himself of course and the jury (and now indeed, the High-Sheriff, and he feared the Sheriff himself)—would meet with the defendant's indemnification. It was, however, a principle of the British constitution, that those who lived in the Houses of Parliament should be extremely careful how they spoke the windows of other people. Now, with regard to the inspectors of prisons themselves, there was one curious fact; one of the parties who were the origin of these proceedings, although styled an esquire, had declared, in his (Mr. Stockdale's) hearing, on before the Chief Justice, as a clergyman, as described by Lord John Russell as North Russell, Esq., but he had described himself as a clergyman; and in answer to the question which was put to him, he declared he had never known anything of medical or legal works, and therefore he was of all men the most incompetent judge, although he wrote a strong language in order to furnish to her Majesty's Government an excuse for depriving the city of London of its liberties. They thought that they could only do this by bringing in the name of the most unpopular man in the country, having already stripped him of his property. They thought, however, that the plaintiff had offended so many by his conduct, and by his uncompromising determination to do good and to do justice, that through the charter of London might be overthrown, and there might no longer be that *imperium in seipsum* which the city of London now constituted. Having obtained two verdicts, he did not make great complaint that, "like an eagle in a cage," as Coriolanus said, he was obliged to stand forward to oppose the omnipotent powers of England. The Commons, however, had no more power than he had—they did not know their privileges as well as he did—threatened, but they delayed till their committee had made a certain report, and then they went into committee, and the House of Commons of England afterwards resolved, that they would have, and will exercise "this fearful power of taking away a man's property which might not be recovered—of taking away a man's liberty which is considered beyond price—of taking away a man's life, which, as far as he (Mr Stockdale) was concerned, he did not value at a snap of the finger—of taking away that, which he did infinitely value, his character. He would stand in the future pages of history as high as any man

living, and he was even prepared to lay down his life on the block if it were necessary—one of his name knew no fear, corporeal or mental. Those against whom the verdict would be that day given must be considered as the agents of the House of Parliament. The House had paid all their former expenses, raised as those expenses were to the utmost possible extent. He was glad that they got them; for there were no men in London, or in the empire, that he respected more than Messrs. Hansard. He had known their father when a servant in the house of which he had died the head, and with him and with them he had spent many large sums of money. He acknowledged that his respect for them was unlimited; and he hoped that they would for many years hold the valuable office they enjoyed, but not to the injury of the jury or of himself, or to fritter away the rights of the public. The only ostensible plea which had been made use of in the course of these proceedings was, "Nobody will choose to encounter this great (so-called) omnipotent power." Many would feel that it was certain ruin—that it was fighting the public purse against an individual. But did he fear? With the law at his back, why should he fear? It was true they might ruin him, but he had been ruined before—he had been ruined by fire—he had been ruined by shipwreck—he had been ruined by water—he had been ruined by bad debts; but there he stood, rather the worse for age, but with physical power sufficient to do not only himself and his family, but the public and his country justice. It was said that the defendants had nothing to do with this, and that there was no reason why he should make such remarks; but he made them because the defendants had pleaded that they were the agents of the House of Commons.

**THE UNDER-SHERIFF.**—Not in this cause.

**Mr. Stockdale.**—In the two former causes they had so pleaded, and in this cause the defendants' attorney intimated that they were agents of the House of Commons, and although the forms of the House did not enable them to plead at all, it must not be forgotten that the House would bear them harmless. He held in his hand a parliamentary document which proved this.

**THE UNDER-SHERIFF.**—Those were expenses relating to a former cause.

**Mr. Stockdale** said he was pleading this in aggravation.

**THE UNDER-SHERIFF.**—As to the verdicts before, the forms of law are open to recover the amount of damages; they could not be recovered in this action.

**Mr. Stockdale.**—The costs allowed to the defendants in the former action amounted to 1200*l.* or 1300*l.* It was necessary that the jury should see the document.

(To be continued.)

BOROUGH COURTS IN ENGLAND  
AND WALES.

2 &amp; 3 VICT. CAP. XXVII.

*An Act for regulating the proceedings in the  
Borough Courts of England and Wales.*  
[19th July, 1839.]

Whereas great difficulty has been found in framing legal and convenient rules for regulating the practice of Borough Courts under the authority given for that purpose by an Act passed in the Session holden in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales;" and by an Act passed in the Session holden in the sixth and seventh years of the same reign, intituled "An Act for the better Administration of Justice in certain Boroughs;" and it is expedient that the power to make rules for regulating the proceedings of such Courts, subject to the approbation and confirmation of the Judges of the Superior Courts of Common Law at Westminster, should be explained and in some respects enlarged: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in every Borough named in the Schedules A. and B. to the first herein-before mentioned Act annexed, in which by charter, custom, or otherwise, there is, or ought to be, holden a Court of Record for the trial of civil actions, every Judge of such Court shall have authority to make, alter, and revoke such rules for appointing the times of holding such Court, for regulating the forms and manner of proceeding, the process, appearance, practice, and pleadings in such Court, and for settling the reasonable fees of the Attornies of the Court for business transacted therein, as shall from time to time seem to him necessary and proper for expediting the business of such Court with most convenience, and at the smallest reasonable expense: Provided always, that no such rules, or any order revoking or altering such rules, shall be of any force until they shall have been allowed and confirmed by three of the Judges of the superior Courts of Common Law at Westminster.

II. Provided also, and be it enacted, That every such Court shall be holden for the trial of Issues of Fact and of Law four times at least in each year, and with no greater interval between the holding of any two successive Courts than four calendar months.

III. And be it further enacted, That from and after the first day of September next, all personal Actions brought in the Borough Courts of Eng-

land and Wales shall be commenced by Writ of Summons.

IV. And be it enacted, That this Act may be amended or repealed by any Act to be passed in this present Session of Parliament.

## NOMINATION OF SHERIFFS.—Nov. 15.

## ENGLAND.

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*Berkshire*.—Henry Hipposley, of Lamborn-place, Esq.; John Jesse Bulkeley, of Lindonhill, Esq.; Sir Henry Russell, of Swallowfield, Bart.

*Buckinghamshire*.—John Peter Deering, of the Lee, Esq.; John Frederick Crewe, of Lokes-hall, High Wycombe, Esq.; Thomas Newland Allen, of the Vache, Chalfont St. Giles, Esq.

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Morfa, Esq.; John Bruce Pryce, of Duffryn, Esq.

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*Radnorshire*.—Edward Rogers, of Stanagepark, Esq.; Francis Phillips, of Abbey Cwmlie, Esq.; George Cornwall Lewis, of Harptoncourt, Esq.

### ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNIES(a) IN HILARY TERM, 1840.

<i>Clerk's Name and Residence.</i>	<i>To whom Articled or Assigned.</i>
Anstis, Bernard, 5, Beaufort Buildings; and Wadebridge.	Matthew Anstis, Liskeard; assigned to Edmund Hambly, Wadebridge.
Abbott, Charles James, 36, Gower Street.	Charles Thelwell Abbott, New Inn.
Alcock, Thomas Crawhall, 3, Denmark Row, Camberwell; and Sunderland.	Robert Wilson, Sunderland.
Bullmore, Henry Orlando, 10, Wilmington Square; and Falmouth.	Francis Pendor and James Genn, Falmouth.
Bircham, Merick Bircham, 8, Devonshire Street; and Cambridge.	Francis John Gunning, Cambridge; assigned to Frederick Talbot, Bedford Row.
Risgood, Thomas, 21, College Place, Camden Town.	Charles Cook, New Inn.
Bramley, Thomas Charlesworth, 3, Camden Terrace, Kentish Town.	Charles John Showbridge, South Square
Brown, Henry Isaac, Bristol.	Thomas Dix, Bristol.
Berry, Edward, Leicester; Sidmouth Street; and Hampstead.	Samuel Stone, Leicester.
Barlett, Robert Henry William, 31, Francis Street; New Milman Street; Southampton Row; Kenton Street; and Shepton Mallett.	Samuel Craddock, Shepton Mallett; assigned to Edward Michell, Shepton Mallett.
Bell, Adam, Manchester.	John Law, Manchester.
Bowl, James Wilford, Basingstoke; and Piccadilly.	Charles Chatfield, 22, Cornhill.
Brownlow, Richard Bolton.	Edmund Haworth, Bolton; assigned to Adam Haworth, Bolton.
Birk, Andrew Robert, Ashton-under-Lyne.	William Slater, Manchester.
Brown, William, Manchester.	Richard Maychell, Bolton-le-Moors; assigned to W. Christopher Chew, Manchester; assigned to William Hugh Myers, Manchester.
Barrett, George, 9, South Square.	William Barrett, Gray's Inn.
Beauvois, Charles, 45, Gower Place; and Bath.	Robert Cook, Bath.
Bellack, John Henry, Chorlton-upon-Medlock.	Alexander Thompson, Manchester.
Baker, Elijah Casser, 16, King Street, Covent Garden; and Norwich.	James Winter, Norwich.
Beckett, Henry Hugh, 50, Burton Street; Frederick Place; and George Street.	William Beckett, Doncaster.
Benjamin, Benjamin, Leeds.	George Sheppard, Oley.
Black, Edward, Sheffield; Manchester; Lincoln's Inn Fields.	Robert Rodgers, Liverpool; assigned to John Morris, Manchester.
Clark, William Fox, Beverley.	James Baker Bainton, Beverley.
Catcopain, William Smith, 13, Colman Street.	Elmer Lawrence, Ipswich.
Chicote, John Gilbert, 43, Gower Place.	Henry James Leigh, Taunton.
Chesshyre, Charles John, Shepherd's Bush.	John William Fleetwood, Peckridge; assigned to Frederick John Manning, Dyer's Buildings.

(a) Marked \* are Common Pleas, the rest are Queen's Bench.

- r, 15, Everett Street; and Truro. George Simmons, the younger, Truro.  
n, Ayling, Portsea. Daniel Howard, Portsea.  
h, Barnsley; and Trinity Terrace, Edward Newman, Barnsley.
- William, 57, Upper Seymour Street; Meaburn Staniland, Boston.  
and Belgrave Street.
- John James, the younger, King's John James Coulton, the elder, King's Lynn.
- George William Francis, 15, Sussex George Philips Foster Gregory, Poultry.  
Regent's Park.
- John, 44, Devonshire Street. George Delmar, 56, Lincoln's Inn Fields.  
John Martin, Bishopwearmouth. Thomas Thompson, Bishopwearmouth; assigned to George Smith Ransom, Bishopwearmouth.
- nry, Kingston-upon-Hull. Thomas Thompson, Kingston-upon-Hull.  
Edward, Cross Street, Hatton Garden; Richard Holier Atkinson, Southampton Buildings; assigned to Christopher Crouch, the younger, Southampton Buildings.  
d's Place; and Brownlow Street. Thomas Coombs, the elder, Dorchester.
- Thomas, the younger, Dorchester; and Ormond Street.
- Edmund William, 46, Drummond Baker Gabb and William Woodhouse Secretan, Abergavenny.  
; and Abergavenny.
- William Brissett, 63, Connaught Ter- Sir George Stephen, 17, King's-Arms Yard.  
lyde Park.
- Isaac, 10, Norfolk Street, Straud. James Phineas Davis, 14, Charlotte Street, Bedford Square.
- rt, William, 16, Ely Place. Robert Southee, Ely Place.  
George, Dursley. William Duberley, Dursley.  
Walter Wren, Prescott. William Rowson, Prescott.  
Thomas Hammond, 3, Upper Kenning- Henry Harpur, Kennington Cross.
- John Frederick, 32, Tonbridge St., Henry Earle, Andover; assigned to Daniel Cullington, Craven Street.  
ancras; Duke Street; and Winchester.
- George Barbor, 20, East Street, Red William Lamb Hockin, Dartmouth; assigned to Edward Dunsterville Puddicombe, Lincoln's Inn Fields.  
Square; and Upper Eaton Street.
- John Reed, 16, Norfolk Street, Strand, George Frederick Fairclough, Liverpool.  
Liverpool.
- James Armstrong Francis, 42, Lower John Archibould, Thrapston.  
our Street; and Thrapston.
- n, Richard Chambers, Nantwich; and John Stanley, Newport; assigned to Richard Edleston, Nantwich.
- Charles, 2, Pinner's Court, Old Broad Thomas Evans, Hereford; assigned to John Burder, Parliament Street.  
; Hereford; and Parliament Street.
- Richard, 25, Frederick Place, Hamp- Joseph Haywood, Sheffield.  
Road; Sheffield; Chichester Place;
- am, Henry, the younger, 36, Judd Thos. Bartlett, and Chas. Bartlett, Wareham, assigned to Barry Parr Squance, Coleman Street.  
Wareham; and New Milman Street.
- Charles, Barnstaple, Devon; and Joseph Fisher, Bury Street, St. James's, deceased; assigned to Thomas Hooper Law, Barnstable; assigned to Samuel Fisher, Bucklersbury.  
Hampton Row.
- Robert Frodsham, Liverpool.  
John, Chesterfield; and Newcastle-upon- Bernard Maynard Lucas, Chesterfield; assigned to Henry Ingledew, Newcastle-upon Tyne.
- David, Darlington. George Allison, Richmond and Darlington.  
Charles Mair, Nottingham. William Nicholson Hodgson, Carlisle.

(To be continued.)

**Business of the Courts.****COURT OF CHANCERY.**

Cheney v. Boulthbee, by order—Jones v. Goodrich, part heard.

**Appeals.**

Wellesley v. Wellesley, part heard—Wroe v. Clayton—Dutmas v. Robertson—Easum v. Appleford.

**Petition by Order.**

Coltham v. West.

**VICE-CHANCELLOR'S COURT.****Short Causes and Unopposed Petitions.****After the petitions,**

Horner v. Seyner, to be spoke to—Ward v. Hatfield, cause and motion by order—St. John v. Champneys, exceptions and petition by order—Down v. Brayley, exceptions by order—Beadles v. Burch, two demurrers, part heard—Morris v. Morgan, demurrer—Ker v. Pew, ditto—Henry v. Pindar, plea—Strickland v. Strickland, ditto—Ryan v. Hill, part heard.

**ROLLS' COURT.**

Bebb v. Beckwith, further directions and costs—Larkins v. Paxton, ditto—Attorney-General v. Johnson—Pride v. Fooks, further directions and costs—Evans v. Brown, ditto, and petition—Davies v. Hopkins, ditto—Hodgson v. Charlton, ditto—Hopkins v. Hopkins—Cooper v. Waldegrave, exceptions—Evans v. Thomas.

**COURT OF QUEEN'S BENCH.****Sittings in Banco.****BAIL COURT (QUEEN'S BENCH.)**

Last Sittings at Nisi Prius in Michaelmas Term. Undefended causes only will be taken.

**COURT OF COMMON PLEAS.****Sittings in Banco.****COURT OF EXCHEQUER.****Sittings in Banco.****COURT OF EXCHEQUER.****London Common Juries.**

Rossetti v. Milne—Hawkes v. Alger—Emery v. Clarke—Jones v. Lockwood—Aulaigner v. James—Willis v. Lloyd—Atkins v. Gompertz—Abrahams v. Abbotts—Spyer v. Gregory—Morgan v. Jones—Hastings v. Smith—Bliss v. Davies—Kerridge v. Hesse—Wilson v. Banner.

**COURT OF QUEEN'S BENCH.****BUSINESS OF THE COURT AFTER TERM.**

Nov. 26.—Peremptory paper.

Nov. 27 and 28.—New Trials.

Nov. 29 and 30.—Special Paper.

Nov. 30.—The Court will give judgment upon cases previously argued.

**NOTICE TO CORRESPONDENTS.**

H. and C. B. under consideration.

SARAH CREIGHTON'S CASE.—From some unexplained cause, we have only just received this case. What was the title of Margaret Sewell? What is the custom of the Manor? and how does it affect a tenant by curtesy?

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# The Legal Guide.

III.] SATURDAY, NOVEMBER 30, 1839.

[No. 5.]

## LAWS OF REAL PROPERTY.

### ESSAY II.

3 & 4 Wm. IV. cap. 74.

*Act for the Abolition of Fines and Recoveries, and for the Substitution of more useful Modes of Assurance.*—[28th Aug., 1833.]

(Continued from p. 51.)

1, CONSIDERED.—DEEDS OF APPOINTMENT AND SETTLEMENT.—WHETHER IT IS POSSIBLE FOR A MAN TO TAKE TO HIMSELF POWER OF LIMITING AN ESTATE BY DEED, WILL, OR WRITING, ATTESTED AS REQUIRED, AT THE SAME TIME TAKING TO HIMSELF THE WHOLE INTEREST IN THE FEE OVER WHICH THE POWER IS TO BE EXERCISED.

Section 1 of this statute enacts (as we have before shown (a)), that every assurance lawfully made, or hereafter to be made, whether by deed, will, private Act of Parliament, or otherwise, by which lands are or shall be entailed, or agreed, or directed to be sold, shall be deemed a settlement; and any appointment made in exercise of any power contained in any settlement, or of any power arising out of the power contained in any settlement shall be considered part of such settlement, and the estate

created by such appointment shall be considered as having been enacted by such settlement.

It has long been settled (b) that where a power of appointment over real estate is executed, the appointment takes under him who created the power, and not under him who executes it. The estates limited in default of and until the execution of the power are defeated by an appointment, for the execution of a power is the limitation of a use under and by the effect of the instrument by which the power was reserved.

Lord Eldon took a very elaborate view of the subject, in *Maundrell v. Maundrell* (c), upon one of the questions raised in that case, whether it is possible for a man to take to himself a power of limiting an estate by deed, will, or writing, attested as required; at the same time taking to himself the whole interest in the fee, over which the power is to be exercised; and his Lordship considered the practice was universal from his own experience. It was an ordinary thing for a man, about to suffer a recovery of an estate, of which he was tenant in tail, to declare that the recovery should enure to such uses, intents and purposes, as he should appoint; and in the mean time, and in default of appointment, and as to so much of the interest, of which there should be no appointment, or

(a) Ante, p. 3.

(b) Sir Edward Clerke's case, 6 Rep. 18.

(c) 10 Ves. Jun. 235.

as should not be exhausted by the appointment that the estate should enure to himself in fee. Mr. *Butler* states that the fee vests until execution of the power (a); and the execution of that power, in the words of Mr. *Booth*, is the limitation of a use under and by the effect of the instrument, by which the power is reserved. It is true, the practice has left it almost without example, that the party does not also pass an interest for the security of the purchaser; for by many acts not disclosed the power might have been gone. When, therefore, the vendor recites his power, executes it, and conveys by feoffment, bargain and sale, or lease and release, he does profess both to execute his power and to pass his interest; and many cases might be [put. Suppose the lease for a year was not executed, having been forgot, or had not a proper stamp, the release would have no operation, but the execution of the power would have limited a use to the persons named; and the use would engraft itself upon what Mr. *Booth* calls *Scintilla Juris* in the releasees; and those persons named in the execution of the power, would have taken precisely as if they had been persons to whom uses were limited in the original deed. Take the ordinary case of a marriage settlement, with a power to the tenants for life of leasing during minority. A power in the tenant for life to lease for twenty-one years is almost as inconsistent with his interest as a power to limit the fee with that of tenant in fee. But, when the tenant for life executes the power, the effect is not technically making a lease, but that lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use, for twenty-one years antecedent to the life estate and the subsequent limitations.

It cannot be represented as a question of any doubt that such a power may be reserved to the person, having the fee, and is capable of being executed. The extent to which the contrary proposition would go in affecting titles is surprising, and therefore the statement of any doubt upon it is alarming. In *Sir Ed. Cleere's* case (e) it is laid down expressly. All the cases applicable to the question of revocation of a devise, by the effect of a partition are wrong, if there is any ground for this doctrine, for, though it has been supposed very difficult to distinguish the cases of *Tickner v. Tickner* (b), and *Luther v. Kidby* (c), the distinction is obvious. In the one the object was a mere partition; the deviser, having an undivided moiety of the estate, took a divided moiety; and it was held no revocation, there being no purpose beyond partition. But, where partition is made, and in the mode of doing it the deviser conveys to such cases as he shall appoint; and, in default of appointment, to himself in fee, that is a revocation. Why? Because he had limited a power. They inferred, that it was legally limited; otherwise there would have been no difference in law between the one and the other. This was recognized in the case of *Kenyon v. Sutton* (d), before Lord ALVANLEY, when Chief Justice of Chester; and the will was held revoked as the deviser had taken a fee, with a power, over-riding it, to limit a use; and is not only sanctioned by practice, but really has its foundation in principle, acknowledged by the courts for the last two or three hundred years. As to the conclusion of the judgment (f) in *Maunderell v. Maunderell*, where the Master of the Rolls (g) seemed to think there is some pe-

(a) Co. Lit. 373. & See also *Farnes* cont. sum. 344. See also *Lord Cranford*, 2 Ves. J. 698; 3 Id. 661; 3 Id. 768.

(b) Cited in *Parsons v. Freeman*, Amb. 116; 3 Atk. 741; 1 Will. 308.

(c) 3 P. Will. 170, n.; 8 Vin. 148.

(d) Cited Ves. J. 601.

(e) Ante p. 65.

(f) 7 Ves. 167.

(g) Sir W. Grant.

ity from the limitation to such uses as t Maundrell should, "by deed or will" it, there is no such thing; for the deed l to create a use, to engraft upon the of the releasees under the old instru\_ may be a deed or will that passed no t whatsoever. There is no difficulty in g that in fact thousands of securities in untry have their foundation in nothing : execution of such a power.

(To be continued.)

### PROBLEM V.

VOL. 3.

PERI FACIAS.

What is this Writ? When, Where, and at what Executed?

What sort of Property may be taken, and disposed of?

THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 3. VOL. III.

ARE THE PRINCIPAL MODES OF DESCENT DERIVED FROM LOCAL CUSTOMS?

Two modes of local descent are two, being Borough English and Gavelkind, the incidents attached to each it will be desirable to consider separately.

Borough English is a custom relating to the descent of lands in some ancient boroughs and copyhold manors that estates descend to the youngest son, or if the tenant has no issue, to the younger brother; this custom is prevalent in Edmeston among other places. The following reason is assigned for the custom—that the youngest son, being of his tender age, is not so able to support himself as the elder; the right of coverture with his tenant's wife on the wedding night never existed in the Lord of the manor, although the belief long prevailed about England and Scotland, and was used as the reason for the custom. This custom goes with the land, and guides the

descent to the youngest son, although there be a decree to the contrary. (2 Sev. 138.) If a man seised in fee of lands in Borough English make a feoffment to the use of himself and the heirs male of his body according to the course of the Common Law, and afterwards die seised, having issue two sons, the younger son shall have the lands by virtue of the custom, notwithstanding the feoffment. (Dyer, 179.) If a copyhold in Borough English be surrendered to the use of a person and his heirs, the right will descend to the youngest son according to the custom. (1 Med. 102.) And a youngest son shall inherit an estate tail; but an heir at Common Law may take advantage of a condition annexed to a Borough English land, though the youngest son shall be entitled to all actuals in right of the land, &c.; and the eldest son shall have tithes arising out of land Borough English, for tithes of common right are not inheritances descendible to an heir, but come in succession from one clergyman to another. Borough English land being descendible to the youngest son, if a younger son die without issue male, leaving a daughter, such daughter shall inherit *jure representationis*. (1 Salt. 243.) By the custom of Borough English, the widow shall have the whole of her husband's lands in dower, which is called her Free Bench, and is given to her the better to provide for the younger children, with the care of whom she is entrusted. (1 Co. Litt. 33, 111.) Borough English is one of those customs of which the law takes particular notice; there is no occasion to prove that such custom actually exists, but only that the lands in question are subject thereto; but the extension of the custom to the collateral line must be specially pleaded. (Robinson, Gavelk. 38, 43, 93.) And as Borough English may be extended by special custom, so may it be restrained, therefore the customary descent may be confined to fee simple. (1 Inst. 110. 6 in n.)

2nd. Gavelkind is a custom annexed to lands in Kent, whereby the lands of the father are equally divided at his death among all his sons, or the lands of the brother among all the brethren, if he has no issue of his own—and is relied on by Blackstone as a pregnant proof that tenure in free socage was a remnant of Saxon liberty. It is universally known what struggles the Kentish men made to preserve their ancient liberties, and the success with which their struggles were attended. And as it is principally here that the custom of Gavelkind prevails, we may fairly conclude that this was a part of those liberties, agreeable to Mr. Selden's opinion, that Gavelkind, before the Roman Conquest, was the general custom of the realm. The distinguishing properties of this tenure are various. Some of the principal are, that the tenant is of sufficient age to alien his estate by Feoffment at the age of fifteen; that the estate does not escheat in case of attainder and execution for felony; that in most places the tenant had power of devising lands by will, before the statute for that purpose was made, the descent of the lands, as above stated, which was, indeed, anciently the most usual course of descent all over England, (Glanvil 67. c. 3.) though in particular cases particular customs prevailed. The daughter of a tenant in Gavelkind shall inherit *jure representationis*, although not within the words of the custom, dividing the lands among the heirs male. A wife shall be endowed of Gavelkind, of a moiety of the land whereof her husband dies seised, during her widowhood. (Co. Lit. 3.) The husband shall be tenant by the curtesy of half the Gavelkind lands of the widow during the time he continues unmarried, without having any issue by his wife; but if he marry, he shall forfeit his tenancy by the curtesy. If the husband have issue by the wife, and she die, he shall be tenant by the curtesy of the

whole land, and though he marry, shall not forfeit his tenancy.

Gavelkind lands are, and always were forfeitable for treason, although the belief, "The father to the bough, the son to the plough extensively prevailed." Rents granted out of Gavelkind land descend in the same way as the land. Lay Rectories are descendible, according to the custom of Gavelkind; but the tithes, according to the Common Law. Parceners at Common Law and co-heirs in Gavelkind have the same rights. All lands in Kent shall be taken to be in Gavelkind, unless disgavelled by particular statutes. If lands are alleged to be in Kent, they shall be in Gavelkind, if the contrary doth not appear. It has been held that the superior Courts may take notice generally of Gavelkind without pleading, though not of the special custom of devising it, which ought to be pleaded specially. Tenure in Gavelkind abolished in Ireland by 17 and 18 G. 3. c. 49. Its abolition in England is recommended by the real Property Commissioners.

Nov. 21, 1839.

H. T. D.

Our industrious correspondent has not taken a sufficiently comprehensive view of this question. There is ANOTHER principal mode of descent derived from local customs viz. by *Copy of Court Roll*, estates held under which are in general descendible, according to the Canons of the Common Law—As for a single instance. In some manors, the widow succeeds as heir to her husband to the exclusion of the issue, or no widow, the younger brother succeeds, and if no brother, the youngest sister, and neither brother nor sister, the youngest next of kin of the whole and worthiest blood.—See *Locke v. Southwood*, 3 Mylne and Craig 420.—*Locke v. Colman*, Id. 430. We shall be glad to see that our correspondent second time takes up the problem, and completely resolves it.—Ed.

## Law Reports.

### ROLLS COURT—Nov. 14.

NELSON v. BRIDGES AND WOODHEAD.

**ORD and TENANT—MINES—PAROL AGREEMENT for a Lease—Where a Lessor by his own act put it out of his power to perform his contract, the subject matter of the contract being destroyed pending the trial of the Court, on a bill filed by the intended Lessee for specific performance, and in reliance to the Master to ascertain the extent of damage, ordered an action to be brought, the defendant in Equity making admissions, requisite to bring the question to be decided before a Court of Common Law.**

Defendant Bridges, the owner of certain quarries, entered into a parol agreement with the plaintiff in February, 1833, to grant a demise of part of the land and quarries, which agreement the plaintiff took possession of. Bridges afterwards refused to perform the contract, and brought an action of ejectment against Nelson, who filed his original bill in Equity for a specific performance, and for an injunction to restrain the ejectment. The injunction was refused upon the merits disclosed by the evidence of Bridges. The proceedings in ejectment were then prosecuted, and the action was tried at the Lent Assizes, 1835, and verdict for the plaintiff Bridges. The cause in Equity was brought on to a hearing in 1837, and the material facts of the answer being then displaced by evidence, the Court decreed the plaintiff in Equity entitled to specific performance of the contract. Pending these proceedings, the defendant Woodhead entered into possession of the quarry under a license from Bridges, and worked the stone quarry to a considerable extent.

This fact, however, did not appear at the trial of the cause; the consequence was, that the subject-matter of the contract being absent to a large extent, the plaintiff Nelson could not have the benefit of the decree pronounced in his favour, and filed his supplemental bill stating these facts, and praying that it might be referred to the Master to take an account to ascertain what loss and damage the plaintiff had been put to by the conduct of the defendants, and that the defendant Bridges pay the amount thereof to the plaintiff. The facts above stated appeared by the answers and evidence. It appeared also by the evidence that while Woodhead was working the quarry the plaintiff was well aware of the circumstances, and granted him, for a consideration, a license to work over his land to enable him to work, and appeared further, that Bridges had discouraged Woodhead from working the quarries.

The defendant Bridges by his answer offered to grant to the plaintiff a demise of an adjoining stone quarry, in lieu of the one worked by Woodhead, and went into evidence to prove that the stone was as abundant and of as good quality.

*Pemberton and Elmsley* for the plaintiff.—

This is a parol agreement affecting land on which no action at law can lie (Stat. of Frauds, sec. 4), and this Court alone can carry it into effect. The plaintiff is now deprived of the benefit of his contract by the conduct of the defendants, which he had no power of preventing. The Court having been induced to allow him to be turned out of possession upon the allegation of an answer which was in fact untrue. The lease when granted will bear date and take effect as of the time when it shall be executed. If the plaintiff should proceed at law, he can recover no adequate damages, because the substance of the thing contracted for was gone before his title at law would commence.

*Richards and L. Wigram contra.*—The agreement, it is true, was originally a parol agreement, but by the decree, declaring the plaintiff entitled to a specific performance, it became perfected and converted into a written agreement. Why, therefore, should not the plaintiff proceed at law upon it? The decree will refer back to the time of the contract, and make the agreement a written agreement in 1834, before the defendant Woodhead had taken any stone. The plaintiff may, therefore, well proceed at law and recover damages. The prayer of the bill is to take an account of the loss and damage sustained by the defendants. A decree to that effect cannot be made against both defendants, for their alleged offences are separate—that of the defendant Bridges not to have performed his agreement, that of Woodhead to have worked the quarry. It is in evidence that Bridges has had no profit of any kind from such working, and Woodhead was a mere trespasser. How, then, can an account of profits be taken against one defendant who has had none, and against another who is a mere trespasser? Besides, the plaintiff cannot be heard to come into Equity for relief when he stood by during the whole time that the defendant Woodhead was working the quarry, and shewed his acquiescence by actually granting him a right of way. The proper remedy for the plaintiff would be to get his license drawn up under the decree made upon the hearing of the cause; such license should be ante-dated, and contain covenants for quiet enjoyment, and other usual covenants, and then he might bring his action. That was the course which the Lord Chancellor intimated his opinion was the proper course in a case of a similar nature. (a)

(a) The case referred to by the learned counsel is *Munday v. Jolliffe*, not yet reported.



*Pemberton*, in reply.—It is not the doctrine of Equity that a party is to have incomplete relief in a matter once within the jurisdiction. Are parties to come here to get equitable relief upon a portion of a case, and then be sent to law for damages? Here, besides, damages cannot be had at law, because there is no legal interest antecedent to the damage. Suppose the contract had been for the sale of a quarry, for which a rent was paid; the decree would be that defendant should account for rents. And does not here the value of the stone stand in the place of a rent? How is an action to be brought? The grant will bear date at the time of execution, and will be a grant of the right to work a quarry of which the greater portion is gone. As to the plaintiff's acquiescence, he was turned out of possession upon an answer which was untrue. He could not come to this Court, and had no power whatever to prevent the defendant Woodhead from working. His grant of a right of way is no evidence of acquiescence, for he had no title to interfere with the defendant's working; his acquiescence was, therefore, compulsory.

The MASTER of the ROLLS, after stating the principal facts, said, there was no doubt but that the plaintiff was entitled to compensation, and the question was how compensation was to be made to him for the loss of the possible benefit he might have derived from working the stone of the quarries. It was said at the bar that he might have a remedy at law, by having his legal grant ante-dated, and then proceeding upon the covenants. But it was not necessary for the Court to proceed in that circuitous way, when the matter was once drawn within its jurisdiction. It was clear that the plaintiff was entitled to relief; but how, was matter of serious consideration. An account of profits would not do, for the defendant Woodhead being discouraged by the defendant Bridges from working actively, had only taken what it was convenient to him to take for his own use. It did not appear whether he had taken any for sale, and it was evident, at any rate, that he had not worked the quarries in the manner in which the plaintiff would, in all probability, have worked them in his trade; the relief certainly sounded in damages; for the plaintiff sought to recover something which was not profit, but an equivalent for the loss of something which might have been gained. The proper course his Lordship thought would be for an action to be brought for damages, the defendants making such admissions of the title of the plaintiff and otherwise, as should be requisite to enable him to have the actual damage sustained by him determined in a court of law. The case stood over for the parties to agree upon the terms of the order. (a)

(a) It will be perceived that in the forego-

ing judgment, his Lordship avoided giving any direct opinion upon the jurisdiction of the Court, although it may be inferred from some of his expressions that he admitted it. The point seems to be very unsettled. In *Denton v. Stewart* (17 Ves. n. 77) the Court assumed the jurisdiction. The case was—parol agreement to assign a lease, partly carried into execution. After the agreement the defendant assigned to another for valuable consideration without notice, and the Court referred it to the Master to inquire what damage had been sustained by the plaintiff, and decreed the defendant to pay such damage as should be ascertained. On the authority of this case, Sir W. GRANT decided (*Greenaway v. Adams*, 12 Ves. 395), where the purchaser objected to the title, and when the objection was taken, the defendant Adams insisted on her title being good, and gave notice to the plaintiff that if he would not take the title she should sell to another, which she did. The bill prayed a specific performance, and if the defendant could not make a good title, then in the alternative for an issue to try what loss the plaintiff had so sustained or a reference to the Master. The MASTER of the ROLLS intimating his doubts of the jurisdiction were it not for authority, referred it to the Master, expressly on the authority of *Denton v. Stewart*. The point came afterwards before the same learned judge in a case a little different, *Gwillim v. Stone*, 14 Ves. 128. In this case the bill prayed that the contract might be delivered up, on the ground of defective title and for compensation for the loss sustained by the plaintiff by the non-performance of the contract. The Court took the distinction, that in the former cases the bill was for specific performance, and in the case before it, alleged from the first that the title was bad, and said it was more proper for an action, the equitable relief being obtained by delivery up of the instrument. And in *Todd v. Gee*, 17 Ves. 273. Lord ELDON intimated a strong opinion against

doctrine of *Denton v. Stewart* being as a general rule. His Lordship said, giving his final judgment in the case, opinion upon the question which depends on the three cases cited, *Denton v. Stewart*, *Greenaway v. Adams*, and *Gwillim v. Green*, is confirmed by reflection, that even in very special cases it is not the course of the Court in Equity to file a bill for specific performance of an agreement, praying in the alternative, if it cannot be performed, an order for an inquiry before the Master with a view to damages. The plaintiff must take his remedy if he chooses it at law; generally, *I do not say universally*, he cannot sue in Equity."

In a late case again, *Blore v. Sutton*, 1337, Sir W. GRANT treated the jurisdiction as doubtful, and put the decision in *Denton v. Stewart* on the ground of the conduct of the party in voluntarily disabling himself from performing his contract; and in *Beckett v. 2 Russ. & My.* is to the same effect. On the whole, the authorities, as they seem to support the jurisdiction, shew that the Court will exercise it under very special circumstances.

#### COURT OF COMMON PLEAS.—Nov. 15.

*THE ASSIGNEES OF DRIVER v. OLDFIELD.*

##### SPECIAL CASE.

**BANKRUPTCY—TROVER**—*As to the right of the Assignees of Goods before the Bankruptcy of the Consignor where the Goods were put into possession after the Bankruptcy.* This was an action of trover brought by the plaintiffs, as assignees of a bankrupt named Driver, to recover from the defendant the value of a quantity of ship's-cabin furniture which had been put into the hands of the bankrupt. The defendant, Mr. Oldfield, was owner of a vessel called the *Bolton*, trading to the East Indies, and had engaged the bankrupt as her captain, upon the usual terms. Upon the vessel putting in to Port Bay, Captain Driver, who was in embarrassed circumstances, went ashore, leaving for his mate, Mr. Fremlin, in command of the vessel. He afterwards wrote to Mr. Fremlin,

desiring him to take charge of the vessel for the owner; and he also wrote to the defendant, informing him that he had handed over to him the cabin furniture, &c., towards the discharge of a debt which he owed him. The defendant thereupon wrote to Captain Fremlin to keep possession of the property in question for him. The ship arrived here on the 5th of December, and the defendant took possession of the goods; but two days previously to that Captain Driver committed an act of bankruptcy, and a fiat issued against him on the 6th. Under these circumstances the assignees claimed the goods, they not having come into the defendant's possession until after the act of bankruptcy had been committed. The defendant, on the other hand, insisted that while the goods were in Captain Fremlin's possession he held them as agent for the defendant, and that, therefore, through him, the defendant had possession of them before the act of bankruptcy.

The COURT held that the defendant had, by Captain Fremlin as his agent, obtained possession of the goods before the bankruptcy, and therefore had a right to keep them; consequently the defendant was entitled to judgment.

#### COURT OF EXCHEQUER.—Nov. 15.

##### HARRISON v. WARNEFORD.

**Joint Stock Companies**—*LIABILITY of DIRECTORS appointed by the Act of Parliament, notwithstanding they may have sold their shares*—PLEADING.

This was an action for arrears of salary claimed by the plaintiff against the defendant, as a director of the West Cork Mining Company.

The plaintiff, it appeared, was in 1834 appointed superintendent of the company's works in Ireland.

The defendant pleaded that he was not a director of the company at the time the action was brought, he having transferred his shares in the company, and thereby, as he alleged, disqualified himself from being a director.

Mr. Baron ALDERSON said, the defendant's plea was a bad plea, as the defendant was appointed a director by the Act of Parliament, and would continue to be a director until 1840, notwithstanding he might have transferred his shares.

Verdict for the plaintiff.

#### BAIL COURT.—Nov. 6.

*POWLET v. THE IMPERIAL BANK OF ENGLAND*  
**MANCHESTER.**

**Joint Stock Companies**—*Liability of any individual partner to have Execution upon*

*a Judgment awarded against the Company, executed against him, upon a suggestion previously entered upon the Roll under 7 Geo. 4, cap. 46.—FIRST APPLICATION.*

Mr. Wightman applied for liberty to enter upon the roll a suggestion that certain persons were partners in the bank in question, under the Joint-stock Companies Act, 7th George IV., cap. 46. The learned counsel stated that, according to the act in question, the action was to be brought against the public registered officers of the companies, and the judgment obtained in any such action was to be a judgment against the company. Execution may, however, according to another part of the statute, be issued against any individual partner in the company. There was no precedent for any suggestion of the present nature, as it had not until now been found necessary to proceed individually against the separate partners of such companies.

Mr. Justice LITTLEDALE granted the application, but directed the learned counsel to take a day to consider the exact shape in which the bill ought to be drawn up, as the present was the first proceeding of the kind.

Nov. 19.

#### EX PARTE TWYNAM.

**ARTICLED CLERKS' EXAMINATION**—*Whether an Articled Clerk can, under particular circumstances, be examined for Practice as an Attorney before the expiration of his Articles.*

Mr. V. Lee applied on behalf of Mr. Twynam, an articled clerk, for leave that he might attend the examination, and be examined before the expiration of his articles. Mr. Twynam was desirous of proceeding to New Brunswick to practise. His articles would not expire before the 11th of April, 1840, which was a few days before the commencement of Easter Term. If he was compelled to wait until Easter Term before he was examined, he could not be admitted until Trinity Term, and this would be after the usual vessels for New Brunswick shall have sailed, and he would not then arrive before the winter had set in. By being allowed to undergo his examination now, he would be enabled to be admitted in Easter Term.

Justice LITTLEDALE.—He may, I think, be examined under the particular circumstances forthwith.—Application granted. (a)

(a) But see *Ex parte Barker*, B. C. Trin. T. 1839. by COLERIDGE J., *Archbold's Prac.* by Chitty, 24. Ed. 7.—Ed.

#### INSOLVENT DEBTORS' COURT.—Nov. 16.

##### CASE OF WILLIAM SCHULTZ.

**ATTORNEYS**—*Whether an Attorney can oppose an Insolvent's discharge for a Bill of Costs, not delivered before the hearing.*

Mr. Nicholls appeared to oppose for Mr. C. Boydell, an attorney of the Court, and the only creditor in the schedule. He said that his client had been the attorney of the insolvent in August, 1838, when the insolvent had taken the benefit of the act. Mr. Boydell had sued him for his bill of costs, but did not appear to have delivered his bill of costs before the hearing, as directed by the rule of the Court.

Mr. Woodroffe for the insolvent, contended that, by the rule, Mr. Boydell was prevented from opposing until a bill of costs was delivered.

Mr. Nicholls asked the Court whether the creditor being a judgment creditor did not alter the case?

The learned Commissioner BOWEN said it did not. The Court were resolved to enforce the rule. Mr. Boydell had no *locus standi*.

The insolvent was discharged.

Nov. 23.

##### CASE OF JAMES BARTLETT.

**FUTURE PROPERTY OF Insolvent**—*Whether a Verdict for debt or damages when recovered shall be considered as subsequently acquired property, and as such belong to the Assignee.*

Mr. Cooke applied on the part of the assignee, for a rule calling on certain persons to hold a sum of money, and on the insolvent to show cause why it should not be paid to the creditors. He stated that Bartlett was discharged under the act in February, 1834; he had recovered a verdict for 49l., which had not been paid; and the present application was to obtain that sum for the assignee as future acquired property, under the particular section of the act.

Mr. Commissioner BOWEN thought it was a somewhat unusual application to treat a debt or damages recovered as subsequently acquired property.

Mr. Cooke said, by no means. Several cases of the kind had been heard, and granted.

Mr. Commissioner BOWEN.—Suppose Bartlett takes no notice of our rule, and issues an execution against the person against whom the verdict has been obtained?

Mr. Cooke.—Then the form must be altered. We could go against the sheriff. The act provides for such a case, and the Court has more power in such matters than a superior court.

Rule granted.

**NEW POSTAGE ACT:**

ORDER—NOV. 21, 1839.

AL POST-OFFICE.—In compliance with of the Lords of the Treasury, the alterations in the rates of postage will on and after the 5th of December

stem of charging letters by enclosures d; all letters, therefore, whether General, Foreign, or Colonial, with the exception of local Penny-post letters, and of the letters passing through the Dublin and local posts, will be charged by weight, to the following scale:—

Letters not exceeding half an ounce, there shall be one rate of postage.

Letters above half an ounce, and not exceeding one ounce, two rates of postage.

Letters above one ounce, and not exceeding two ounces, three rates of postage.

Letters above two ounces, and not exceeding three ounces, four rates of postage.

Letters above three ounces, and not exceeding four ounces, five rates of postage.

Letters above four ounces, and not exceeding five ounces, six rates of postage.

Letters above five ounces, and not exceeding six ounces, seven rates of postage.

Letters above six ounces, and not exceeding seven ounces, eight rates of postage.

Letters above seven ounces, and not exceeding eight ounces, nine rates of postage.

Letters above eight ounces, and not exceeding nine ounces, ten rates of postage.

Letters above nine ounces, and not exceeding ten ounces, eleven rates of postage.

Letters above ten ounces, and not exceeding eleven ounces, twelve rates of postage.

Letters above eleven ounces, and not exceeding twelve ounces, thirteen rates of postage.

Letters above twelve ounces, and not exceeding thirteen ounces, fourteen rates of postage.

Letters above thirteen ounces, and not exceeding fourteen ounces, fifteen rates of postage.

Letters above fourteen ounces, and not exceeding fifteen ounces, sixteen rates of postage.

Letters above fifteen ounces, and not exceeding sixteen ounces, seventeen rates of postage.

Letters above sixteen ounces, and not exceeding seventeen ounces, eighteen rates of postage.

Letters above seventeen ounces, and not exceeding eighteen ounces, nineteen rates of postage.

Letters above eighteen ounces, and not exceeding nineteen ounces, twenty rates of postage.

Letters above nineteen ounces, and not exceeding twenty ounces, twenty-one rates of postage.

Letters above twenty ounces, and not exceeding twenty-one ounces, twenty-two rates of postage.

Letters above twenty-one ounces, and not exceeding twenty-two ounces, twenty-three rates of postage.

Letters above twenty-two ounces, and not exceeding twenty-three ounces, twenty-four rates of postage.

Letters above twenty-three ounces, and not exceeding twenty-four ounces, twenty-five rates of postage.

Letters above twenty-four ounces, and not exceeding twenty-five ounces, twenty-six rates of postage.

Letters above twenty-five ounces, and not exceeding twenty-six ounces, twenty-seven rates of postage.

Letters above twenty-six ounces, and not exceeding twenty-seven ounces, twenty-eight rates of postage.

Letters above twenty-seven ounces, and not exceeding twenty-eight ounces, twenty-nine rates of postage.

As the rate to and from North America already is a uniform rate of one shilling for a single letter, the rate of postage on letters conveyed by packet between the United Kingdom and all the British Colonies (with the exception of letters to the East Indies, which are to be charged when they are sent or received via Falmouth 2s. 6d. as at present), will be a uniform single rate of one shilling, advancing on all letters exceeding half an ounce, according to the scale of weight already laid down.

No penny postage will hereafter be charged upon letters passing through the General Post, except on those which are franked; franks, however, will still be liable to the local rates of a penny or twopence, as at present, when passing through penny posts in the country, or the local posts of London and Dublin.

The additional rates heretofore chargeable on letters conveyed by the route of the Menai and Conway bridges, that of Milford and Waterford, and the additional halfpenny on letters conveyed by mails in Scotland, will be abolished.

No letter which is not franked, or which shall not be either despatched by or addressed to a public department on the public service, shall be forwarded when above the weight of sixteen ounces, with the exception of those from foreign countries or the colonies addressed to the United Kingdom, whether they shall arrive by packet or by private ship, and deeds and parliamentary proceedings when addressed to the Colonies to be forwarded by packet. The letters will be delivered according to their address, but at the rates of postage to which they will be liable by the scale before given. With respect to deeds and parliamentary proceedings, they will be treated according to the existing regulations, and will be charged with the rates they are at present liable to, except where those rates are higher than they would be under the new system. Parliamentary petitions above sixteen ounces within the United Kingdom will be treated in a similar manner. Letters evidently intended to be franked, but which have become liable to postage by wrong date, &c. must be forwarded, even if above the weight of sixteen ounces, but at the rates already laid down.

All letters exceeding the weight of an ounce (with the exception of letters addressed to France) must have the postage paid in advance. Should the postage not be paid in advance, the letters must be charged with double the rates to which they would otherwise be liable.

The charge on letters transmitted by private ship between the United Kingdom and places beyond sea (with the exception of the Channel Islands, the Isle of Man, and places within the limits of the East India Company's charter) will also be taken by weight according to the scale before given. The single rate of postage on such

letters will be eightpence when posted or delivered at the port of departure or arrival, and one shilling when posted or delivered at any other place within the United Kingdom. These rates of eightpence and one shilling will apply also to letters between this country and China.

The rates on letters conveyed by private ship between the United Kingdom and countries comprised within the limits of the East India Company's charter will be the present uniform rate for sea postage of twopence outwards and fourpence inwards for letters not exceeding the weight of three ounces, when posted or delivered at the ports of departure or arrival respectively; beyond that weight a uniform rate of one shilling per ounce will be taken as sea postage. When, however, such letters are posted or delivered at any other place than the port of arrival and departure, they will be liable to the charge of inland

postage, calculated according to the new scale weight, in addition to the sea postage before mentioned.

Letters transmitted by private ships between places within the United Kingdom must be treated in the same manner as General Post letters forwarded by the regular mails between such places, and charged with the same rates of postage according to the scale of weight before laid down. Letters conveyed by private ships between Great Britain and the Channel Islands and the Isle of Man must be treated in a similar manner.

All letters that cannot be forwarded owing to their exceeding the prescribed weight must be sent to the Dead Letter Office in accordance with the existing regulations.

By command,  
W. L. MABERLEY, Secretary

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNIES (a)  
IN HILARY TERM, 1839.

(Continued from p. 63.)

<i>Clerk's Name and Residence.</i>	<i>To whom Articled or Assigned.</i>
Green, Charles, Runcorn.	Charles Aikin Holland, Northwich and Runcorn.
Gosset, Montague, the younger, George St., Mansion House.	Richard Roy, Lothbury.
Gill, James, Liverpool.	Robert Frodsham, Liverpool.
Goodlad, Godfrey, Brighton.	William Sargent, Sheffield.
Goode, Philip Benjamin, 43, Howland Street; and Cork Street.	Philip Goode, Howland Street; assigned to John Pike, Golden Square.
Godden, John, 6, St. George's Terrace, Hyde Park North.	Robert Bicknell, Bloomsbury Square; assigned to George Waugh, Great James Street.
Gell, Alfred, Lewes.	Francis Harding Gell, Lewes.
Gibbs, Thomas Washbourne, 4, Manchester Street, Gray's Inn Road; and Bath.	Frederick Dowding, Bath.
Harrison, George Frederick, 98, Upper Stamford Street; and Leeds.	John Atkinson, Leeds.
Hellawell, John Beaumont, Huddersfield.	William Barker, Huddersfield.
Hanbury, Thomas James, Tonbridge Place, New Road; John Street; and Lamb's Conduit Street.	Thomas Sewell, Newport; assigned to Robert Carr Foster, Gray's Inn.
Hawksford, John, Wolverhampton.	William Manby, Wolverhampton.
Hume, John Penry, 29, Alsop Terrace, New Road; and 30, Regent Square.	Robert Montague Hume, Great Winchester Street; assigned to Edmund Maunde, Great Winchester St.; assigned to W. Willoughby Gunston, Great Winchester Street.
Holby, John, York.	William Jackman, York.
Humble, George, the younger, Cleckheaton.	George Teale, Lister, Cleckheaton.
Hucknall, Alfred, Loughborough.	William Blunt Fosbrooke, Loughborough; assigned to Joseph Parker, Loughborough.
Harrison, George, Bishop Wearmouth.	George Harrison the elder, Bishopwearmouth; assigned to Joseph John Wright, Sunderland.
Hardisty, Edward Brydges, Hampstead.	John Swaine Sculthorpe, Great Marlborough Street.

(a) Marked \* are Common Pleas, the rest are Queen's Bench.

derick Shepard, 32, Throgmorton and Liverpool.	William Thompson, Liverpool; assigned to John Burch Lloyd, Liverpool; assigned to William Henry Cotterill, Throgmorton St.
ter Tait, 16, Bridge Street, Vauxhall.	William Waller, Clement's Inn.
omas, 1, Heathcote Street; and	Benjamin Hope, Wells; assigned to James Beavan Meredith, Heathcote Street.
, John George, 11, Caroline Street, e Hill, near Leeds.	John Bramwell, Durham.
Robert, Arundel.	William Duke, Arundel.
ohn, 12, Coborn Terrace, Bow; and	John Anderson Pybus, Newcastle-upon-Tyne.
se.	
ohn, Chester.	John Finchett Maddock, Chester.
otworthy Owen, 3, Lincoln's Inn	John Orde Hall, Brunswick Row.
James, 5, Belgrave Street, South; ; Higher Broughton; and Alders-	John Makinson, Manchester.
et.	
is Whincop, 6, Well's Street, Gray's e; and King's Lynn.	Lewis Weston Jarvis, King's Lynn.
ohn, the younger, Deal.	John Mercer, Deal.
Wm. 8, Barnsbury Place, Istington.	Benjamin Workman, Evesham.
John, 4, Euston Grove; and Rut-	Edward Robert Porter, New Court; assigned to Thomas Wright Nelson, New Court.
et.	Charles Kingdon, Holsworthy.
Richard, Holsworthy; and 15, Cum-	
et	
, the younger, Greenheys, Lanca-	David Law, Manchester; assigned to Joshua Southward, Manchester; assigned to Marma- duke Foster, Manchester; assigned to Fran- cis Dickin, Manchester.

(To be continued.)

## QUESTIONS

THE EXAMINERS TO APPLICANTS FOR  
ION AS ATTORNEYS AT THE EXAMINA-  
MICHAELMAS TERM, 1839.

### I. PRELIMINARY.

d you serve your clerkship?  
particular branch or branches of law  
h you have principally applied your-  
ing your clerkship.  
some of the principal law books you  
ad and studied.

ON AND STATUTE LAW, AND PRACTICE  
OF THE COURTS.

hat time after service of a writ of sum-  
must the memorandum of service be  
d? And what is the consequence of  
g such indorsement?  
endant keep out of the way to avoid  
al service of a writ of summons, are  
any, and what, means by which to  
an appearance?  
l action maintainable in any case in  
the cause of action constitutes an in-  
le offence?  
what time after the date and issuing of  
of summons must it be served?

What is the meaning of an appearance *secundum  
statutum*?

In what cases must the declaration be filed, and in  
what cases delivered?

A defendant quits, and altogether gives up his  
place of residence, after service of the copy of  
a writ of summons, but before the plaintiff  
has declared. How do you proceed in the  
action?

State briefly the difference between a plea in bar,  
and in abatement.

What evidence is necessary for the plaintiff on  
the trial of an undefended action for goods  
sold and delivered, or on the execution of a  
writ of inquiry in the like action?

Does an issue in law conclude to the country?  
And what is meant by concluding to the  
country?

By what course of proceeding is secondary evi-  
dence made admissible?

What is meant by interlocutory proceedings?

Can the plaintiff issue a *fiat facias*, after a  
*capias ad satisfaciendum* has been exe-  
cuted?

How do you proceed to revive a judgment more  
than a year old?

When a defendant, having no personal interest  
in goods in his possession, is sued by two  
different claimants of such goods, has he any,  
and what relief at law?

## III. CONVEYANCING.

*A*, under a power appointed an estate to *B*. his heirs and assigns, to the use of *C*. his heirs and assigns. What estate did *B*. and *C*. take under the appointment?

*A*, conveyed his estate to *B*. his heirs and assigns, to the use of *C*. his heirs and assigns. What estate did *B*. and *C*. respectively take?

State the form of attestation of the execution of a deed, where it is executed by *A*. under a power of attorney from *B*.

What are the clauses usually introduced in a mortgage deed?

What constitutes an estate in tail general, and what special?

What is a remainder, and what are the different kinds?

What is an executory devise?

What is a shifting use?

What is an estate in severalty?

What is the distinction between a joint-tenancy, and a tenancy by entireties?

Where infants are mortgagees, how and in what manner is the estate to be reconveyed?

What is the difference between taking an estate by descent and by purchase?

May a term created for raising portions, not assigned to attend, be at any time presumed to have become void, or to have been merged or surrendered? State instances.

Can a lessee for 999 years grant a lease for life? Give a reason for your answer.

If a real estate be purchased out of partnership funds, is it treated as real or personal estate in any and what respects?

## IV. EQUITY AND PRACTICE OF THE COURTS.

Can a suit be maintained by a plaintiff, residing out of the jurisdiction of the Court?

Can a defendant set down a cause for hearing?

Can a defendant move to dismiss a bill filed for discovery only?

When is a defendant entitled to the carriage of a commission to examine witnesses?

What is the advantage of the prayer for general relief in a bill in Chancery?

What is the distinction between multifariousness and misjoinder as applied to bills in Chancery? and is there any and what difference in their consequences?

To a bill filed by a cestui que trust, is the trustee a necessary party?

What is the rule in equity as to the necessary parties to a suit, and how does it differ from the rule at law?

What effect has the overruling of a demurrer on the future defence of the party filing it?

Will equity relieve against acts performed under mistaken notions of law or of fact?

What is the general rule of equity in granting relief against breaches of covenant?

Does the Court impose any and what term upon a plaintiff seeking to set aside an usurious contract?

What will amount to fraud in a purchaser not apprising the vendor of any advantage which the latter is ignorant?

To what amount of principal money, or of a annual payment, will the Court of Chancery pay to a married woman or her husband without order? and if the sum in Court exceeds that amount, what is necessary to be done in order to obtain payment thereof?

State the distinction between legal and equitable assets, and the difference in the mode of their administration in payment of debts.

## V. BANKRUPTCY AND PRACTICE OF THE COURTS.

What is the lowest amount of debt which must be owing to a creditor, or two or more creditors, to found a fiat?

Are any and what members of parliament liable to the bankrupt laws?

If a member of parliament is liable to the bankrupt laws, what proceedings must be taken to make such member a bankrupt?

Is any and what priority allowed to judgment creditors?

What is the course of proceeding in issuing an order for prosecuting a fiat up to the adjudication inclusive?

If a debtor liable to the bankrupt laws has not committed an act of bankruptcy, how can he be proceeded against in order to make him a bankrupt?

What is a scrivener within the contemplation of the bankrupt law?

What is the course of proceeding under a fiat when there is an equitable mortgage by way of collateral security held by a creditor?

What is the effect of a proof of debt by a creditor who has the bankrupt in execution for the same debt?

In case the bankrupt shall have entered into an agreement for the purchase of any estate or interest in land, what course must the vendor pursue in order to obtain a performance of such agreement, or the possession of the property?

What contracts made at any and what time before the fiat, but after the act of bankruptcy are deemed valid?

What is the effect of a certificate with regard to the bankrupt's liabilities?

In what case is the future property of a certificated bankrupt applicable for the creditors under that commission?

Is a bankrupt's certificate a discharge of an annuity payable by him?

## LETTER TO THE EDITOR.

ly of two partners be declared bankrupt, whose name or names must actions be brought to recover debts due to the partnership?

ALL LAW AND PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

homicide, and what are its different degrees?

Give examples of each.

or more magistrates take bail, in any case, and which of the cases?

person committed to prison by magistrate or under a coroner's warrant, charged with any of these offences, be admitted to bail, and if so, by whom, and what are the conditions necessary to be taken on the appearance of the party to be so admitted to bail?

cases are usually tried at the quarter sessions?

indictment has been preferred, when may the prosecutor proceed to trial?

indictment in any, and what, inferior court, be removed to the Court of Queen's Bench, and if so, in what way?

jurisdiction does the Court of Queen's Bench possess over an order or conviction by the Court of the peace, and what is the mode of proceeding?

any and what appeal against the finding of a coroner's jury, imposing a deodand, and the value thereof; and what is the mode of proceeding?

offences is leave given to file a criminal information, and what is the mode of proceeding to obtain it?

proceeding is a criminal information a civil one?

the Superior Courts at Westminster have jurisdiction in granting rules for a criminal information, or is it confined to any particular one of them?

the mode of proceeding to try the validity of an election to an office of public trust?

if damage by persons riotously assembling, have magistrates any summary power to award compensation to the party sustaining damage, and to any or what extent; or is it left to his action at law?

indictment for stealing any record, will, or other legal document, from its place of deposit, is it necessary to prove value or production of such document?

Queen's Counsel be retained to defend a person accused in a criminal case; and if so, under what circumstances?

appears that 125 applicants attended this examination; 116 were considered qualified, 14 were rejected, for want of a sufficient number of satisfactory answers.

SIR,—I confess it was with great surprise that I observed your note appended to my answer in your last number. (a) You there charge me with wilful mystification, by giving a false reference to an authority; but I beg leave to state, that my authority is cited with perfect accuracy, and that, contrary to your statement, the rule which I have given is to be found according to the reference, viz. Chitty Jun. Contr. p. 275. You quote Chitty on Contracts, p. 574; now, the edition of this work that I use, which I believe is the original edition, does not contain so many as 400 pages. It is clear, therefore, that we must have used different editions; so that you should not judge of what is to be found in my edition by yours, nor of the paging of my edition by that of yours. This at once offers an explanation of the whole matter, so obvious, that I am surprised it should not have occurred to an Editor.

By looking attentively at the MS. answer, after the words "notice a few of the leading rules for the rescinding of contracts," you will observe the obliterated words "as given by Chitty Jun. on Contr." &c. But as those rules related to a collateral subject, I feared, lest they would, as there given, occupy too large a space in your columns, and I accordingly abridged them as they now stand. By so doing, I may, perhaps, have rendered myself liable to the charge you bring against me of mutilation. But, as to that of unintelligibility, (referring to the last three short paragraphs) I leave that with any one who can read.

In justice to Alphonso, as well as to set right those readers who may labour under the mystifying tendency of your part of the note, I trust you will permit this to be published.

ALPHONSO.

We admire the spirit of our worthy cor-

(a) Ante, p. 3.2



respondent in keeping the field although *hit*. The very contest, to say nothing of the feeling manifested, shews industry and a desire of knowledge. We invite all such to the field, despite the labour imposed upon us in the strife. With this preface, we have a few words for our friend and subscriber. The date of our book (*Chitty on Contracts*, Ed. 1834,) is very immaterial, as applied to our observations; which, by reference to chap. 5, s. 6, of that work, will be found confirmed. We do not at any time write hastily, and when we write at all upon the answers to our problems, it is with the intention to *benefit the writer*, and not to cavil either with words or with him. There is also a reason why we should look after our correspondent, he is a sort of wrangler with his fellow students; nay, he would even wrangle with us—and for this we applaud him;—but, he should therefore be the more careful in his writings, and see that he does not make the same slip that he complains of in others.—ED.

#### REVIEW OF NEW BOOKS.

**DR. ROBINSON'S MAGISTRATES' POCKET BOOK,** or an *Epitome of the Duties and Practice of a Justice of the Peace out of Sessions, alphabetically arranged.* THIRD EDITION, with considerable alterations and additions, an extensive collection of Forms of Commitment and Convictions, and a copious Index. By JOHN FREDERICK ARCHBOLD, Esq. Barrister-at-Law, LONDON: John Richards and Co. Law Booksellers, &c. 194, Fleet Street.

We have not seen a work that we can

with greater confidence recommend to the notice of magistrates and their clerks than that before us. As a practical book, not should be without it. The work has received from the Editor many valuable additions and corrections, and in particular a collection of forms of commitments and convictions which the original work had not and which will render the work more *practically* useful to magistrates and their clerks and when the many alterations that have recently been made in the law relative to the duties of justices of the peace, and in the criminal law generally, are considered, work like the present, bringing up all those alterations to the mind's eye in an alphabetical shape, and directing attention to the statutes governing every case, must be seen and read to be fully appreciated. A reference to the book will shew its utility, and supply *prompt information* without the labour of research. The following two first articles are the plan of the work:—

#### ABDUCTION.

1. Taking away or detaining a woman against her will, from motives of lucre, with intent to marry or defile her—felony. 9 Geo. 4. c. 31 s. 19.
2. Unlawfully taking an unmarried girl, under the age of sixteen, out of the possession, against the will of her parent or guardian—misdemeanour. Id. s. 20.

#### ABORTION.

Administering poison, or other noxious thing or using any instrument or other means, to procure the miscarriage of a woman—felony. 1 Vict. c. 85. s. 6.

#### SITTINGS AFTER MICHAELMAS TERM, 1839.

Before the LORD CHANCELLOR, Lincoln's Inn.

Tuesday	Nov.	26	-	-	}	Appeals and Causes.
Wednesday	"	27	-	-		
Thursday	"	28	-	-		
Friday	"	29	-	-		
Saturday	"	30	-	-		
Monday	Dec.	2	-	-	}	First Seal—App. Motions with Appeals & Causes.
Tuesday	"	3	-	-		
Wednesday	"	4	-	-	}	Appeals and Causes.
Thursday	"	5	-	-		
Friday	"	6	-	-		
Saturday	"	7	-	-		
Monday	"	9	-	-	}	The Second Seal—Appeal Motions with Appeals and Causes.

	"	10	-	-	}	Appeals and Causes.
day	"	11	-	-		
y	"	12	-	-		
	"	13	-	-		
	"	14	-	-	}	The Third Seal—Appeal Motions with Appeals and Causes.
	"	16	-	-		
	"	17	-	-	}	Appeals and Causes.
lay	"	18	-	-		
	"	19	-	-		
	"	20	-	-	}	The Fourth Seal—Appeal Motions with Appeals and Causes.
	"	21	-	-		
	"	23	-	-		Petitions.

**Before the VICE CHANCELLOR, at Lincoln's Inn.**

	Dec.	2	-	-	}	The First Seal—Motions.
	"	3	-	-		
ay	"	4	-	-	}	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
	"	5	-	-		
	"	6	-	-	}	Short Causes, Unopposed Petitions and Ditto.
	"	7	-	-		Pleas, Demurrers, Exceptions, Causes, and Further Directions.
	"	9	-	-	}	The Second Seal—Motions.
	"	10	-	-		
ay	"	11	-	-	}	Pleas, Demurrers, Exception, Causes, and Further Directions.
	"	12	-	-		
	"	13	-	-	}	Short Causes, Unopposed Petitions and Ditto.
	"	14	-	-		Pleas, Demurrers, Exceptions, Causes, and Further Directions.
	"	16	-	-	}	The Third Seal—Motions.
	"	17	-	-		
ay	"	18	-	-	}	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
	"	19	-	-		
	"	20	-	-	}	Short Causes, Unopposed Petitions and Ditto.
	"	21	-	-		The Fourth Seal—Motions.
	"	23	-	-		Petitions.

**s Honour the Vice-Chancellor will sit at LINCOLN'S INN after Term until the First Seal to hear Motions and Causes by order.**

**ROLLS' COURT.—Before the Right Hon. the MASTER OF THE ROLLS.**

	Dec.	2	-	-	}	Motions.
	"	3	-	-		
ay	"	4	-	-	}	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
	"	5	-	-		
	"	6	-	-	}	
	"	7	-	-		
	"	9	-	-	}	Motions.
	"	10	-	-		
ay	"	11	-	-	}	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
	"	12	-	-		
	"	13	-	-	}	
	"	14	-	-		
	"	16	-	-	}	Motions.
	"	17	-	-		
ay	"	18	-	-	}	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
	"	19	-	-		
	"	20	-	-	}	
	"	21	-	-		Motions.
	"	23	-	-		Petitions.

**ises, Consent Causes, and Consent Petitions, every Tuesday at the Sitting of the Court.**

**Business of the Courts.****COURT OF CHANCERY.**

## Causes.

Burgess v. Thompson—Robins v. Cleaver—  
Chatfield v. Betts—Ashleigh v. Waugh—Grafton v. Froggatt—Green v. Green—Morgan v. Swill—Thomas v. Thomas—Berwick v. Willett—Roberts v. Evans—Hughes v. Hughes, further directions—Cresswell v. Balfour—Gould v. Ultermore.

**VICE-CHANCELLOR'S COURT.**

## Short Causes.

Inge v. Inge—Dower v. Gregory—Evans v. Pilkington—Gilbert v. Bennett—Dolman v. Dolman—Horne v. White—Harrison v. Cumming—Cohen v. Waley, further directions and costs—Pritchard v. Morgan, ditto—Protheroe v. May, ditto—Festing v. Allen, ditto.

After which a list of thirteen unopposed Petitions.

## After the Petitions.

Horner v. Sayner, to be spoke to—Down v. Brayley, to be spoke to—St. John v. Champneys, exceptions by order.

## After which Motions continued.

**COURT OF QUEEN'S BENCH.**

## Sittings in Banco.

**COURT OF COMMON PLEAS.**

## Middlesex Special Juries.

Whitehead and another v. Barron—Galloway and another v. Bleadon—Currie v. Allmond—Becke v. Cameron and another.

## Middlesex Common Juries.

Doe, dem. Biers v. Cocks—Webster v. Else—Cass v. Smith—Toms v. Hedge, undefended—Dix and another v. Smith, ditto.

The last defended cause is No. 45 on the list.

**COURT OF EXCHEQUER.**

## Revenue Causes—Special Juries.

Attorney-General v. Boyne—Attorney-General v. Oliver.

## Middlesex Common Juries.

Rose v. Barron—Carter v. Johnson—Spooner v. Mason—Booker v. Staines—Halford v. Chittenden—Goldshede v. Holland—the same v. Caldwell—Dennison v. Barwell—King v. Golborne—Lewis v. Veney.

The last cause is No. 68 on the list.

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**NOTICE TO CORRESPONDENTS.**

DON JUAN.—Do pray find some other *non de guerre*.—We are afraid of *Sparks*.—Your answer to Prob. 3. vol. 3. came too late.

S. A. W.—Under consideration.

L. E. X.—If you are admitted an Attorney at the Courts at Westminster by taking out a *Town Certificate*, you may practice any where so long as you comply with the Rule H. 1 Geo. 3. K. B. and the Rule M. T. 1 W. 4. 8. Ex.

On Dec. 1 will be published, price 4s, to be continued Monthly, Vol. III. Part IV.

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# The Legal Guide.

I.] SATURDAY, DECEMBER 7, 1839.

[No. 6.]

## LAWS OF REAL PROPERTY.

### ESSAY II.

3 & 4 Wm. IV. cap. 74.

*for the Abolition of Fines and Reconveyances and for the Substitution of more Modes of Assurance.*—[28th Aug. 1833.]

(Continued from p. 67.)

CONSIDERED.—DEEDS OF APPOINTMENT AND SETTLEMENT.—NOT NECESSARY TO EXPR  
SITUTE AN INTENTION TO EXECUTE A  
; IF THE ACT CAN BE DONE ONLY  
T AUTHORITY. BUT WHERE THE  
REPORTS TO PASS THE INTEREST, IT  
BE CONSIDERED SO INTENDED, AND  
EXERCISE AN AUTHORITY.  
ION BETWEEN A TERM IN GROSS AND  
TO ATTEND THE INHERITANCE.

case of *Maundrell v. Maundrell*(a)  
ate before marriage was limited to  
as the husband should, by any  
will, appoint, and in default of ap-  
t to the use of himself for life, and  
decease to the use of his right heirs;  
question which arose upon the wife's  
dower against a purchaser, was,  
the power was valid. Sir W.  
M. R., said,(b) that the power was

merely nugatory, and nothing distinct or different from the fee. The fee was clearly in the husband until appointment. In *Goodhill v. Brigham*,(c) it was held that a power added to the fee was merely void; so the power in this case, followed by a limitation of the fee, must be absorbed in the fee, which includes every power. The reason commonly given why a power may have effect though limited to the owner of the fee is, that he may appoint in a mode by which his legal fee would not entitle him to convey. He gave no opinion upon the sufficiency of that reason; but in this case it was to such uses as he should appoint by deed or will, legally executed, and by those instruments he might have passed the fee, though nothing was said about the appointment. The limitation, therefore, operated purely as a limitation of the fee, and that fee he could only convey subject to her right of dower.

Sir Edward Sugden, in his *Treatise on Powers*,(d) thus observes upon *Goodhill v. Brigham*, The devise was to a married woman in fee, with a power superadded for her to dispose of the estate as she should think proper, and as if she were sole. The Court of Common Pleas held this power to be void, as repugnant to the fee before vested in her. We have seen that this decision cannot be

(a) ante, p. 65.

(b) L. 583.

III.

(c) 1 Bos. & Pull. 192.

(d) Vol. i. p. 110.

relied on. It has never been spoken of with satisfaction. I have seen an opinion of the late Lord Rosslyn's given in the year 1775, where the estate was limited by a fine and declaration of uses to the use of C. M. a married woman in fee, "together with such powers as are hereinafter mentioned and reserved (that is to say), that it should be lawful for her to appoint any new, or other use or uses, estate or estates," &c. in the usual way. The question was, whether the power was well created. He wrote the following opinion:—"The intent of the deed is clearly to give Mrs. M. an option to dispose of her estate, notwithstanding her coverture, and that construction of the words which will give effect to the clear intent of the deed and not destroy it, is certainly the best construction. The fee limited to Mrs. M. is qualified in the very sentence itself, by the powers after mentioned, inserted for no other purpose but to enable her to dispose of that fee, and which are to take effect out of the very estate given to her. *The deed would have been more properly drawn if the first use declared had been to such person or persons, and for such estates as she by deed or will should appoint, and in default of appointment to her in fee*; but it is exactly the same thing in substance to limit the estate to her in fee, subject to her power of appointment, for whoever claims as heir to her must, by the express terms of the deed, take subject to the power of appointment; and if it is well executed, as in this case it appears to be, the execution of the power defeats the title of the heir."

From this opinion it may be inferred that Lord Rosslyn would not have agreed with the decision in *Goodhill v. Brigham* had that case come before him, and it clearly shows that he thought an estate might be effectually limited to such uses as a person should appoint, and in default of appointment to the same person in fee. In a case before Lord KENYON he treated it as wholly

immaterial in what part of the deed powers are inserted, whether before or after the estates created. (a)

Lord ELDON in *Maundrell v. Maundrell*, said, the authority of *Sir Edward Cleere's* case, as well as all general doctrine, seemed to furnish this: that *it is not necessary to recite, that he means to execute the power: if the act is one, that he can do only by that authority*. Though the form may not at first suggest, that he proposes to exercise it, the purpose of the act makes it necessary to hold, that he did intend it. On the other hand it is in general clear where a party has both an authority and an interest, and does an act, purporting to mean to pass the interest, he shall be held to intend that, and not to exercise his authority. The tenor of this instrument is not only such as that he may be supposed to intend merely to pass an interest, but peculiarly so; for it recites the power over one estate, and his interest in that estate, and as to that estate expressly in exercise and by virtue of his power recited, and other powers and authorities, declares that former conveyance should remain, continue and be, to such uses, &c.: and then he goes on by lease and release to pass his interest in those estates. Having also this estate, and in it both a power and an interest, does not execute his power as he did as to the other estate, but passes his interest as he did in the other estate. This is not, therefore, the mere ordinary case, but affords the additional inference, that, where he means both to execute his power and to pass interest, he has done both. It is said, as that, his purpose required him to do so, two reasons; 1st. He meant the estate should pass free from dower; but then it is objected that there is a covenant against dower. The answer to that is, that it is a sort of surrogage, if the estate is not subject to dower.

(a) *Rex v. the Inhabitants of Easington*, 4 T. Rep. 177.

udent precaution, lest it should be to dower. There is also an answer *Svanock v. Lifford*; (a) for in that case is the same covenant against dower. answer, as to the purpose to have it dower, is suggested by the circumstance that all the conveyancers concerned in the preparation of this instrument, thought, having been assigned to attend the case, there was little or no danger of

is then said, there being a conveyance of the interest subject still to the exercise of power, this must be taken to be a reservation of the power, as well as a reservation of the interest; otherwise he might, by exercising his power, destroy the interest. But to that is, that his power is not exercised when he passes his whole interest, though not exercised, is destroyed.

But, if there is any reasonable doubt on that, it is purely a legal question which might be disposed of in a case, before a Court of Law. Another point in the same case, upon which Lord Hardwicke expressed a doubt whether it is possible to say, *the assignment of an estate, that has once been assigned to a person, is necessary from time to time, whenever that inheritance is made out of purchase*. If it is true, his Lordship added, that the law of the Court should be such at the time by Lord Hardwicke (b), and has been since understood to be so, that must prevail; but it is not to be perfectly satisfied that Lord Hardwicke did consider the law as settled at that time, and that it has since been so understood. The way in which it strikes me is this—it has been long settled, and the distinction between a term in gross, and a term to attend the inheritance. Where a term is created for a particular purpose,

and that purpose has been satisfied, if the instrument does not provide for the cesser of the term, when that purpose is satisfied the term remains without any object to which it is to be applied, and the beneficial interest in it is a creature of equity, to be disposed of and moulded according to the equitable interests of all persons having claims upon the inheritance. When that proposition is established it seems quite obvious that where the persons claiming subject to the term claim all under contract, whether there is an assignment of the term or not as to those who stand behind. *Qui prior est in tempore potior est in jure*. And the trustee of the term is a trustee for them, according to their priorities. And in *Willoughby v. Willoughby*, Lord Hardwicke has mainly intended to establish that there is no difference whether the term was originally expressed to attend the inheritance or not. But when the mode of conveyancing had created terms in many estates, and persons dying, it was difficult to find representatives; and it turned out in fact that a term was existing, it was not known where, and the dealing with the estate became dangerous, as a legal title could not be obtained, therefore it was very early decided, that if A and B advance money innocently, and C bought also innocently, not having notice of each others advances, he who first had the luck to get in the legal estate, had as good a right as any one, and should hold by his legal title the possession against the prior equities. And it was decided in *Willoughby v. Willoughby* (a) that to place them in that situation he must have a clear conscience and as good a right, and he must either get in the legal estate, or possess himself of the deed creating the term, which Lord Hardwicke admitted would do.

Afterwards came *Svanock v. Lifford*, *Lady Radnor v. Vandebendy* established, (b)

b. 6.; 2 Atk. 208. by the name of *Hill v.*

*Willoughby v. Willoughby*, 1 T. R. 763.

(a) 1 Term Rep. 763.

(b) Show. P. C. 69. Pra. Ch. 65.

that where a person purchases the inheritance, and there is an outstanding term, he may deal with the trustee of the term, and it is added that the trustee may deal with him, and upon payment to the owner of the inheritance, with full and complete notice of the dowress's title, the trustee who before was trustee for her and her husband having also distinct notice of the title to dower, they may defeat her title. There is a very important difference between the cases of dower and a mesne incumbrance. All Lord HARDWICKE's reasoning in *Swannock v. Lifford* goes to the difference between persons claiming under contract and under legal title, and he lays down generally, as a principle he should wish to see established, that the legal title should take their chance, and the Court would not interfere even to put dower out of the way. It is clear those cases do not furnish the same question, for Lord HARDWICKE lays down, and there is no doubt that if there is notice in the case of the incumbrance, you cannot deal for the legal title; and Lord HARDWICKE goes much further, that the trustee having notice cannot deal with you. There is, therefore, a clear distinction between the cases. Then the general doctrine, that *he who takes from the trustee with notice, is himself a trustee*, introduces a difficulty to say, if the trustee, having an estate expressly declared to attend the inheritance, is a trustee for all who have interests in the inheritance, in this sense, that he is a trustee for the dowress and also for him who has the inheritance subject to his wife's right of dower, having distinct notice of her right, and the purchaser also having notice of it, he may by a simple assignment create an estate not subject to the same equities, though only a transfer to another trustee to attend the inheritance.

(To be continued.)

#### PROBLEM VI.

##### VOL. 3.

WHAT IS AN ESTATE TAIL BY IMPLICATION?

TO THE EDITOR OF THE LEGAL GUIDE.

#### ANSWER TO PROBLEM 3. VOL. II.

Upon what is an action of debt founded?  
—For what is an action of detinue maintainable?

I. The action of *debt* is founded upon a privity of contract either expressed or implied, in which the certainty of the sum or duty appears, and the plaintiff is to recover the sum in *numero*, and not in damages. But when the damages can be reduced by the averment to a certainty, as to say so much per load for wood, &c. debt will lie. (Bull. N. P. tit. Debt.)

The action of debt is very extensive in its operation, and is sustainable on specialties records, simple contracts, express or implied, verbal or written, and on statute by a party grieved, or by a common informer (Bull. N. P. 167.)

II. The action of *detinue* is maintainable for the recovery of specific chattels only, and not for any real property (*Coupledike v. Coupledike*, Cro. Jac. 39); and such chattels must be clearly distinguishable from others; so that it would not lie for money, coin, or the like, unless such money or coin &c. was distinguishable by being in a bag or box (Co. Litt. 286; Cro. Eliz. 457); but for all chattels that can be so distinguished may be maintained. (See Co. Litt. 286.)

As a general rule to support the action of detinue, the plaintiff must have the absolute or general property in, and the right to the immediate possession of the goods sought to be recovered. So that it has been said it will not lie where the defendant has taken the goods tortuously; for by the trespass the property in the plaintiff is divested (Co. Dig. title Detinue (D.)); but it would seem from what was said by Vavasor in that case and also from what was said by Anderson and Warberton in *Bishop v. Montague* (Cro. Eliz. 824; and see Cro. Jac. 50), that the position cannot be maintained. But a position

has only a special property, as a c. may support this action where he takes the goods to the defendant, or taken out of such bailee's custody. (47; 2 Keb. 588.)

the goods belonged to a *femme sole* before marriage, it is said the husband must bring the action, on the ground that the property of them is in him at the time the action is brought. (Keb. 41; Noy, 1 N. P. 50.) And if goods come to the wife *covert*, detinue lies against the husband only. (Rol. Ab. 607.) But if such goods come to the wife before marriage, it is said the action must be brought against the husband and wife. (Co. Litt. 351. C.) The ground of this action is the *detainer*; it will therefore follow that it cannot be maintained against any person who is not in possession, as if a bailee of goods die, the action cannot be maintained against his personal representative, unless he takes possession of them. But if after the death of the defendant the stranger takes possession of them, the action will lie against him. (1 Rol. Ab. 607. D.) Nor will it lie against the defendant before any demand he lose them from him, though if he wrongfully deliver them to another he will continue liable. (Ainer, Pl. 1, 33, 40.)

C. B.

## Law Reports.

COURT OF CHANCERY.—Nov. 28.

WILKINSON v. HARWOOD.

*—Cestui que Trust of age, but of full age—PRACTICE as to discharging trustees by final decree upon Bill for account.*

Mr. Anderdon stated this to be a bill for an account of the rents and profits of freehold lands and the trustees appointed under the will of the testator of Miss Wilkinson for her life. The account was almost of course, but one peculiarity in the bill, that it was the next friend of Miss Wilkinson, who, being imbecile, was of too slow and backward to manage her own affairs.

Mr. Craig, for the defendant, said there was no objection to the account, but as the young lady was of age, and therefore, *prima facie*, competent to file her own bill, he was only anxious that the decree should be final, and operate as a discharge to his client, who was the representative of the surviving trustee.

The LORD CHANCELLOR said, the appointment of a next friend would be a security to the defendant, and there must be the usual decree to account.

Mr. Anderdon then presented a petition from Mr. Gooday, the next friend of Miss Wilkinson, praying that the costs occasioned by his intervention on the unsuccessful attempt to sue out a commission of lunacy against her might be allowed him. It also asked the costs of her board, the terms of which had been settled by Colonel Addison as her guardian at £60. a-year. It appeared that while residing at Sudbury her health, appearance, and intellect had much improved.

Mr. Walker, for the father of Miss Wilkinson, suggested that he was justified in attempting to sue out the commission by the evidence of medical men. He now acquiesced in the suit, as he was ready to do in any course which was most likely to promote his daughter's interests.

The LORD CHANCELLOR said he could not allow costs to the father of Miss Wilkinson. It was not enough to show incompetency of mind in a party; there must be other circumstances to render a commission expedient and necessary.

ROLLS COURT.—Nov. 11

EATON v. SMITH.

*EXECUTORS—PERSONAL CONFIDENCE—limited bequest—power of one of three Executors who proved the will of a Testator where the other two had not executed a Deed of disclaimer.*

This was a Bill to carry into execution the will of John Eaton, deceased, a wheelwright, and was filed by all the children of the testator, excepting John Eaton, who had been made with Smith the acting executor, a defendant. A decree had been made, and an account ordered to be taken. The Master, by his report, stated the balance due from the executor and the available personal estate of the testator. By the will the testator appointed three executors, whom he authorised and requested to carry on his business, and he directed that they should stand possessed of the monies arising from the sale of his property and from his business, upon trust, to divide the same among his children, all of whom he named except his son John. The testator continued, he had purposely omitted the name of his son John on account of his beha-



viour. He gave him 5*l.* only, and trusted that he would alter his conduct and behave himself towards his brothers and sisters with that kindness and affection that was due to them, and towards his executors with respect; and in case he did so, the testator gave unto his three trustees and executors, *and the survivors and survivor of them, and the executors and administrators of such survivors*, full authority to permit his son John to have an equal share of his estate with his brothers and sisters. The defendant Smith alone proved the will. The testator's business was carried on by his two sons John and George. The business has been well conducted by John, who had been bred to it, which George had not, and yielded a large profit.

Mr. Kindersley, for the defendant Smith, admitted that the business had prospered, and that it had yielded a profit of not less than 33 per cent.

Mr. Girdlestone, for the plaintiff. John Eaton the younger, died in 1828, and another person had been appointed to carry on the business. A state of facts had been brought in before the Master, stating that John Eaton, the son, had demeaned himself well, and that his representatives were entitled to an equal share with his brothers and sisters in the executor's property; but in the affidavit in support of this statement the defendant Smith only stated that he had employed John Eaton to conduct the business.

Lord LANGDALE.—The testator intended that his son John should have an opportunity of redeeming himself.

Mr. Girdlestone.—There were three executors appointed by the testator—two declined to act, but executed no disclaimer. Was it competent for Smith, the sole acting executor under the will, to exercise his discretion on the claim made for John Eaton, the son?

Lord LANGDALE.—It was not a personal confidence, because it was to the executors and to the survivor of them, and to the executors of such survivor.—Order made.

#### COURT OF QUEEN'S BENCH.—Nov. 23.

Sittings in Banco.

GOCOCK v. WELLER.

WRIT of CAPIAS—*Whether an Insolvent Debtor in prison under a remand, may be detained by a Writ of Capias, without a Judge's Order or Summons, although there might be no apprehension of his leaving the country.*

Mr. Ball moved for a writ of *capias* without

a judge's order or summons being previously issued. On Thursday last the defendant was opposed by his creditors in the Insolvent Debtors' Court, and was remanded for seven months for having fraudulently disposed of part of his property. Being in custody at the suit of a friendly creditor, it was feared that the object of the other creditors would be defeated, as the insolvent would be entitled to his discharge at the end of the seven months. But the Act of 1 & 2 Vict. c. 110. which abolished arrest by mesne process, did not (he contended) include such a case as this, and therefore the insolvent might be detained by a *capias* without a judge's order or summons, and even though there might be no fear that the insolvent was likely to leave the country.

Lord DENMAN.—What was the reason assigned by the officer for not granting the *capias*?

Mr. Ball.—That he wished for the direction of the Court.

Lord DENMAN.—Did you mention the case to Mr. Justice Littledale in the Bail Court?

Mr. Ball.—I did, and he wished to have the opinion of the full Court.

Rule granted.

#### COURT OF COMMON PLEAS.—Nov. 23.

NEILSON v. SLEE.

RULE TO COMPUTE—*Service where Defendant is abroad*—PRACTICE.

Mr. Ogle moved to make a rule absolute to compute principal and interest, due on a promissory note of the defendant, who was the captain of a ship, and had sailed abroad. The writ had been served at his residence, No. 45, Wellclose-square, in September, and an appearance having been entered for him, notice of declaration was delivered to him at the same place on the 24th of October. He then asked for time, and the plaintiff consented to allow him fourteen days to pay the debt and costs, at the expiration of which time a rule *nisi* to compute was obtained; but on an attempt being made to serve him at his house, it was stated that he was gone abroad, having sailed four days before. A copy of the rule was left with a female servant on the premises, and another copy was stuck up in the Master's Office, it was submitted that this was sufficient service. Affidavit of *such service* was made.

TINDAL, C. J.—The question is, whether should not have been part of the rule *nisi* that this should be deemed good service. The rule may be amended in that respect.

Rule refused.

Nov. 25.

OF BARRISTERS FROM THIS COURT.

MR. JUSTICE TINDAL addressed Mr. Rankie as follows:—With respect to the motion made by my brother Wilde on the 10th of term, on the subject of the sole privilege of the sergeants being practising in this Court, notwithstanding the warrant of the Crown under the 1st, we have given the matter full consideration, and resolved on the course we have adopted. Upon the first day of next term, I should, owing to circumstances, be absent from town on that day, then on my return, I shall, if any gentleman of the degree of the coif be present, not fail to move. But at the same time, any gentleman so first passed over shall be making any observations as to the merits of the degree of the coif, to be heard by himself and of other members of the Bench. The Court will be willing to hear him on that day, either then, or if his observations appear to require further consideration, on some future day, announce the course we have finally adopted, and the reasons on which it has been founded.

Nov. 26.

Sittings at Nisi Prius.

MR. V. JOHNSON AND OTHERS.

*For Rent when a Landlord has a Right to Distrain.*

An action to recover the value of a furniture distrained by the defendant.

It was set up, that the plaintiff had removed the goods in question to the defendant from distraining for the rent, and that there was considerable doubt upon the evidence whether the rent was due on the 17th of the month, the goods having been removed on the 18th, in the middle of the day, the defendant living at Gravesend.

MR. JUSTICE said that it was now settled that unless the rent was actually due and the goods were removed, the landlord had no legal right to follow them.

The Court returned a verdict for the defendants, and the learned Judge's direction, found that the goods to be 18*l.*, for which sum the plaintiff's counsel leave to move to the Court, in case the Court above should award of a point of law raised by them.

COURT OF EXCHEQUER.—Nov. 15.

Sittings in Banco.

LEE v. HOLLAND.

WARRANT OF ATTORNEY—PRACTICE—*Necessity that the Affidavit should allege that the party making it saw the Defendant alive on a certain day.*

Mr. Whitmore moved for leave to enter up judgment on a warrant of attorney. In order to prove that the defendant was alive on a certain day, the deponent swore that he "saw" him on that day. The officer of the Court declined to draw up the rule, because the affidavit did not allege that the party making it saw the defendant "alive." But the affidavit went on to state that he verily believed the defendant to be "still alive," which could not be had he not been living when seen some days before.

The Court thought it better to adhere to the long-established forms used in these cases, and directed the affidavit to be amended before the rule issued.

Sittings in Banco.

Nov. 16.

MARKS v. BENJAMIN.

LICENSED VICTUALLERS—*What constitutes a Disorderly House under the Stat. 25 Geo. 2. c. 36.*

This penal action was tried on the 25th of June last (a), and was brought against the defendant as the landlord and occupier of Howard's Coffee House, situate in St. James's-place, Duke's-place, Aldgate, a place much resorted to by members of the Jewish faith, who were in the habit of celebrating their marriage feasts there, keeping the Passover, and also giving public and private balls, concerts, and masquerades, to enforce the penalty of £100. under sec. 2. Geo. II. c. 36. on the plea of the house being kept for public "music and dancing" without a license, and therefore within the terms of the Act a "disorderly house." At the trial, Lord Abinger was decidedly of opinion that the case was not proved, and therefore directed a nonsuit to be entered, but

Mr. Humfrey having obtained a rule nisi for a new trial on the ground that the case ought to have been submitted to the jury, who ought to have found the facts.

Mr. Jervis now appeared in opposition thereto, and argued that the learned Chief Baron was quite correct in withholding the case from the jury, for that the facts proved showed, on the authority of several cases cited by the learned

(a) See Report and ante, vol. ii. p. 152.

gentleman, that the house did not come within the terms of the Act. In order to constitute a disorderly house within the Act, it ought to be shown that it was kept expressly for the purpose of public music and dancing, and opened at regular and stated times, and that the defendant was aware of the purpose for which it was opened by the parties to whom the room was let out by him.

Mr. *Humfrey* submitted, that the facts proved did bring the case within the Act; at all events, it was a case for the jury to say whether the defendant knew of the proceedings. As it was, the learned judge had, on his own authority, told the jury that the house was not a disorderly house within the Act. If the Court were to uphold that ruling without taking the opinion of the jury, they would be deciding as a matter of law that under all the strong facts proved in the case, the house was not within the Act, which would, in fact, be a virtual repeal of the statute.

The COURT, after consideration, made the rule absolute for a new trial, the puisne Barons being of opinion that there was something to go to the jury.

Nov. 26.

Sittings in Banco.

BENNETT v. BECKETT.

RULE to compute against two persons, makers of a PROMISSORY NOTE.—Service—PRACTICE.

This was an action against two parties jointly liable on a promissory note, in which the judgment had been allowed to go by default.

Mr. *Addison* now moved to make a rule absolute to refer the case to the Master, as usual, to compute the amount of principal and interest due on the note in question; but was desirous of knowing whether the service of the rule nisi on one only of the defendants was enough to entitle him to make his rule absolute against both the defendants.

Lord ABINGER.—That is enough. There is no necessity to serve them both, if they are jointly liable.

Rule absolute.

PREROGATIVE COURT.—Nov. 16.

HOLBY AND WIFE v. MUNNINGS.

REVOCATION of a WILL by alterations and obliterations made by the Testator.

Proving the will of Mr. G. B. Munnings, by Mrs. Ann Rebecca Holby, wife of John Holby, one of the daughters of the deceased, as sole executrix, against the other children of the deceased. The deceased died suddenly on the 9th

of February, 1837, a widower, leaving a real estate worth £4000., and personal property of the value of £2000. In March, 1827, his wife being living, and being on terms of affection with all his children, he executed a will, which was attested by three witnesses, and which he enclosed in an envelope, sealed. In April, 1827, his wife died, and having had a quarrel with his son, Thomas Munnings, he made various alterations in his will, cutting off his son with a shilling. He afterwards quarrelled with his other sons, and in September, 1834, he made further alterations in the will, cutting them off with a shilling, and making his daughter Ann Rebecca sole executrix. After his death the will was found in a secret well in his writing-desk, enclosed in an envelope, but not sealed, with the various alterations and obliterations, and the names of the attesting witnesses erased. It appeared that the deceased, prior to his death, had become much displeased with his daughter, on account of her marriage, and had declared that she should not be benefited by his property. The case came on for hearing upon the answers and evidence of the three witnesses. For Mrs. Holby, it was contended that the will, as altered, was an operative will, and not revoked; on the other hand, it was argued that, on the face of the paper, with the alterations and the cancellation of the attestation clause, there was not sufficient to entitle it to probate.

After hearing the *Queen's Advocate* and *Dr. Haggard*, for the respective parties,

Sir H. JENNER said, the case was not without difficulty; but he was of opinion that the will was revoked, and that, as far as appeared to the Court, the deceased must be held to have died intestate. It was clear that it was not his intention latterly that his daughter, Mrs. Holby, should have so large a share of his property as was given her by the altered will; and it was equally clear that he did not intend that his sons should have the property that would devolve to them by an intestacy; but it was a choice of difficulties, and the Court was of opinion that the deceased had left undone what he probably intended to do—namely, re-execute the will in the presence of witnesses.

COURT OF THE SHERIFF OF MIDDLESEX

STOCKDALE v. HANSARD.

*Libel.*

(Continued from page 59.)

The UNDER-SHERIFF.—How is it evidence in this cause?

Mr. *Stockdale*.—It had been published by defendants.

The UNDER-SHERIFF.—The costs of the former trial are not evidence in this. The pro

if the courts of law in former trials given in evidence, but not printed less to show the *animus* of the defendant the proceedings of the House of could not be introduced there.

*Stockdale*.—The defendants themselves no *malus animus* in this case—that be with the authors; but for what the published they were responsible to to the country. They pleaded that privileged to publish what the House ordered. And when they got 1300*l.* costs, what was allowed to him? ent four years of time and talent, and aged man; he had got only 1*l.* 4*d.*; winner—he had beaten the great men so highly paid, and there was his re- must, however, refer to a consecutive blished by the inspectors of prisons one of whom was Mr. William Craw- other the Rev. Whitworth Russell, worth Russell, Esq. In their report, e complained, they stated that he was er of a certain book which was found the rooms of Newgate. It appeared nged to one Foulger, who had been a ship, and who had had it for the use , and the attention of the Lord Mayor nen having been called to the book by uncourteous language of the inspec- sons, took it into their consideration. ) the opinion of the aldermen the in- us went on:—"We now proceed to e mis-statements in the Report of the of the Court of Aldermen, which we dy shown to be our duty to correct. g of the statements in the inspectors' lative to the books found by them in ress through the wards of the prison, ittee thus express themselves:—"Pass- other books particularised in the re- onfine ourselves to the notice of the red to, for the name of which and its nks are left; and the name of Stock- tioned as that of the publisher, and mal statement that the book was of a usting nature, and the plates obscene nt in the extreme. We were prepared net with a publication very different which was handed to us, as being the ook referred to by the inspectors. We t it bore the title of the 'Generative ' John Robertson,' and that it was de- y permission to the late Dr. Baillie. ed on a careful examination to be a book, the plates to be purely anat- culated to attract the attention of per- nected with surgical science; and we om Mr. Cope that it belonged to the d prisoner Foulger, who had been cap-

tain of a whaler, and who had devoted himself to such studies.' But we deny," said the inspectors, "that the book is a scientific work," and they characterised it as a work of Stockdale's, the obscene publisher. Now, he would not attempt to disgust the Court by the one thousand times more obscene language introduced into the report of these esquire and reverend inspectors of prisons, but he must say that of all the works he had ever read, if he wanted a book with the most obscene expressions, he would take the report. And yet that was the book which the House of Commons threatened, if there were a complaint. He would hand the book to the jury, but he would only read one inferential remark. It was said of one prison, "In this yard the visitors are admitted close to the prisoners, and are separated only by open iron railings, and rarely in the presence of an officer." There was also like evidence in p. 106.

The UNDER-SHERIFF.—Was the book of defendant's publishing?

Mr. *Stockdale*.—It was published after the former report, and it was bought after the former publication; it was published in 1837.

The UNDER-SHERIFF.—So it appears by the type. Can you give us any evidence of the subsequent publication?

Mr. *Stockdale* did not know whether he could call the defendant's attorney.

The UNDER-SHERIFF did not know whether the defendant's attorney appeared.

Mr. *Parkes*, who was in court, said that he did not appear as defendant's attorney.

Mr. *Stockdale* continued. There were doubtless those who could find "sermons in stones, and good in every thing;" but he would refer the jury to pages 106, 107, 136, and 137 of the report of the inspectors, and he would assert that in that book the housebreaker, the highwayman, and other wrong-doers, would obtain a code of instruction in misdeeds, and that those who wished to plunge into disgusting language might, in the books which it was thought necessary to force into circulation in this moral country, obtain a better code of immorality and vice than from any other source. It was well known that by an ingenuity in putting leading questions every one might obtain what answers he pleased. These inspectors put leading questions, and though Mr. Cope, of Newgate, remonstrated, he was obliged to go on; and Mr. Chesterton, of Cold-Bath-Fields, had complained of distinct misrepresentation. He would next refer to what had been published that morning, to show that Messrs. Hansard still continued to pursue the same course that they had hitherto taken in that cause.

The UNDER-SHERIFF could not visit the defendants with anything that took place in the

Queen's Bench yesterday on the part of the sheriff. If the plaintiff were damnified by anything the sheriff had done he had his remedy, but it could not injure the defendants unless it were done with their knowledge.

Mr. *Stockdale* would observe that all the legal talent which the public purse could employ was against him; but his legal right he would have, though they should give a fee to counsel under cover of another party.

The UNDER-SHERIFF had told him before, and must tell the jury, that the defendants could have nothing to do with that.

Mr. *Stockdale*.—On the first occasion application was made to the House of Commons; on the second cause exactly the same took place; and again, in the present cause, the day before compensation was to be given, another attempt was made to deprive him of his right by a side-wind. He did not know what was strict law, but he knew constitutional law better than both Houses of Parliament. He could not be committed without being brought to the bar, and if the House should usurp such a power under the really proud constitution of this empire, the jury should want no power that he could afford either in their defence or his own. If the House of Commons should dare to attempt such a despotism, they should be met by him at the bar of the House, and he would show them there what he might have shown them, as their equal, if he had not consented to become a partisan, had he not preferred eating bread, and coarse bread it was, to selling the rights of his country. The Sheriff of Middlesex had not nerve, or he never would have truckled to that power, or to any other. He sat in that court as a judge; but the effect of his application to the Court of Queen's Bench would be to deprive the jury of their greatest right under the British constitution. The Attorney-General had stated in the Court of Queen's Bench that his (Mr. *Stockdale's*) complaints were completely futile, and that he had every power, by petitioning the House of Commons, to obtain redress from the same high court by which the injury had been inflicted. But before he had taken a single step, Lord John Russell had refused to present his petition.

The UNDER-SHERIFF.—Unless the defendants were cognizant of this it could not be stated.

Mr. *Stockdale*. Before he had taken any steps he did petition, or attempt to petition the House. He might read many applications to Members to present his petition. Every one told him that he would have redress if there were a wrong. Every one said, you have the right to petition, "but I will not present it." And the House would not even appoint an officer to  
 "the petitions which Members would not

present. And could the jury conceive that any sum which they could give would compensate a man so persecuted? He and his father had spent 30,000*l.* in maintaining the institutions of the country; he was not the one to pull them down; and yet he had been represented to the judges as a man about to fly to America. It was fifty years since his father, defended by the late Lord Erskine, had stood at the bar of the House, and successfully opposed arbitrary power. But there were giants in those days in the House. He would only refer, in continuation, to what had been brought before the Court of Queen's Bench, by his able advocate in the last action; the opinion of Lord Brougham, which was so applicable and so much to the point, that he was sure it would have its due weight with the jury in assessing the damages in the present case. But he ought first to remove a wrong impression which the former verdict had created. His counsel in the hurry had said "whether you give 100*l.* or a farthing, you must give something," and the jury, mistaking the highest sum for the limit of his claim, had given the highest sum that was named, thinking he had asked no more. He had received 100 guineas a-day, and his acquirements entitled him to a larger sum than if he kept a chandler's shop; but it was for the jury to say what damages those talents entitled him to; for a man whose education enabled him to plead his own cause was entitled to more damages than the mere mendicant, whose wants would be relieved by a meal given to him by the Mendicity Society. But even the right of the mendicant was not to be infringed, and in his own case the jury ought not to limit the amount by a mere consideration of pounds, shillings, and pence. Had he not suffered materially? Would the jury, after the charges that had been made against him, entrust him to publish any work? And yet he challenged for his character the fullest inquiry, and only as it came out clear would he ask them to appreciate it. With these prefatory remarks he would read what Lord Brougham said, referring to his (Mr. *Stockdale's*) case. These were Lord Brougham's words:—"The pretensions, at different times set up by the Houses of Parliament to certain privileges, placing them above the law of the land, are the more familiarly known in consequence of their having of late been brought into discussion by a new and extravagant claim asserted on behalf of the House of Commons to publish libels through irresponsible agents. The natural course of irregular and anomalous power is that it should increase gradually until it becomes intolerable, and create resistance which finally prevails.

(To be continued.)

ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNIES (a)  
IN HILARY TERM, 1840.

(Continued from p. 75.)

<i>Articled Clerk's Name and Residence.</i>	<i>To whom Articled or Assigned.</i>
Thomas Carr, North Shields.	John Lowrey, North Shields.
Andrew, Starcross.	John Gidley, Exeter.
William, the younger, 18, Portugal Birmingham, and Manchester.	Samuel Danks, Birmingham.
Joseph, 6, Frederick's Place, Old Jewry.	William Stevens, Frederick's Place, Old Jewry.
Robert, London; Tewkesbury.	Lindsey Winterbottom, Tewkesbury; assigned to Edw. Blackmore, 1, Mitre Court, Temple.
John Fitchett, 40, Sidmouth Street; London.	Joseph Wagstaff, Warrington.
William, Bradford, Wilts.	William Timbrell, Bradford.
Richard, 68, Myddleton Street, Clerk-	William Belton Crealock, 4, Regent Street.
Henry William, York.	Thomas Walker, York.
William Henry, Kingston-upon-Hull.	William Henry Rosser, Gray's Inn Place; assigned to Charles Frost, Kingston-upon- Hull.
Alfred Allen, 27, Lloyd Square, Pen-	John Bridges, Red Lion Square.
George, Wells Street, Gray's Inn Road; Barnsley.	John Mercer, the younger, Ramsgate.
William John, 1, New Court, Mid-	Giles Miller, Goudhurst.
Joshua Furness, 1, Manchester Gray's Inn Road; and Halifax.	James Stansfeld, Halifax.
William Henry, 51, Manchester Street, Manchester Square; Haverfordwest; Hen-	William Evans, Haverfordwest.
Thomas, 27, Tavistock Place, Tavistock Stratton.	Thomas Lediard, Cirencester.
William George, Clapham.	Lawrence Desborough, Size Lane.
William, 12, Upper Kennington	Beriah Drew, 185, Bermondsey Street; assigned to Geo. Drew, 185, Bermondsey Street.
Muel Swire, Richmond, Yorkshire.	Ottiwel Tomlin the elder, Richmond, Yorkshire.
Thomas, 25, Featherstone Buildings; Melksham.	Henry Goddard Awdry, Melksham.
James Henry George, 13, Little Street; Tiverton.	Clement Govett, Tiverton; assigned to Ro- bert Loosemore, Tiverton.
William, Skipton.	Thomas Brown, Skipton.
George Harrison, 5, New Boswell Court	William Pybus, Middleton Tyas; assigned to Thomas Henry Dixon, 5, New Boswell Court
Harry Harris, 6, Essex Street, Strand.	John Geare, the elder, Exeter; assigned to Wightwick Roberts, Lincoln's Inn Fields.
Edward, Cheltenham.	Joseph Cooper Stratford, Cheltenham.
Frederick Rowland, 4, Warwick Court, London; and 14, St. Thomas Street East, London.	Horatio Hughes, Aberystwith.
Thomas, 58, Pratt Street, Camden and Huddersfield.	William Barker, Huddersfield.
Thomas, 44, Southampton Buildings; Aln-	William Dickson, Alnwick.
and Middleton Street.	
Thomas, 20, Baker Street, Lloyd	William Rymer, Darlington.
; Cockerton; and Norfolk Street,	
London.	
Henry, 34, Percy Street, Bedford Square;	John Teesdale, 31, Fenchurch Street.
John, Great Coram Street.	(To be continued.)

(a) Marked \* are Common Pleas, the rest are Queen's Bench.

## GENTLEMEN CALLED TO THE BAR, MICHAELMAS, 1839.

## LINCOLN'S INN.—Nov. 19.

Thomas Flowers.  
William Daniel Bullock.  
Joseph Whalley.  
Lumsden Mackeson.  
Josiah Heale.

## Nov. 22.

Alban Charles Stonor.  
Charles Cassidi.  
John Todd, jun.  
Andrew Bisset.  
Roger Wood.

## INNER TEMPLE.—Nov. 22.

Richard Ford.  
William Atherton.  
James William Dacdonald.  
George Tickell.  
Edward Platt.  
John Williamson Fulton.  
James Plaisted Wilde.  
William Forsyth.  
George Taylor.  
Robert Thorpe.  
William Webster Watson.

John Edward Panter.  
Stephen Charles Denison.  
George Wilkin.  
George Goodin Moulton Barrett.  
John Edward Giles.

## MIDDLE TEMPLE.—Nov. 6.

Patrick Robert Welch.  
Hamilton Gorges.  
Rolla Rouse.  
Henry Nichols.

## Nov. 22.

Matthew Fortescue.  
James Vaughan.  
Vincent Dowling.  
Thomas Hanmer.  
Edward Windsor.  
Edmund Humphrey Woolrych.  
Simon Bristowe.  
George Henry Woodward.  
John Monk.  
John Burmester.  
James Jell Chalk.

## GRAY'S INN.—Nov. 22.

Richard George Stevens.

## ARTICLED CLERKS WHO PASSED THEIR EXAMINATION

## MICHAELMAS TERM, 1839.

<i>Names.</i>	<i>Name and Residence of Attorney to whom articulated or assigned.</i>
Adney, Frederick	Henry Mooring Aldridge, Poole.
Anderson, Thomas Francis	George Anderson, Ludlow, Salop; assigned to George Pleydell Wilton, 16, Gray's-inn-square.
Arthur, Edward	George Eastlake, Plymouth.
Ashford, Robert	Henry Scarth, 2, Lyon's Inn.
Awdry, Frederick	West Awdry, Chippenham, Wilts.
Baker, John Howard	Richard Underhill, Birmingham; assigned to William Wills, Birmingham.
Bentall, Francis	John Coles, 25, Throgmorton-street.
Bartlett, Robert Henry William	Samuel Craddock, Shepton Mallet; assigned to Edward Michell, Shepton Mallet.
Bartlett, Alfred Durling	Robert Bartlett, Reading.
Beaton, Charles	Robert Cook, Bath.
Bell, Adam	John Law, Manchester.
Bircham, Merrick Bircham	Francis John Gunning, Cambridge; assigned to Frederick Talbot, 47, Bedford-row.
Bonsall, John George William	John Thomas Herbert Parry, and John Jones Atwood, Aberystwith.
Booth, Charles Brook	George Holmer, 23, Bridge-street, Southwark.
Bowden, James (B. A.)	William Tooke, 39, Bedford-row; assigned to William Ogle Hunt, 10, Whitehall.
Boyson, John Robert	Edward Gatty, 2, Red-lion-square.
Braithwaite, Francis, the younger	George Rawson, Nottingham; assigned to James Parke, 63, Lincoln's-inn-fields.
Briggs, William Sturges	Thomas Briggs, 55, Lincoln's-inn-fields.
Brown, William	Richard Maychell, Bolton-le-Moors, Lancaster; assigned to William Christopher Chew, Manchester; assigned to William Hugh Myers, Back-king-street, Manchester.

James	William Pass, Altrincham.
John Henry	Alexander Thompson, Manchester.
Thomas William	George Capron, 9, New Burlington-street; assigned to Thomas Loftus, New Inn.
John Hawkey Bingham	John Smale, Exeter.
th, Thomas Mitchell	Edward Sykes, Wakefield.
Barnabas, the younger	John Rawlins, Birmingham.
Charles John	John William Fleetwood, Wolverhampton.
Fred. Wm. Pouget	John Kelly, Plymouth.
r	George Simmons, the younger, Truro.
Samuel	Matthew Rackham, Norwich; assigned to George Frederick Hudson, 23, Bucklersbury.
William	Meaburn Staniland, Boston.
avenport Welch	John Gidley, Exeter.
Richard	Robert Loosemore, Tiverton, Devon; assigned to William Henry Clapham, 29, Great Portland-street.
John James, the younger	John James Coulton, the elder, King's Lynn.
William Brissett	Sir George Stephens, Knt., 17, King's-arms-yard, Coleman-st.
Henry	Richard Dewes, Coventry.
John Reed	George Frederick Fairclough, Liverpool.
n	William Hazard, Redenall-with-Harleston, co. Norfolk.
Richard	Joseph Hayward, Sheffield.
n, the younger	David Davies, 51, Leicester-square.
David	George Allison, Richmond, county York, and Darlington, county Durham.
Edward Falkner	Frederick Day, Hemel Hemstead; assigned to Thomas Fairthorne, St. Albans; assigned to Thomas Pocock, 59, Bartholomew-close.
Frederick	George Shaw, Bellericay, Essex.
Wm. Gley	Frederick Lucas, Louth, Leicester.
Thomas Washbourne	Frederick Dowding, Bath.
Edward	Robert Gillam, the younger, Worcester.
John Cree	John Hull Terrell, Exeter; assigned to Hull Terrell, 30, Basinghall-street.
John Beaumont	William Barker, Huddersfield.
n, Grosvenor	George Hodgkinson, Newark-upon-Trent
Alfred Catchmayd	Robert Osborne, Bristol.
Beneca	William Hughes, 7, George-street, Minorities.
John	Robert Heming Parr, Poole,
Joseph	Thomas Harrison, 5, Walbrook.
William	Robert Barbor, 122, Fetter-lane; assigned to Francis John Gough, 32, East-street, Red-lion-square; assigned to Richard Nation, 23, Somerset-street, Portman-square.
Is Porter	John King, Buckingham; assigned to Thomas Kennedy, 100, Chancery-lane.
Frederick	Charles Salt, Rugeley.
rt Paramor	William Lee, Sandwich.
Charles John	Charles Beare Longcroft, Havant, Herts; assigned to William Bromley, 3, Gray's-inn-square.
ncis	William Lowe, 2, Tanfield-court, Temple.
l, Henry Robert	G. Rawson, Nottingham; assigned to Rich. Hole, Leicester.
Samuel	Robert Soulthorpe, Peter-gate, Nottingham.
William, the younger	Thomas Blackwel Mason, Doncaster.
John Fitchett	Joseph Wagstaff, Warrington.
Frederick	Thomas Metcalfe, 5, Lincoln's-inn.
James Arthur	John Carr, Bedford-row; Arthur William Tooke, Bedford-row.
Richard	Matthew Brettingham, Kingsbury, Bungay, Suffolk; assigned to John Chevallier Cobbold, Ipswich; assigned to Alfred Cobbold, 5, Chancery-lane.



Nodes, Stephenson

Oliver, John Bass  
Overton, James  
Parrott, William

Paxon, Francis  
Percival, Andrew  
Philips, Charles Frederick

Pilgrim, John Thomas  
Plews, Thomas  
Polydore, Henry  
Preston, Charles  
Prothero, Charles  
Purvis, Frederick

Riccard, Russell Martyn  
Roberts, Frederick Rowland  
Robinson, Joseph  
Rowland, John Leche  
Salmon, George  
Salomon, Joseph Constant

Salmon, William

Sharland, George Edward  
Sheppard, Thomas James  
Slade, James Frederick

Smith, James Knight

Smith, Robert  
Snell, George Wells  
Sparke, James Bird

Stevens, Charles, jun.  
Stone, David Henry  
Stone, John  
Strick, Edward

Surrage, John  
Teale, William  
Theobald, John Peter  
Thompson, John

Tillett, Jacob Henry  
Turner, William Cullen  
Tuson, Henry, the younger  
Twining, Daniel  
Twisden, Thomas Edward  
Watson, George Henry  
Wight, Thomas  
Williams, Edward  
Williams, Lewis Walter

Worsley, Jonathan  
Yetta, Joseph Musckett

John Oliver Jones, 1, John-street, Bedford-row ; assigned to  
John Philpot, 3, Southampton-street, Bloomsbury.  
Thomas Fowke Andrew Burnaby, Newark-upon-Trent.  
John Overton, Fakenham, co. Norfolk.  
Robert Southes, 16, Ely-place ; assigned to Edward Augustine  
Vorley, Stoney-Stratford, Buckingham.  
Gustavus Thomas Taylor, 18, Featherstone-buildings.  
John Gates, Peterborough.  
John James, jun., Newnham ; James Leman, 51, Lincoln's-inn-  
fields.

Henry Power, Atherston.  
Edward Lawrence, 32, Bucklersbury.  
Edmund Sambert Newman, Cheltenham.  
Isaas Preston, the younger, Yarmouth.  
Thomas Phillips, the younger, Newport, Monmouth.  
James Wenn, Ipswich ; assigned to John Dyneley, 1, Field-  
court, Gray's-inn ; assigned to John Coverdale, 1, Field-  
court, Gray's-inn.

James Edward Jackson Riccard, Southmolton, Devon.

Horatio Hughes, Aberystwyth.

James Jay, Hereford.

William Cooper, Shrewsbury.

Edmund Lloyd, Thornbury.

George Booth, 4, Newman-street, Oxford-street ; assigned to  
Charles Addis, 10, Great Queen-street, Westminster.

Sturley Nunn, Ixworth ; assigned to Harry Wayman, Bury St.  
Edmunds.

John Physick, the younger, Bath.

Francis Philip Wingate, East Stonehouse, Devon.

Philip Goode, Howland-street, Fitzroy-square ; assigned to  
Charles Dodd, Craven-street.

Clement Chadborn, Newnham ; assigned to Thomas Elliott,  
Newnham.

William Dean, 109, Guildford-street.

William Thaliassen Morgan, Launceston.

Godfrey Goddard, Wood-street ; Frederick Harrison, 34,  
Bloomsbury-square.

James Dougan, 7, Symond's-inn.

Frederick Nicholls Devey, 34, Ely-place.

Henry John Mant, Bath.

John Williams, Swansea ; assigned to John Jackson Price,  
Swansea.

Thomas Lyddon Surrage, Sandwich.

Robert Barr, Leeds.

John Theobald, 2, Staple-inn.

Walter Burley, Shrewsbury : assigned to Jonathan Scarth,  
Shrewsbury.

John Rising Staff, Norwich.

William Ormond, Wantage, co. Berks.

Henry Tuson, Northover, Somerset.

Theed Pearse, the younger, Bedford.

James Partridge, Tiverton, Devon.

Thomas Hodson, Castlegate, city of York.

William Robinson, Dudley.

Peter Warburton, St. Owen's-street, Hereford.

Ambrose Clare, Frederick's-place, Old Jewry, and 5, Broad-  
street-buildings.

Thomas Carthew, Woodbridge, Suffolk.

Nathaniel Palmer, Great Yarmouth ; assigned to Robert Jack-  
son, 41, Bedford row.

## NEW POSTAGE ACT.

rect attention to the Order for the  
f Letters within the LONDON Dis-

n all letters not exceeding half an  
eight, and not being by law specially  
from the twopenny and penny post  
mitted by any twopenny or penny  
ondon or Dublin, (and not having  
rough, or being intended to pass  
e (General Post) there will, on and  
th day of December last, be charged  
a rate of one penny only, *provided*  
ge be *prepaid* at the time of posting

BUT in case any letter not being by  
lly exempted as aforesaid, transmitted  
h twopenny or penny post, shall not  
/ when posted, on shall exceed half  
n weight, the same rate of postage  
arged as is now payable by Law

r will be sent by any such twopenny  
ost exceeding four ounces in weight,  
same shall have originally passed or  
ntended to pass through the General  
in such last mentioned case, not  
the weight of sixteen ounces, unless  
uthorised by the Order in the London  
the 22d of Nov. last.

## COUNTRY POST,

egard to all INLAND LETTERS. There  
arged upon all letters not by law spe-  
npted from postage, and *not exceed-*  
*an ounce in weight*, (not being  
it to or from parts beyond the seas)  
rm rate of postage of *Four-pence*,  
eference, and for *every* further half-  
ight a progressive and additional sum  
ence.

re been informed of the result of weigh-  
of paper of various manufacturers, and  
is not one sort in general use, even  
what is commonly known as the  
demy paper, of which may not be  
sheet (and of the superfine papers no  
th an envelope and a full sized seal,  
ch will come under the half ounce, or  
e of postage. The only papers of  
o sheets may be used are the foreign  
bank post, and the very thin common  
these must be without an envelope.  
ounce weight will do but little more  
y these quantities doubled.

SITTINGS AFTER MICHAELMAS TERM,  
1839.QUEEN'S BENCH.—*Middlesex.*

Monday, Dec. 2, and daily, to Friday, Dec.  
6, both inclusive.—Common juries.  
Saturday, Dec. 7, and daily, to Tuesday, Dec.  
10, both inclusive.—Special juries.

*London.*

Wednesday, Dec. 11.—Adjournment-day.

COMMON PLEAS.—*Middlesex.*

Friday, Nov. 29, and daily, to Friday, Dec.  
6, both inclusive.—Special juries.

*London.*

Adjournment-day, Dec. 9.—Common juries.

EXCHEQUER OF PLEAS.—*Middlesex.*

Tuesday, Nov. 26, and following day.—Com-  
mon juries.

Thursday, Nov. 28.—Revenue and Common  
Juries.

Friday, Nov. 29.—Common Juries.

Saturday, Nov. 30, and daily, to Tuesday,  
Dec. 3, both inclusive.—Special and Common  
Juries.

Wednesday, Dec. 4, and following day.—  
Common Juries.

*London.*

Wednesday, Nov. 27.—To adjourn only.

Friday, Dec. 6.—Adjournment-day and Com-  
mon Juries.

Saturday, Dec. 7, and daily, to Tuesday, Dec.  
10, both inclusive.—Common Juries.

Wednesday, Dec. 11, and daily, to Saturday,  
Dec. 14, both inclusive.—Special and Common  
Juries.

Monday, Dec. 16, and daily, to Wednesday,  
Dec. 18, both inclusive.—Common Juries.

The Court will sit at half-past nine o'clock.

## CENTRAL CRIMINAL COURT.

## SESSIONS 1839—40.

## Sittings.

1839.

Monday	-	-	November 25th
Monday	-	-	December 16th

1840.

Monday	-	-	January 6th
Ditto	-	-	February 3d.
Ditto	-	-	March 2d.
Ditto	-	-	April 6th.
Ditto	-	-	May 11th.
Ditto	-	-	June 15th.
Ditto	-	-	July 6th.
Ditto	-	-	August 17th.
Ditto	-	-	September 14th.
Ditto	-	-	October 19th.

**Business of the Courts.****COURT OF CHANCERY.**

'Kirkwall v. Flight, by order—Wingate v. Cresswell—Winter v. Boys—Perry v. Jenkins—Jenkins v. the Same—Lewis v. Tipton—Hunter v. Pugh—Purton v. Bicknell—The Same v. Branscomb—Forsyth v. Chard—Martin v. Pellett—Bristow v. Woods, further directions and costs—Liddell v. Taylor, ditto—Bolton v. Malkin.

**VICE-CHANCELLOR'S COURT.**

Short causes and unopposed petitions.

Causes after the Petitions—Harrison v. Bennett, part heard—Ryan v. Hill—Woolwich Ferry Company v. Clarke—Odgers v. Teague, exceptions—Muggeridge v. Muggeridge, further directions and costs—Bonfil v. Purchas, ditto.

**ROLLS' COURT.**

Attorney-General v. Brooke, part heard—Miller v. Crawford, demurrer—Lewin v. Moline—Franks v. Price, further directions and costs—Evans v. Brown, ditto and petition—Davies v. Hopkins, further directions—Hodgson v. Charlton, ditto—Hopkins v. Hopkins, ditto—Cooper v. Waldegrave, exceptions and petitions—Evans v. Thomas—Peach v. Evans, exceptions, further directions, and costs—Bates v. Bonner, further directions and costs.

**COURT OF QUEEN'S BENCH.**

Middlesex Common Juries—Scott v. Parker—Bolton v. Shipley—Ward v. Sanderson—Serry v. Levy—The Queen v. Paterson—Bone v. Davy—Bingham v. Stanley—Gadsden v. Allan—Thompson v. Godfrey—Bell v. Mantle—The Queen v. Millett and Gregory—Doe dem Butler v. Tidmarsh—Staniforth v. Robson—Ablett v. Eyre—South v. Shuttleworth—Alexander and others v. North.

**COURT OF COMMON PLEAS.**

Middlesex Special Juries.—Gurney v. Evans—Barrow v. Gardiner.  
Middlesex Common Juries.—Fairmaner v. Garwood—Waddell v. Pardy—Toms v. Hedge, undefended—Dix v. Smith, ditto.

**COURT OF EXCHEQUER.**

Middlesex Common Juries.—Harman v. Layton—Wilkins v. Fell—Johnson v. Winter.

**EQUITY EXCHEQUER.**

Irring v. Thompson, demurrer by order—Morton v. Hayter, exceptions to certificate—Jackson v. Foord, further directions—Madge v. Riley, ditto.

**NOTICE TO CORRESPONDENTS.**

C. B.—S. A. W.—Under consideration.  
Communications for insertion in this paper should be sent to the Editor not later than Thursday morning.

**TO COUNTRY SUBSCRIBERS.**

A Stamped Edition of this paper is published every Saturday, which will be forwarded to Subscribers, postage free, at any part of the United Kingdom, upon application to the Publishers.  
ANNUAL SUBSCRIPTION £1. 10s. to be paid in advance.

**ERRATUM.**

Vol. 3, p. 77, 2nd col. last line but one, for "ALPHINOS," read "ALPHONSO."

On Jan. 1, 1840, will be published, price 4s. to be continued Monthly, Vol. IV. Part I.

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Vol. III. was published Dec. 1, in cloth bds. with Table of Contents.

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# The Legal Guide.

[ SATURDAY, DECEMBER 14, 1839.

[No. 7.

## LAWS OF REAL PROPERTY.

### ESSAY II.

1 & 4 Wm. IV. cap. 74.

*On the Abolition of Fines and Records for the Substitution of more Modes of Assurance.*

(Continued from p. 84.)

CONSIDERED.—RULE BETWEEN INCUMBERS, THAT A SUBSEQUENT INCUMBER, WITHOUT NOTICE, AND HAVING AN INTEREST, GETTING IN THE LEGAL POSSESSION BY ASSIGNMENT OF A TERM, OR POSSESSING HIMSELF OF THE DEED CREATING IT, IS NOT PREJUDICED.—DOWER.—OUTSTANDING

ELDON, in further considering the case of *Maundrell v. Maundrell*, would the case stand if the party entered into a contract to sell the land contracting for more than to convey good title, no speciality about dower, Master's report was in favour of the plaintiff on the ground that a term was outstanding which might be assigned. The Court would make the purchaser take the land as the trustee might convey, if the Court would not let them to defeat the dower by making another trustee to attend the inheritance. The decision has established that there is no such idle ceremony we must abide by what is the principle that supports

ports such a decision? The question comes to this—Whether, because Lord HARDWICKE has used the terms that are found in that case, importing that an assignment of the term was made, if there has been no assignment, the principle shall not be applied.

Upon the case coming again before Lord ELDON, it appeared that neither the deeds creating nor assigning the term were delivered to the purchaser. There was a mortgage upon the estate at the time of the purchase; and all the title deeds remained in the possession of the mortgagee, and his Lordship in giving his judgment said, upon the whole “I mean to say, for it is impossible to say with confidence there is any great difference in principle upon the case of the dowress, that she stands as an owner of the inheritance contradistinguished from every other owner, so that though notice of the title will protect every other interest in the inheritance it shall not protect her, and nothing shall protect her, but the circumstance that the purchaser has omitted to take an assignment of the term to be attendant upon the inheritance in that very transaction, though the term has in a prior transaction been declared attendant upon the inheritance. But in the case of *Swannock v. Lifford*, Lord HARDWICKE takes the House of Lords to have so decided upon the ground that in those very circumstances, and that precise case, the Court is bound, not by a principle upon which it can well reason, but

by a practice of conveyancers found to be inveterate, that to that length it will go, and that it will not go farther. At least my opinion is, that the ground upon which the Master of the Rolls decided that part of the case is right, and therefore I confirm that."

In the case of *Roach v. Wadham*, 6 East, 289, which was decided six months before Lord ELDON made his decision, and in which the same point arose, it was erroneously stated that the decree at the Rolls in *Maundrell v. Maundrell* had been reversed in the House of Lords, and thereupon the counsel on the other side admitted that the power was not merged in the fee, and the Court of King's Bench in delivering judgment took the point for granted. (a)

A woman's dower is now under the absolute dominion of her husband, so that the observations here made do not apply to cases within the Dower Act, but to cases that remain under the old law. Lord ELDON's judgment in *Maundrell v. Maundrell* may be considered the authority establishing the necessity of an actual assignment of the term to bar the dower of the wife. See 2 Barn. and Ald. 710. 782. And in other cases (not of dower), Lord ELDON observed, that if a purchaser do not get in the satisfied term in some sense, either taking an assignment, making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect him against any person having a mesne incumbrance or charge.

And in a subsequent case (b), when the doctrine again came into question, his Lordship observed this :—the purchaser has got the original title-deed to the term, the Court cannot be satisfied that there is any truth in the assertion that the legal estate was in the person who the adversary says had it. Lord HARDWICKE thought, as you cannot in many cases

trace the representative, if the purchaser uses so much diligence as to take possession of the deed, a Court of Equity ought not to compel him to produce that deed to his prejudice. It was not, he said, determined what is the situation of the trustee who makes the assignment. Lord HARDWICKE says the question is not, whether the trustee shall be punished, but whether the purchaser shall hold under the breach of trust. That, he said, was strange doctrine; and he desired to be understood that he had not made up his mind that the Court would not restrain the trustees from permitting their names to be used. From some saving expressions, he did not conceive Lord HARDWICKE meant to determine, that the trustees, aware of the prior incumbrance, would be safe in making the assignment to a subsequent incumbrancer. One of the greatest difficulties he met with in deciding the case of *Maundrell v. Maundrell*, was Lord HARDWICKE's expression, that the purchaser would be safe in taking the assignment, if he could get it; but Lord HARDWICKE would not say, the trustee would be safe. Surely, he added, if the purchaser would be safe, the trustee ought to be so.

(To be continued.)

## PROBLEM VII.

VOL. 3.

MERGER.

What is it?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 13. VOL. II

BAILMENTS—COMMON CARRIERS.

What is the Common Law responsibility of a Common Carrier, and who shall be considered as such?

A common carrier is a person who undertakes to transport from place to place, for hire, either by land or water, the goods of such persons as think fit to employ him.

(a) 1 Sugden on Powers, c. 110.

(b) *Ex parte Knott*, 11 Ves. J. 613.

have to consider this subject with the Common Law liability of a carrier, it may conveniently be treated under the following divisions, viz.

1. What persons come under the denomination of common carrier.

2. In what cases a carrier is chargeable for loss or damage in his duty.

3. When his responsibility ceases.

4. What is his interest in the things delivered to him.

5. In what cases actions against carriers are brought.

Persons carrying goods for hire, and owners of ships, lightermen, wharfmasters, &c. come under the denomination of common carriers: *Bac. Abr. vol. ii. s. 1*. A wharfinger, who undertakes to carry goods from his wharf to the vessel in lighters, *Morning v. Todd*, 1 Stark 145, and a mail contractor, *Coggs v. Lord Raym.* 918, are also carriers.

As to a stage-coachman, a hackney-coachman, who conveys passengers only, is not a common carrier, *Aston v. Heaven*, 2 Esp. 1. A hackney-coachman is not liable as a common carrier, unless he receive money for his carriage, &c. *Upshare v. Aides*, 15. Nor is the Postmaster-General a common carrier within the custom of the country, *Ex v. Cotton*, 1 Lord Raym. 646.

When a man delivers goods to a common carrier, and he conveys them to a certain place; or damages them, an action upon the case lies against him, *Cro. Jac.* 262.

1. A common carrier, who is offered goods, and who hath convenience, refuses to carry them, in a manner as an innkeeper who refuses to entertain a guest, or a smith who refuses to shoe a horse, *Bac. Abr. Carrier*. A carrier is bound to be ready and ready resolved that if a carrier be charged, he shall answer the value of the goods, which he hath his hire, which implies

an undertaking for the safe custody and delivery of them, which charges him at all events, *Co. Litt.* 89. 2 Lord Raym. 918.

If a box is delivered generally to a carrier and he accepts it, he is answerable, though the party did not tell him there was money in it; but if the carrier asks, and the other says "no;" or if he accepts it conditionally, provided there is no money in it; in either of these cases the carrier is not liable. *Pet King, C. J., Tichbourn v. White*, 1 Str. 145.

Where a carrier had given notice that he would not be liable for certain valuable articles, if lost, of more than the value of a specified sum, unless entered and paid for as such; and articles of that description were delivered to him by a person, who knew the conditions, but concealed the value, paying no more than the ordinary price of carriage and booking; on a loss, it was holden, that the carrier was neither liable to the extent of the sum specified, nor to return the price actually paid for the carriage and booking. *Clay v. Willan*, 1 H. Bl. 298.

3rd. The responsibility of a carrier, as such, ceases when the goods have reached their place of destination, and the control of the carrier over them, in the character of a carrier, has terminated. *Chitty on Contracts*, 383.

4th. A carrier, who hath goods delivered to him, undertakes for his hire to deliver them safely, and he hath the possession of them for no other purpose; yet he hath such a special limited property, that he may bring trover and conversion against a stranger that takes them away, or he may sue the hundred when robbed of them, because he is answerable over in damages to the absolute owner. *Co. Litt.* 89. 2 Saund. 47.

While the goods are in his custody, he is bound to the utmost care of them; and, unlike other bailees falling under the same class, he is, at common law, responsible for every injury sustained by them, occasioned by any means whatever, except only by the

act of God or the king's enemies. 1 Inst. 89.  
Dale v. Hall, 1 Wils. 281.

By force of the duty imposed on carriers to convey the goods of the subject for a reasonable reward, to be therefore paid, they have a lien as far as the carriage price of the particular goods, but not to any greater value or extent, *Skinner v. Upshaw*, Raym. 752, which lien is gone, if a carrier parts with the possession of the goods after the lien attaches.

*Lastly.* In general, the action against a carrier for the non-delivery, loss of, or damage to the goods must be brought by the person in whom the legal right of property is vested at the time. Therefore where a tradesman orders goods to be sent by a carrier, as at the instant when delivered to the carrier the goods are considered as delivered to the purchaser, and the whole property (subject only to the right of stoppage *in transitu* and the carrier's lien) vests in the purchaser, he alone can maintain an action against the carrier for any loss or damage to the goods; and this rule holds as well where the particular carrier is not named by the purchaser as where he is, *Dutton v. Solomonson*, 3 Bos. & Pul. 584, *Dawson v. Peck*, *supra*.

As to the rights and liabilities of carriers under particular statutes, see Selwyn's Law of Nisi Prius and Chitty on Contracts.

H.

### Imperial Parliament.

LONDON GAZETTE, Tuesday, Dec. 10.

#### BY THE QUEEN.—A PROCLAMATION.

VICTORIA R.,

Whereas our Parliament stands prorogued to Thursday, the 12th day of this instant December; we, with the advice of our Privy Council, do hereby publish and declare that the said Parliament shall be further prorogued, on the said 12th day of December instant, to Thursday, the 16th day of January next; and we have given order to our Chancellor of that part of our United Kingdom called Great Britain to prepare

a commission for proroguing the same accordingly; and we do hereby further, with the advice aforesaid, declare our royal will and pleasure that the said Parliament shall, on the said Thursday, the 16th day of January next, assemble and be holden for the despatch of divers urgent and important affairs; and the lords spiritual and temporal, and the knights, citizens, and burgesses, and the commissioners for shires and burghs of the House of Commons, are hereby required and commanded to give their attendance accordingly at Westminster, on the said Thursday, the 16th day of January next.

Given at our Court at Windsor, this 9th day of December, in the year of our Lord 1839, and in the third year of our reign.

God save the Queen.

### Law Reports.

#### COURT OF CHANCERY.—Nov. '6.

DE HOUMELIN v. SHELDON AND THE ATTORNEY-GENERAL.

ALIEN HUSBAND—VENDOR AND PURCHASER—*Wife's Estate—Purchase-money arising out of land devised to Trustees for Sale out and out—Cestui que trust, an English woman married to a Frenchman, and domiciled abroad—Whether the property became forfeited to the Crown.*

This was a Supplemental Bill, in the cause *De Houmelin v. Sheldon*, heard at the Rolls on the 10th Nov. 1837, and 28th Jan. 1838, (a) and was filed with the consent of the purchaser, Lord Radnor, to bring the question at issue formally before the Court, and make the Attorney-General a party to represent the Crown.

The original Bill was filed by the Count de Houmelin, a Frenchman, and Frances Matilda his wife, an Englishwoman and child, to have the will of Mrs. Elizabeth Sheldon established and carried into execution; and by the decree dated the 15th June, 1832, it was declared that the will ought to be established, and the trust carried into execution; and by a subsequent decree dated 16th April, 1835, it was ordered that the estates should be sold with the usual directions.

The facts of the case were these:—Elizabeth Sheldon, by her will dated the 9th day of Oct. 1824, duly executed, devised, and apportioned her estate unto and to the use of Edward Sheldon, James Somerville Fownes, and Richard Samuel White, and to their heirs and assigns forever, upon trust that they should make sale and absolutely dispose of the same to any person

(a) Ante, Vol. 1, pp. 42, 218. Vol. 2, p. 84.

purchase, and should convey and assure to the use of the purchasers, their heirs, and should, on payment to the purchase-money, give receipts for which receipts were to be effectual to the purchasers, and should discharge being obliged to see to the application or nonapplication thereof. Directed that the trustees should stand of the monies to arise by such sales, after payment of the costs and expenses of the mortgages affecting the estate, the residue in the public funds, or on real securities; and to stand upon such monies, funds and securities, after her husband, Charles Henry Sheldon (died 1826), as concerning one sixth part trust, during the life of her daughter, Matilda, the wife of the defendant, the Houmelin; to pay the interest, dividual produce thereof, as the same received, into her proper hands, or into such person or persons as, notwithstanding coverture, she should from time to time by way of assignment, charge or appointment to receive the same, for her life; and subject to the life interest of the said Matilda De Houmelin, in trust for children (aliens) by her said husband, son or sons, should attain the age of twenty-one, or being a daughter or daughters, in that age or marry, in equal shares if more than one, and if but one such child then living, for such child. And the three sixths parts were given respectively, in like trust for the benefit of her daughters, Caroline, Margaret Frances, the wife of Maximilian de la Roche, the plaintiff, Lucy Catherine and Elizabeth Emma, the wife of Antoine Deudon, and their respective heirs. And the testatrix directed, that in the event of any of the daughters dying without issue who should live to acquire vested interest, the husband of each daughter (four of whom should enjoy a life interest, with an exception for the benefit of Charles Henry Sheldon if he should be then living, or if he should be then dead, for the next of kin of the said Charles Henry Sheldon). Four of the daughters married aliens, and they had issue, who were also aliens. The testatrix died in 1829. The trustees sold the property of the testatrix, and the Earl of Radnor, the purchaser of that in question, for which he paid the purchase-money into the hands of the trustees. It was referred to the Master to inquire whether the plaintiff could make a good title to the property. The Master, by his report dated the 10th of August, 1838, stated that he was of opinion that the plaintiff could make a good

title, and that such good title was first shewn on the day on which the abstract of title was first delivered. To this report exceptions were taken, and it was objected that interests in land were attempted to be given to the husbands and children of the testatrix's daughters, who were aliens, that such interests could not be held as against the Crown, and consequently that the Crown had a title over which the vendors had no power.

The MASTER OF THE ROLLS, at the hearing, said, (a) It is obvious that if the trusts be performed as the testatrix intended, the land will remain vested in the trustees till a conveyance is made to the purchaser, and never can be vested in any alien; and that the purchase money, after paying costs and satisfying incumbrances, being invested in stock, the interest of the aliens will be in such stock and not in land. It appears, also, that whether we regard the land or the stock into which the testatrix intended it to be converted, there is at the present time no vested interest in any alien. The vested interests are in English subjects. The interests in aliens are contingent and expectant on the determination of those vested interests. The English subjects in whom the interests are vested are entitled to have the trusts performed; and no claim of the Attorney-General to have secured for the Crown the interests which were intended for aliens, could have prevented the decree for sale. It is not a case in which they being entitled, or the Attorney-General or the Crown being entitled, can exercise an option, and elect that there shall be no conversion. There is a decree for sale: the sale has taken place, and when it is complete the money will be the only property in which the aliens will have any interest. But it is argued, that taking the case as it stood at the death of the testatrix, and as it must remain until the conversion shall be completely made, the land is the source from which the money or stock in the shares of which the aliens are to be interested is to be realized, and that in that respect the aliens have an interest in the land. And as the gift of an interest in land to an alien may be good, and the alien, though capable of taking the gift, cannot hold it for his own benefit but for the Crown: only that it is contended that the Crown has here a right to that interest, and therefore to an interest in the money or stock which is to arise from the sale of the land. In the case of the *King v. Holland*, reported in Ayleyn, p. 14, and in other books, (b) it was the expressed opinion of one of the Judges, though it was not then necessary to decide the point, that an alien could not compel feoffees to execute

(a) See 1 Beauv. 89.

(b) 1 Rolles Abridgement, 19 b. Styles, 20, 40, 75, 84, 89, 94.



a use; and of another of the Judges, that though the King should have the use, yet he could not seize the land itself, but by equity might have a decree for the land; or, in other words, might in a court of equity compel the trustees to execute the trust for his benefit. This doctrine is applicable to a case in which land is given to a trustee to be held by him in trust for an alien; in which case the alien takes in the land a permanent equitable interest, which might be attended by inconveniences nearly the same as those which are considered to attend a permanent legal interest vested in an alien. But the same doctrine is not necessarily applicable; nor do similar reasons extend to a case in which no interest in land was intended ever to vest in the alien, in which the legal estate is vested in the trustees and intended to pass from them to the purchaser, and in which the interest of the alien and his right, if right he has, is only to have the land converted into money, and is so far of a transitory nature that it endures only till the purposes of the donor can be performed by the due execution of the trusts he has created.

It has been held, that the disability of an alien to hold lands for his own benefit is not in the nature of penalty or forfeiture, but arises from the policy of the law; and none of the various reasons on which the Judges have considered the policy of the law relating to aliens to be founded, seem applicable to such a case as this. When the land is converted into money, as the trust intends, no objection in respect of tenure, fealty, or allegiance remains: and it has been considered to be in conformity with the policy of the law that aliens should be interested in the English stocks or funds. The law giving to an alien the right of holding money or stock, and refusing to him the right of holding land, any man desiring to benefit an alien may, if he pleases, sell his land and give the purchase money or the stock which it may produce to an alien, or to a trustee for his benefit. In so doing he would do nothing contrary to the policy of the law; and it would be singular, if being entitled to do this by himself, he could not accomplish the same purpose by means of another as his agent or trustee, created by deed or will, for the purpose of sale and conversion, because, during the time which may elapse before the conversion can be completed, the alien is by the peculiar doctrine of this Court considered to have an interest in the land which is to be converted, *i. e.* an interest that the land should be sold to persons who can legally hold it, in order to raise the money which he, the alien, can legally hold. I confess that I am at a loss to understand in what way the policy of the law can be applied, so as to give to the Crown any part of the money which in such a case is intended as a provision for the

members of the testatrix's family, though some of them happen to be aliens. The policy of the law in relation to mortmain is subject to considerations so entirely different that they do not appear to me to be at all applicable to the case. The only authority on which the purchaser relies and which appears to me to occasion any difficulty, is the case of *Fourdrin v. Gowdey* (a) in which Sir John Leach considered a gift of this kind as a gift of land subject to charges and held that aliens could no more "take" an interest in land than the land itself. He must have meant to use the word "hold," instead of the word "take," because it is clear that aliens may take land, though they cannot hold it against the King. But in *Fourdrin v. Gowdey* the question principally argued related to the effect of letters of denization, and the question which bears upon the point arising in the present case was much less considered. Moreover, there was no estate devised to trustees for the purpose of enabling them to sell and convey, but only a direction to the executors to sell, and the heir-at-law being an alien the real estate could not descend to him, and the circumstances afforded a ground for the decision in *Fourdrin v. Gowdey*, which does not exist in the present case. Having regard, however, to the expressions which fell from Sir John Leach, and his decision as to the leaseholds in that case, I think that he would probably have considered such an interest as given to the aliens in this case, as an interest which might be claimed by the Crown; and that respect, *Fourdrin v. Gowdey*, if to be sustained, appears to me to be an authority for the exceptions, which are taken to the Master's report in this case. But it is a single case; in the consideration of it the policy of the law in regard to mortmain seems to have been in some degree confounded with the policy of the law as to alienage, and as upon the most careful consideration of it I am unable to acquiesce in the reasons upon which so much of the decree is applicable to the present case is founded, or to find any others which are satisfactory, I do not think that I ought to be governed by it. It does not appear to me that in respect of the species of interest in land, which is here given to aliens, the Crown is entitled, by its prerogative either to come into equity to have the trust executed, in order that the benefit of it in money stock may be taken from the persons to whom it was given by the testatrix and secured to the Crown, or to insist that the trust shall not be executed as intended, but that the interests vest in the aliens before conversion shall remain in the same form, and be in that form taken by the Crown, because an alien cannot continue to hold it.

(a) 3 Mylne and Keen, 388.

*ceptions were overruled.*

THE CHANCELLOR this day gave his

His Lordship said, the question in this case was whether the Crown had any interest in the property. His opinion was that the Crown had no right. He would not give any authority for the principle of the decision in *Fourmond*, by Sir John Leach, as it did not apply here, where the estate is directed to be paid out and out—a circumstance which did not exist in that case, where the testator did not direct the legatee to take the land itself. The principle of this case was very different. If the legatee is entitled to the money produced by the estates, then no debtor or other person can direct his land to be sold to pay his debts. If none of his creditors happened to be a creditor, could any foreigner enforce a claim against his debtor, in this country, having no interest in the property?

His Lordship said he was clearly of opinion that the Crown had no right to the property. The legatee is to have their costs out of the estates of the alien legatees. The costs of the legatee are to be paid out of the general estate.

CHANCELLOR'S COURT.—Nov. 21.

IN RE MRS. TAYLOR.  
OF INFANTS BILL, 2 & 3 VICT.  
—PRACTICE.—*Whether the Court can order substitution of service of the writ on the Husband's Solicitor or at his business.* (b)

Bruce made a further application to the Court for an order to substitute service of the writ on Mr. Taylor's solicitor, or at his business in London. The application was supported on a former day, the wife's counsel then entertained hopes that another attempt to communicate with her husband by letter would prove successful. That attempt was unsuccessful. A letter was written to him on the subject of the wife's conviction of heretofore misconduct to him, and with imputation. The letter was sent to the solicitor's, and copies of it were shown to Mr. Taylor at his house at South Street, the brewery at Limehouse; but no answer had been taken of it, the present application being necessary.

THE CHANCELLOR said that a sufficient case had been made out by the affidavits produced in support of the application, together with those filed on a former day, previous to the present application, to warrant the Court to order for substituting service of the writ on the solicitor.

See, p. 28.

(b) See ante, p. 22.

COURT OF QUEEN'S BENCH.—Nov. 29.

Sittings in Banco.

ROBINSON v. MAY.

*PROMISSORY NOTE must be absolutely to pay, and not depend upon a contingency. Special Case.*

The defendant had given a note of hand to the plaintiff in the following form:—"Twelve months after date I promise to pay to Messrs. Robinson, Foster, and Co. the sum of £500, to be held by them as a collateral security for any monies now owing to them by Mr. James Malachi, which they may be unable to recover in realizing the securities now held." The question was whether this was a promissory note or not.

Sir W. Follett, on the plaintiff's side, said the ground upon which it was contended that this was not a promissory note was, that a promissory note should not rest upon a contingency. The promise must be absolutely to pay; at all events, payment must not depend upon any contingency. There were several cases in which the fact of payment was itself uncertain, depending on a contingency; but there was a case, *Goss v. Nelson*, 1 Burrow, p. 226, in which an infant promised to pay when he should come of age, at the same time mentioning a particular day, the 12th of June, 1750. It was objected that this was not a good note, but Lord Mansfield held that it was, the money being made payable on a particular day mentioned in the instrument itself. That was the oldest case, and upon that all the rest were founded. In the present case, also, there was no contingency, because the money was to be paid twelve months after date, and therefore the time was certain. It professed to be given as a collateral security for any monies owing to the plaintiff by a third party, and the question might arise whether the note or the money was to be held as the collateral security pending the recovery of the debts; but, be that as it might, still there would be no contingency of payment of the note at the end of the twelve months, because the parties holding the note could then enforce payment. If, indeed, in the interval the monies due were recovered, that could be pleaded against payment. It was objected that the note was not negotiable; but that did not alter the case, because it was payable to the party receiving the note, and they might enforce payment on all grounds whatever, unless they had actually received the monies due from the third party before the expiration of the twelve months. The wording of the note, by which it was professed to be given as a collateral security, did not make any difference; still there was no contingency of payment twelve months after date. No particular form was necessary to constitute a promissory note.

Mr. Kelly, for the defendant, argued that the note was not a promissory note, for, though it was made payable at twelve months after date, still there was a condition set forth.

The COURT.—We are satisfied that it is not a promissory note.

Sir W. Follett.—My learned friend seemed to rest his case on the statement that the note was to be payable at twelve months after date.

Lord DENMAN.—So did you.

Sir W. Follett.—Suppose it had been to pay £500 at a given time, if the money owing was not paid before?

Lord DENMAN.—We consider it the same as that, on the face of it. It must be taken as a conditional promise, and therefore it cannot be a promissory note. (a)

(a) There must not be a restriction as to what is to be the nature of a payment, as to pay "in three good India bonds," or to "pay so much money, and deliver a horse;" for such are neither bills of exchange nor promissory notes within the 3 & 4 Ann. c. 9. See Bull. N. P. 273. *Jenvey v. Horle*, 2 Lord Raym. 1361, *Morris v. Watkins*, id. 1362, 1396. *Appleby v. Biddle*, 1 Strange, 219; and in *Sproat v. Matthews*, 1 Term Rep. 182, it was held that whether a conditional or an absolute acceptance was a question of law; and in *Palmer v. Pratt*, 9 Moore, 959, S. C. 2 Bing. 186, it was held that a bill of exchange payable on an uncertain contingency is absolutely void.—

EDITOR.

#### COURT OF COMMON PLEAS.—Nov. 18.

Sittings in Banco.

GINGER v. PEACH.

SUBPENA—PRACTICE—*Meditated contempt*.

Mr. Sergeant Wilde moved for a rule to show cause why an attachment should not issue against a gentleman for not appearing upon a subpoena. The trial upon which he had been summoned was first on the paper, but he did not attend until a quarter of an hour after the cause had been withdrawn in consequence of his absence. The object of this application was to compel this individual to pay £20, the costs of the day.

Chief-Justice TINDAL.—Should we not have proof of something like *meditated contempt*?

Mr. Sergeant Wilde said he thought suitors should be protected in such cases.

Chief-Justice TINDAL.—Yes, but the question

is, whether you ought to have an attachment. The plaintiff may obtain redress by means of an action.

Mr. Sergeant Wilde proposed that he should take a rule to show cause why the witness should not pay the costs, or, in case of refusal, why an attachment should not issue against him.

Chief-Justice TINDAL.—That will be the best mode.

Rule granted.

Nov. 20.—*Sittings in Banco.*

HILL v. WHITE.

ATTORNEYS' BILL OF COSTS—*Joint Contracts*—PRACTICE—PLEADING IN ABATEMENT.

This was an action of *assumpsit*, brought by the plaintiff, who is an attorney, for work and labour done for the defendants, to which the latter pleaded in abatement to the whole cause of action that the contracts in the declaration mentioned were made by them jointly with other parties. Issue was joined upon the plea, but after the cause was set down for trial, the parties agreed to refer it. The arbitrator made a special award, from which it appeared that some of the contracts mentioned in the declaration had been made by the defendants jointly with other persons, but that the remainder had been made by them solely; and he raised the question whether in that state of the facts and the pleading, the plaintiff was entitled to recover.

The case was now argued by Mr. Butt for the plaintiff, and Mr. Gray for the defendant.

The COURT, after a short consultation, decided that the defendant had failed in making out his plea. The old authorities clearly established, that when there were several counts in a declaration, the defendant might plead in abatement to some of them, and in bar to the others; and there was no reason why the same thing should not be done now, when several causes of action were included in one general count, as to some of which the defendants were suable jointly with others, and as to the rest suable alone. Upon the authority of the old cases with respect to declarations with several counts, there was no reason why a plea in abatement should not be divisible in relation to several causes of action contained in one general count—no reason why the defendants might not pray that the writ should abate as to those contracts which they had entered into jointly with other persons. Here the defendants had not adopted that course, but had pleaded in abatement to all the causes of action. They chose to say that all the contracts declared upon had been entered into by them jointly with others. Now the facts, as found by the arbitrator, did not support that plea, because some of the contracts had been made by them alone. Why, then, was the plaintiff to be injured by

of the defendant's plea? If the defendant was to prove his plea in part, he must show that the plaintiff ought to have been a shareholder; but there was no reason why a shareholder was necessary, for the plaintiff, as a shareholder, had a right to stand upon the false defendant's plea, the defendant having admitted more largely than the facts warranted in any case in the books of a shareholder after a plea in abatement. The defendant's plea being found against the defendant, the plaintiff was entitled to the full amount in the declaration.

for the plaintiff.

Nov. 28.

at Nisi Prius.—Special Jury.

WHITEHEAD v. BARRON.

*THE COMPANIES — Liabilities of Shareholders to the Debts of the Company as to Trademen.*

An action to recover the price of and other machinery supplied to Kingdom Patent Beetroot-Sugar Works, which the defendant was alleged to have supplied.

for the plaintiff.—This company was formed in the early part of 1836, and in May in that year they issued prospectuses announcing a capital of £250,000, in shares of £25. each, with a deposit of £12.50. The prospectuses also set forth from which the most brilliant success was to be expected, and stated that the machinery was of the most perfect kind, and was in forwardness. The defendant, who was in Oxford street, applied for some time to the 31st of that same month of May, and received a letter from the secretary of the company, apprising him that thirty shares had been allotted to him. In the months of September and October following the machinery was completed, and delivered to the defendant, who, however, turned out to be a failure. He never had been a capital of more than £1200, and only about 1200 shares were distributed, of these there were not above 700 which the deposit was paid. The defendant was glad to dispose of his shares to the directors for 1s. each. It was under these circumstances that the present action was brought against him as a member of the com-

pany. The defendant, reprobated by the court, was in the strongest terms, as in fraud and delusion from first to last, contended that this was in effect the case of the directors, who, being really liable for the loss, had induced them to make the

experiment of suing the defendant, as was manifest from the fact that all the documentary and other evidence adduced was supplied by them; they, in all probability, having guaranteed them against the consequences. He contended that the defendant had never been an actual proprietor at all; but, at all events, he had not become a member of the company at the time when the order for the machinery was given by the company, because in the prospectus issued in May, 1836, it was stated that the machinery was in a state of forwardness, whereas the defendant had not had shares allotted to him until the 31st of that month.

The LORD CHIEF JUSTICE said, that the jury would first have to inquire whether, supposing the defendant to have become a proprietor at all, he had become one before the order was given to the plaintiffs for the machinery in question; if they should be of opinion that he had not, it would be unnecessary to enter into the other point, as to whether he was at any time a proprietor in point of law.

The jury said, that they were satisfied on the first point, and returned a verdict for the defendant.

The LORD CHIEF JUSTICE perfectly concurred in the propriety of their verdict, but said he hoped the case would operate as a warning to parties how they engaged in speculations of this kind without first calculating upon the extent of their liabilities, and also to tradesmen how they gave credit to such speculators without first ascertaining the extent of their capabilities.

#### COURT OF BANKRUPTCY.

IN THE MATTER OF MESSRS. CHAMBERS AND SON, BANKRUPTS.

EQUITABLE JURISDICTION OF THE COURT.—

*Right of a Creditor's Assignee (by assignment) to prove his assigned Debt against a Bankrupt's Estate without the concurrence of the Assignor.*

Mr. Egan applied for leave to prove a debt standing in the name of the late Lord Langford. He stated that, when the commission of bankruptcy was issued against Messrs. Chambers and Son, they were indebted to the late Lord Langford on the balance of a banking account. His Lordship subsequently assigned his claim, but the debt remained unproved, and hence arose the necessity for the present application.

Mr. Arnold, for the bankrupt's assignees, said, although there was no disposition on the part of his clients to offer objections, yet they were bound to scrutinise every claim set up against the bankrupt's estate; and he contended that the present application could not be granted, as the executor of the deceased nobleman had not joined with the assignees.

Mr. Egan said, the will left by his Lordship was calculated to cause considerable litigation, and that it had not been proved. He, however, maintained that, although an equitable creditor could not take a commission of bankruptcy, yet an equitable as well as a legal claim might be proved under a fiat, and cited *Ex parte Williamson*, 2 Ves. sen. 249.

Mr. Arnold said, the debt could not be legally recovered unless his Lordship's executor appeared.

Mr. Egan argued, that the assignment was sustainable in equity (*Row v. Dawson*, 1 Ves. sen. 332; *Duke of Chandos v. Tulbot*, 2 P. Wms. 608; and *Lord Townsend v. Wyndham*, 2 Ves. p. 6); that there was no case in which an assignment, especially for a chose in action, operated otherwise than by putting the assignee in the situation of the assignor (*Purdew v. Jackson*, 1 Russ.); and that the Court possessed an equitable as well as legal jurisdiction, and, consequently, was competent to take cognizance of the claim.

Mr. Commissioner HOLROYD said, the constant practice of the Court had been to require the assignor or his legal personal representative to concur with the assignee.

Mr. Egan said, that *Ex parte Lloyd*, 1 Rose, 4, tended to establish a different doctrine. There Lord Eldon said, "The assignee has purchased the right of an individual who was entitled to prove, and is, as such purchaser, entitled to his advantages, remedies, and equities, and therefore to prove in his name."

Mr. Arnold maintained that *Ex parte Lloyd* had been overruled by *Ex parte Herbert*, 2 Glynn and Jameson, 66.

Mr. Egan replied, *Ex parte Herbert* decided a very different point, namely, that "a creditor who had proved his debt, and subsequently assigned it, was entitled to sign the bankrupt's certificate:" the distinction between the two cases was obvious from the language of the Lord Chancellor: "I remember no instance," said his Lordship, "where, after a creditor had proved, and subsequently assigned his debt, the purchaser had been admitted to sign the certificate." He contended there was, within the control of the Court, ample evidence to prove the claim: the bankrupts having passed their examination, their accounts were admissible evidence; for the rule in equity was to admit the best evidence which the circumstances of the case afforded, *Whitfield v. Faussett*, Cas. tempo. Lord Hardwicke. And the deed of arrangement entered into by the chief creditors with the bankrupts and their assignees (whereby £23,000 was secured to Mr. Chambers, sen., as a consideration for submitting to the commission) was also additional evidence. That deed Lord Langford executed at the request of the assignees; they had recognised his

Lordship as a creditor, and they consequently were stopped from opposing the proof.

Mr. Commissioner HOLROYD said the deed of arrangement should be produced by the assignees.

Mr. Mayhew said he had it not in Court, but admitted the execution of it by the late Lord Langford.

Mr. Egan then submitted that the evidence which had been elicited afforded sufficient grounds for the exercise of that equitable authority which the Court unquestionably possessed, and which he hoped would be extended to the present case.

Mr. Commissioner HOLROYD was of opinion that proof for the amount which appeared on the bankrupts' books ought to be admitted.

Proof admitted.

#### ADMINISTRATION OF JUSTICE IN THE COURTS OF BANKRUPTCY AND INSOLVENCY.

The LORD CHANCELLOR has directed a Commission of Inquiry, to inquire into the present state of the laws relating to BANKRUPTCY and INSOLVENT DEBTORS, and the administration thereof; and whether it be expedient to make any alterations therein; and particularly whether the several Courts by which they are now administered may not be beneficially united, or arranged as to co-operate with and assist each other, and by what means the full benefit of such laws may be secured, and the better administration thereof provided for in the country districts.

The Commissioners named are Mr. Justice Erskine, Mr. Commissioner Law, Mr. Evans, Mr. Fonblanque, and Mr. Holroyd; W. Crawford, Esq. M.P., B. Hawes, Esq. M.P., Wynne Ellis, Esq. M.P., Mr. Horsley Palmer, Mr. J. A. Hankey, and Mr. C. J. Glyn.

#### SPECIAL COMMISSION, MONMOUTH.

Tuesday, Dec. 10.

The LORD CHIEF JUSTICE TINDAL delivered the following Charge to the Grand Jury:—

My Lord, and Gentlemen of the Grand Jury.—Her Majesty having been pleased that we should be assembled this day, under commission issued not for the holding of an ordinary assize and gaol delivery, but on a special and extraordinary occasion, it has become my duty to lay before you the nature and description of the offences to which those commissions extend, the class and character of the cases which will probably be brought under your investigation, and the law which will apply to such cases respectively. It is not my intention, nor indeed have I the power to detail or comment on the circumstances of each particular case upon which you may be called to inquire. Undoubtedly, it will be more advantageous on the present occasion, where the

unfortunately, very numerous upon the highest crime which can affect you should receive only a general view of the law, which you may yourselves be able to do. I should be embarrassed by the minuteness of detail of the facts of this particular case. By such a course it appears to me, the ends of justice would be more completely satisfied, to the satisfaction both to yourselves and to the public. Gentlemen, with the very limited knowledge which I possess on the subject, I should not be expected, neither would it be proper for me to attempt with any minuteness of detail to enter into the history of the case which has formed the occasion of this business convened together at the present time. It is so desirable that you should be able to perform your duty without any aid in your minds as to the facts of the case, that I shall not attempt to say more than it is necessary for you to know. It is so notorious, that disturbances have taken place within this county of such a character, and of such magnitude, as to render it highly probable that some charges indictments for high treason have been preferred against some of the parties concerned to have taken a share in those disturbances. It will, therefore, be my more important duty on the present occasion to call your attention to the charges which will, in all probability, be brought under your investigation, and to expound to you, in a plain and simple manner, the law which defines and regulates those several charges; to explain to you what will be necessary to constitute the crime charged by such charge; and to add such observations relating to the nature and extent of the proof as will enable you to come to a just estimate of its weight and sufficiency in the charges brought before you, and to arrive at such conclusion in each particular case as justice and reason require. The first of my order and terminer, one of the offences under which we sit, is in itself generated in its terms and extent. It is within it all treasons, misprisions of treason, felonies, and misdemeanours whatsoever, the only criminal charges that are brought before you are those which are brought from or are connected with the offences above referred to, with respect to which I have already observed, there can be no doubt that presentments for high treason ought to be brought forward, my duty will be, in the offer you such remarks upon the subject of high treason as may assist you in the discharge of the important functions you may be called upon to execute. Gentlemen, the crime

of high treason, in its own direct consequences, is calculated to produce the most malignant effects upon the community at large; its direct and immediate tendency is the putting down the authority of the law, the shaking and subverting the foundation of all government, the loosening and dissolving the bands and cement by which society is held together, the general confusion of property, the involving a whole people in bloodshed and mutual destruction; and, accordingly, the crime of high treason has always been regarded by the laws of this country as the offence, of all others, of the deepest dye, and as calling for the severest measure of punishment. But in the very same proportion as it is dangerous to the community and fearful to the offender from the weight of punishment which is attached to it, has it been thought necessary by the wisdom of our ancestors to define and limit this law within certain express boundaries, in order, that on the one hand no guilty person might escape the punishment due to his transgression by an affected ignorance of the law; and, on the other, that no innocent man might be entangled or brought unwares within reach of its severity by reason of the law's uncertainty. And accordingly, in the Parliament of the 25th year of King Edward III. an act was passed, entitled "A declaration which offences shall be adjudged treason;" and upon this ancient statute, expounded, and in some degree enlarged, by a statute passed in the 36th year of King George III., stands the law of treason at the present day, so far at least as relates to any of the cases which can by possibility be made the subject of your inquiry. The statute of Edward III. declares it to be treason "when a man doth compass or imagine the death of our Lord the King," (within which designation a Queen regnant is included), "or if a man do levy war against our Lord the King in his realm, and thereof be proveably attainted of open deed by the people of their condition." The statute afterwards declares, "It is to be understood that in the cases above rehearsed, that ought to be judged treason which extends to our Lord the King, and his majesty." By the more recent statute of George III., temporary only at first, but afterwards made perpetual, it is enacted, "That if any person shall, within the realm or without, compass, imagine, invent or devise, or intend death and destruction, or any bodily harm tending to death and destruction, maim or wounding, imprisonment or restraint of the person of the King, or to deprive or depose him from the style, honour, or kingly name of the imperial crown of this realm, or to levy war against His Majesty within this realm, in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon or to intimidate or overawe both Houses or either House of Parliament, and such

compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, every person convicted in the manner therein mentioned shall be deemed, declared, and adjudged to be a traitor." Gentlemen, it cannot have escaped your observation that in the statute of Edward the substantive offence of treason thereby declared, affecting the life of the King, and in the latter statute, the substantive offence of the several treasons thereby created, consists in the compassing, intending, devising, and imagining the perpetration of the several acts therein specified, not in the commission of the acts themselves. But inasmuch as the wicked imaginations of men's hearts are known only to the Supreme Being, until they are evidenced to man by outward act, so the former statute has required, that before any one should become subject to the penalties of treason, he shall be thereof proveably attainted "of open deed:" and again by the latter statute it is enacted, that before any one falls within its penalties he shall express, utter, or declare, such his compassings, imaginations, and intentions, by publishing some printing or writing, "or by some overt act or deed." These overt acts, therefore, so required by the statutes, are the means by which the particular treason has been attempted to be carried into effect: they are the instances in which the guilty party has endeavoured to complete the treasonable design: they are the *indicia* or proof of the treason, not the treason itself. It is obvious, therefore, that these overt acts will be found to vary in each particular case. Where the object of the treason has not been actually perpetrated, combinations and conspiracies to carry it into effect, meetings to propose, to plan, to mature, or to accelerate its completion, the inciting and procuring others to join such combinations, the knowingly making, procuring, or furnishing arms and ammunition, money, or other necessities to insurgents for the purpose of accomplishing their treasonable designs, the administering illegal oaths to bind men to aid each other in such treasonable designs—all these, and many others of the same stamp and character, might be suggested as instances of overt acts of the particular class of compassing or devising to which they apply, within the meaning of both the statutes. And, gentlemen, as the proof of some overt act or acts is absolutely necessary to support the charge of treason, whatever it may be, so must the proof be confined to those specific overt acts which are charged in the indictment, and no other, in order to give the party accused the opportunity of knowing the real charge which is made against him, and to enable him the better to prepare for his defence; for the overt act is the charge to which the prisoner must apply his defence. And still further, with

respect to these overt acts, it is to be observed that in favour of the party accused a statute was passed in the reign of King William III. which enacts, "that no person shall be indicted or tried for high treason whereby any corruption of blood ensues, but by or upon the oaths of two lawful witnesses, either both of them to the same overt act, or one of them to one, and one of them to another overt act of the same treason." And various other advantages and privileges have been granted by the Legislature from time to time in favour of persons accused of high treason, which do not belong to persons charged with other offences. Having thus endeavoured to explain to you the nature and property of these overt acts which must be alleged in the indictment, and what evidence they must be supported, I proceed to call your attention to the different heads or classes of treason which may be laid in the indictment against the accused. It is not improbable that one charge of treason may be laid in the indictment to be the compassing and imagining the death of our Lady the Queen, and various overt acts may be stated in support of it and perhaps, amongst the rest, the levying war against the Queen in her realm, which hath been held by many decided cases to be an overt act of that species of treason, as well as a substantive treason in itself. But, as there can be no reason to suppose that any direct or immediate intention of injuring the sacred person of the Queen could by possibility be surmised to have existed on the occasion, it will be unnecessary, as it appears to me, to occupy you with any observations on the head of treason.

(To be continued.)

#### REVIEW OF NEW BOOKS.

**PRECEDENTS IN CONVEYANCING**, adapted to the present State of the Law. Illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq., F.R.A., of the Middle Temple; Author of the "Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. In continuation of the *Precedents* by S. VALL BONE, Esq. Vol. III. AGREEMENTS, COMMERCIAL, DEEDS, LEASES. London: John Richards and Co. Law Booksellers, 194, Fleet Street, 1839.

We are much gratified in seeing Vol. II. of this ORIGINAL WORK upon CONVEYANCING before us in a complete form. The number included in it, for the present month

continuation of COMMERCIAL PRECEDENT, and some very useful forms of the AUTHOR does not as the work taken his hand, but continues his work of introducing new forms of the existing state of the law. Before us a NEW PRECEDENT for a CO-PARTNERSHIP, "a simple form of common agreements in Trade," in which arbitration clauses are so drawn as to prevent the litigation that so frequently occurs among partners, to say nothing of the ruinous expense that inevitably results by which the partners are rendered taking proceedings against each other in arbitration shall have been refused." In a note to this clause the following:—

"In general practice a new form of clause, proposed will prevent much of the litigation which frequently occurs among partners, and of the ruinous expense that attends it. The author's attention has been directed to this restraining clause from the note made by Lord Loughborough upon *Halfhide v. Fenning* (2 Bro. Chan. 11) and *Mitchell v. Harris* (2 Ves. jun. 11). In the former case there was a similar clause. His Lordship observed—'Parties are bound by it; and it is every day's practice, to say that they cannot proceed contrary to it.' But there is a great distinction between an express agreement that there shall be no suit at law or in equity, and a bare agreement to refer disputes to arbitration, and the former should be taken particular notice of.

"If there be an express agreement that there shall be no suit at law or in equity, then the parties are bound to proceed contrary to that agreement, and it is pleaded in bar; but if there be a bare agreement to refer disputes to arbitration only, the parties are bound to give damages; it cannot be pleaded in bar to any action or suit: the reason is, because the agreement of parties does not oust the jurisdiction of the Court. Lord Loughborough, in *Mitchell v. Harris* (ante), had not been furnished with any authority, or even dictum, to show that an agreement to refer, where no reference has taken place, stops a court of law; nor has there been any idea of a bill to enjoin a party from proceeding at law, under a notion of giving effect to such a covenant as this, where the parties are proceeding at law.

Lord Hardwicke, in *Wellington v. Mackintosh*, speaking of a covenant to refer (2 Atk. 569), said the parties might have made such an agreement as would have ousted this court of its jurisdiction.

"Lord Kenyon, in *Thompson v. Charnock*, 8 Term Rep. 140, observed, it had been decided, again and again, that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction.

"Lord Eldon, in *Tattersall v. Groote*, 2 Bos. & Pull. 131, took a comprehensive view of all the cases. That was an action in the Common Pleas upon covenant between parties, in case of a dissolution of the partnership, to refer all matters relating thereto to arbitration, and one of the parties refused to nominate one. Lord Eldon said, 'There is no instance of such an action as the present having ever been brought in a court of law; and though courts of equity will decree the specific performance of reasonable covenants, where substantial damages cannot be obtained in a court of law, yet no man ever heard of a suit in equity to compel the specific performance of a covenant to refer disputes to arbitration.' In *Wellington v. Mackintosh*, Lord Hardwicke overruled a plea of covenant to refer matters in difference, which was pleaded to a bill for a discovery. Lord Kenyon, indeed, in *Halfhide v. Fenning*, supported such a plea; but then the words there were, 'before they brought any suit.' His Lordship said, he thought he did not misconstrue the case of *Mitchell v. Harris*, by stating that the opinion of Lord Loughborough did not agree with the doctrine laid down in *Halfhide v. Fenning*. In the discussion of *Mitchell v. Harris*, the counsel were asked by the Lord Chancellor, if an action like the present had been known in a court of law; and it was admitted that no instance was to be found. It would be difficult to direct a jury upon what rule to proceed in assessing damages in such an action; for *non constat* that the plaintiff would have succeeded in the arbitration. The covenant, therefore, seems nugatory, or, if not so, yet it cannot be enforced, as tending to exclude the jurisdiction of the courts."

The value, to practical men, of the notes in this Work is very great, they are copious—yet to the purpose, and most useful, as leading them to the present state of the Law, upon every point connected with the subject matter of each Precedent—as for instance, upon the clause in a Copartnership deed, providing for a Dissolution of the Copartnership. The Author says—

"When a partnership is, by notice, death, or



by any other mode of determination, actually ended, as regards all the partners, no one of them can make use of the partnership estate, in a manner inconsistent with the winding up of the concern. The object of their original association is then terminated, and their power of employing the joint property in the way of trade ceases. The partners cannot create any new obligations; for after a dissolution, nothing remains to be accomplished, except the arrangement of the affairs of the partnership; but *until they are settled*, the connection between the partners subsists; and in that sense, and until such a settlement takes place, the partnership may be said to continue, and the ex-members of the firm may be sued as existing partners. Lord Eldon, in *Ex parte Williams* (11 Ves. jun. 5), thus explained the equities, among partners, and the consequences upon a dissolution, with reference to each other and creditors:—

“Among partners, clear equities subsist, amounting to something like lien: the property is joint, the debts and credits are jointly due. They have equities to discharge, each of them, from liability, and then to divide the surplus according to their proportions; or, if there is a deficiency, to call upon each other to make up that deficiency, according to their proportions. But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners, and get judgment, and may execute his judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment; clearly not in respect of any interest he has in the partnership effects, while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership: effluxion of time; the death of one partner; the bankruptcy of one, which operates like death; or a dry, naked agreement that the partnership shall be dissolved. In no one of those cases can it be said that, to all intents and purposes, the partnership is dissolved: for the connection still remains until the affairs are wound up. The representation of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor, or the solvent partner: but still, in either of those cases, that community of interest remains, that is necessary, until the affairs are wound up, and that requires, that what was partnership property before, shall continue, for the purpose of a dissolution, not as the rights of the creditors, but as the rights of the partners themselves require; and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as, in the

case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution. The creditors are not injured by the agreement of partners to dissolve the partnership, and that, from that time, what was joint property shall become the separate property of one; notice of the dissolution being given; as either a consideration is paid, or, which for this purpose is equal to consideration, a covenant is entered into to pay the debts and indemnify the retiring partner, so conceived as not to leave any lien upon the property.—That when the possession of the property is delivered over to the surviving partner, and he goes into the world as a sole trader, he has all the credit belonging to him as such sole trader; having the possession and dealing with mankind, as such.’ His Lordship would not agree that mere dissolution would work all this effect, as that does no more than declare that the partnership is not to be carried any farther, except for winding up the affairs; and he, who has actual possession, has it, clothed with a trust for the other, to apply the property to the debts; and that will qualify the nature of his possession, so that it cannot be said he has the sole possession of the specific effects or the debts, to bring it within the operation of the statute (22 Jac. 1. c. 19. ss. 10, 11; see *Jones v. Gibbons*, 9 Ves. jun. 407), which certainly affects debts. His Lordship added that having had occasion lately (see *Lady Arundell v. Phipps*, 10 Ves. jun. 139) to look into the doctrine from *Twyne’s case* (3 Co. 80), he thought in modern times a tendency had prevailed to give more effect to the actual manual possession, as evidence of fraud, than *Twyne’s case* was intended to sanction. But it was enough to say, mere dissolution of partnership, if there be no more, leaves each partner in possession, as trustee for all, to the extent of enabling each to call upon all to apply the partnership effects to the purposes to which they ought to be applied, even if there was no dissolution. But it is the equity of the partners among each other that requires that application; not that of the creditors; for whom, however, a provision thereby necessarily operated, which they could not operate for themselves, unless by action and execution, laying hold of the effects, as they might of the person. See also *ex parte Ruffin*, 6 Ves. jun. 119.; *Peacock v. Peacock*, 16 Id. 57.; *Wilson v. Greenwood*, 1 Swanst. 480.; *Crawshay v. Maule*, Id. 506.

“The arrangement of the affairs, and winding up of the partnership concern, being the sole object and purpose to be attained after a dissolution, equity will, in all cases, interfere where the conduct of partners is of a description not likely to be attended with such a result. See *Hardin v. Glover*, 18 Ves. jun. 281.; *Crawshay v.*

); *Natsoch v. Irving*, Gow. App. *McCote v. Hulme*, 1 Jac. and Walk. on *v. Gaywood* (antè). The common property is ascertained, or may insist upon a sale of the same. The rights of the partners are equal; each may require the whole to be wound up by a sale, and a division. One partner has no claim upon the proportion of a specific article, nor upon an exclusive right in it; but only to a general arrangement of the business, and for that purpose to the produce of the aggregate joint property. *Johnson v. Ryan*, 2 Swanst. 565. n.) separate his share from the bulk of the partnership, nor compel his copartner to accept of a valuation, his interest may be sold. *Crawshay v. Collins*, antè; *Lingin v. Sim.* & Stu. 600.) In *Nerot v. Huss*, 56.) pending an appeal against a partnership dissolved, and

directing the property to be sold, and an account, the COURT, upon motion, suspended the sale, upon the terms of bringing title deeds into the Master's office, and giving security for the value of the effects."

The PRECEDENTS of LEASES are adapted to every purpose, and have this great advantage that most of them are stated to be under 30 folios; a very useful Table is also added, containing "The CUSTOMS in the several COUNTIES of ENGLAND, shewing the usual periods of entry, the customary duration of Leases and the Rent days," as applicable to FARM LEASES, which, to COUNTRY SOLICITORS in particular, must be of great use; and we again recommend the Work to general notice.

**TICLED CLERKS APPLYING TO BE ADMITTED ATTORNIES (a)  
IN HILARY TERM, 1840.**

(Continued from p. 91.)

<i>Articled Clerk's Name and Residence.</i>	<i>To whom Articled or Assigned.</i>
Isaac Sparks, 30, Kenton Street, Brunswick and Crewkerne.	Isaac Sparks, Crewkerne.
Sturley Nunn, 5, Norfolk Street, Strand; assigned to Harry Wayman, Bury St. Edmunds.	Sturley Nunn, Ixworth; assigned to Harry Wayman, Bury St. Edmunds.
Timothy Surr, 80, Lombard Street.	Timothy Surr, 80, Lombard Street.
George Saffery, 69, Strand; 9, Fountain Street, Strand.	George Saffery, Market Rasen.
Henry John Mant, 38, Milk Street; Bath; and Pancras, Cheapside.	Henry John Mant, Bath.
Philip Goode, 8, Argyle Street, Regent Street.	Philip Goode, 44, Howland Street, Fitzroy Square; assigned to Charles Dod, Craven Street, Strand.
Robert Bartlett, Chelmsford.	Robert Bartlett, Chelmsford.
Godfrey Goddard, 13, Warwick Court, Holborn.	Godfrey Goddard, Wood Street, Cheapside; assigned to Frederick Harrison, 34, Bloomsbury Square.
George Cooke, Bristol.	George Cooke, Bristol.
Ottiwell Tomlin, the younger, 30, Mornington Street, Richmond, Yorkshire.	Ottiwell Tomlin, the elder, Richmond, Yorkshire; assigned to James Williamson, 4, Verulam Buildings.
Robert Barr, 98, Upper Stamford Street; and	Robert Barr, Leeds.
Walter Burley, 19, Compton Street, Brunswick; Shrewsbury; and Castle Street,	Walter Burley, Shrewsbury; assigned to Jonathan Scarth, Shrewsbury.
John Beckwith, Fishmongers' Hall, London Bridge.	John Beckwith Towse, Fishmongers' Hall.
John Rising Staff, Norwich.	John Rising Staff, Norwich.
Theed Pearce, the younger, 43, Southampton Street; and Bedford.	Theed Pearce, the younger, Bedford.

(To be continued.)

(a) Marked \* are Common Pleas, the rest are Queen's Bench.

## Business of the Courts.

### COURT OF CHANCERY.

In re Griffiths, lunatic petition, by order—Hill v. Gomme, appeal, part heard.

Causes.—Kirkwall v. Flight—Dillon v. Coppin—Mersey v. Mersey, further directions—Rudd v. Sewell—Green v. Milton—Mills v. Hudson—Wartnaby v. Shuttleworth—Rose v. Clarke—Mills v. Baylis—Hodges v. Curzon—Praed v. Richardson.

### VICE-CHANCELLOR'S COURT.

His Honour will take a list of sixteen short causes and twenty-four unopposed petitions.

After the Petitions—Illingworth v. Manchester and Leeds Railway, motion, part heard.

### ROLLS' COURT.

Attorney-General v. Ironmongers' Company, part heard—Franks v. Price, part heard.

### COURT OF QUEEN'S BENCH.

London Common Juries—Dyer v. Wilkinson—Tebbutt v. Ambler—Reynolds v. Munro—Hodsoll v. Stallebrass—Stephens v. Nash—Williams v. Pittock—Thompson v. Stuart, executrix—Bell v. Francis and others—Fisher v. Channdy—Addams v. Lewis and others—Bayliss v. Pope—Hastings v. Cooper and others—Hatch and another v. Darby—Smith v. Hancock—Colls and others v. Beesley—Bryant v. Perkins—Thompson v. Coulter.—(The last cause is No. 56 on the list.)

### COURT OF COMMON PLEAS.

London Special Juries.—Gillett and another v. Wilby—The Same v. Chapman.

London Common Juries.—Perring v. Luckin—Christian v. Bennett—Leeds v. Berry—Betts v. Creed—Barwell v. Griffin—Edwards v. Brewer—Wilkinson v. Thompson.—(The last common jury cause is No. 93 on the list.)

### COURT OF EXCHEQUER.

London Special Juries.—Browne v. Nairne—Green v. Hedges—Robinson v. General Steam Navigation Company—Attwood v. Preston and Wyre Railway Company.

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# The Legal Guide.

SATURDAY, DECEMBER 21, 1839.

[No. 8.]

## WS OF REAL PROPERTY.

### ESSAY II.

4 Wm. IV. cap. 74.

*he Abolition of Fines and Reco-  
for the Substitution of more  
les of Assurance.*

*Continued from p. 98.)*

#### NG POWER OF A TENANT IN TAIL. ECTOR OF A SETTLEMENT.

inery substituted by this statute  
d tenancy to the Præcipe, which  
ant in tail to suffer a recovery,  
remainders, is entirely new to  
England. It consists in inter-  
power called the " Protector  
ent," the nature of which will  
by taking the Report of the  
ty Commissioners (a), from  
its origin.

of this machinery, and the  
influenced the Real Property  
s in introducing it, will be  
tly plain by the following pas-  
e first Report. 1 R. P. R. 31,  
e too broad a principle to esta-  
enant in tail, whether in pos-  
remainder, should be enabled to  
and the remainders over, with-  
striction; and the giving him  
stricted power in allcases, might

be productive of serious evils by rendering family settlements abortive. Although the rule requiring the concurrence of the person who has the freehold to make the tenant to the præcipe in a recovery, is purely technical, and is liable to many objections, as we have already stated, yet great benefits, which could not originally have been contemplated, when recoveries were first applied to the barring of entails, have resulted from it. It has given parents, who, in family settlements usually have the first estate of freehold, the means of checking any improvident dealings with the property by their children; it has given rise to family arrangements which are usually entered into as soon as the first tenant in tail comes of age, and which generally terminate in a re-settlement of the property, and in continuing it in the family for another generation, and in an immediate provision for the first tenant in tail, and in giving him powers to provide for a wife and children in the life-time of his father; and it has prevented the intention of the original settlor from being defeated, at the will and caprice of the tenant in tail, who may possibly never come into possession. To avoid the evils which have resulted from this rule, and at the same time to preserve the benefits we recommend, that the concurrence of the person having the immediate estate of freehold, should, as seised of that estate, be no longer necessary to enable a tenant in tail to bar the entail

(a) 1 Rep. 31.

and the remainders over ; and that, instead of such concurrence, where, by the deed or will creating the entail intended to be barred, or by any appointment made in exercise of a power contained therein, a beneficial estate, either for life, or years, determinable on life, or of any greater extent, not being a lease on which a rent shall be reserved, shall be limited prior to the estate tail intended to be barred, and shall be subsisting, or where the first beneficial estate shall have devolved upon some person as tenant by courtesy, either at law or in equity, in respect of the estate tail intended to be barred, or of any other estate tail created by the same deed or will, any disposition by the tenant in tail shall be made with the concurrence of the person to whom such prior estate, or the first of such prior estates, if more than one, shall have been limited, or of the person upon whom such prior estate shall have devolved, and that any disposition made without such concurrence shall only bar the estate tail ; and that the concurrence of such beneficial owner shall be equally good and available, notwithstanding he may have encumbered or aliened his estate, or may have become bankrupt or insolvent, and that the concurrence of the first beneficial owner may be signified either by his being a party to the substitute or by a separate deed and without obtaining from him an actual conveyance of his estate. If the concurrence should be signified by a separate deed, we think it advisable that it should not be allowed to the concurring party to impose any terms on the tenant in tail, as the necessity of seeing whether he had complied with those terms would then be avoided. This will not prevent the parent or other beneficial owner from requiring the estate to be settled in a reasonable manner, for the benefit of the family, as he will always have it in his power to do this by keeping back the deed of concurrence until he is satisfied that the estate has been settled in such manner as he has required. If the first benefi-

cial owner should be a married woman, we recommend that her husband should also be a concurring party, and that as she will part with no estate her concurrence should be given without a separate examination, and as if she were a female sole. The deviation from the present rule will not be so great as may at first sight appear ; for, in the majority of cases, the tenant of the immediate estate of freehold, and the first beneficial owner, will be the same person. We have not thought it advisable to require the concurrence of the tenant in dower, for it seldom, if ever, happens that dower is set out by metes and bounds ; and if such an estate does occur, her concurrence would have only a partial operation, as the estate is confined to a part of the lands entailed.

The Act then proceed to give effect to this machinery, and establishes a PROTECTOR for every settlement ; and by Sec. 22, it is enacted That if at any time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands or any part of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for the purposes of this Act deemed the prior estate) shall be the protector of the settlement in so far as regards the lands in which such prior estate shall be subsisting, and shall for the purposes of this Act be deemed the owner of such prior estate, although the same may have been charged or encumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incu-

such prior estate, and although the estate may have been absolutely conveyed by the owner thereof, or by order of the bankruptcy or insolvent commission, or by any other act or deed of the owner; and that an estate by way of mortgage in respect of the estate tail, or of any other estate created by the same settlor, shall be deemed a prior estate under the meaning of the clause, and that an estate by way of mortgage or trust to or for the settlor, shall be deemed an estate under the same meaning of this clause. Provided always, That where two persons shall be owners, under a settlement, the meaning of this Act, of a share in the sole owner of which estate, there shall be only one, would in respect of the protection of such settlement of such persons, in respect of the share as he could dispose of, the purposes of this Act be the same as if he were the owner of a prior estate, and the protection of the other or others of the settlement, the sole protector of such settlement, to the extent of such undivided share.

(To be continued.)

## LAW OF INJUNCTIONS.

### ESSAY I.

#### JURISDICTION OF THE COURT OF CHANCERY TO RESTRAIN PROCEEDINGS IN OTHER COURTS.

S. D. Esq. Barrister-at-Law.

Principle on which Courts of Equity restrain the prosecution of proceedings in other Courts by injunction, is that the person proceeding, and not the Court in which such person is proceeding, is the subject of the language of an old case, that the Court should not act upon the Court in derogation of its jurisdiction (as in the case of *Sheffield v. Duchess of Bucks*), but admitting the jurisdiction, and, if it think proper, from collateral

circumstances, not to suffer the parties to apply and take the benefit of that jurisdiction." (a) Upon this principle, it seems immaterial where or what the Court is in which proceedings are sought to be restrained, provided the party sought to be restrained is amenable to the jurisdiction, and is capable of being acted on by the process of contempt of the Court; and the extension of the jurisdiction of Equity to stay proceedings in other Courts besides Courts of Common Law, and in foreign Courts, as well as in Courts within the jurisdiction of the Court of Chancery, becomes, when considered in reference to the principle, as rational and intelligible as it is firmly established in practice. Instances of the interference of the Court of Chancery to stay proceedings in the Ecclesiastical Courts is to be found in very early cases. In the one already referred to (b), before Lord Loughborough, a party had long acted under a will, and admitted the validity of the probate in proceedings in Chancery and in the House of Lords, and then sought, without bringing forward any new evidence, to controvert the validity of the will in the Ecclesiastical Court; an injunction was granted to restrain the party from proceeding in the Ecclesiastical Court. And in another case, before the same learned Judge, where a woman of mean circumstances and bad character entrapped an infant ward of Chancery into a marriage, under circumstances amounting to a gross contempt of the Court, and afterwards obtained a decree for alimony in the Ecclesiastical Court, and sentence of excommunication against her infant husband and his guardian, the Court, on a petition being presented by the guardian for a prohibition to restrain proceedings upon the decree and the excommunication, refused the prohibition, expressly admitting the jurisdiction of the Ecclesiastical Court, but held

(a) *Sheffield v. Duchess of Bucks*, 1 Atk. 6. & 630.

(b) *Id.*

that having regard to the jurisdiction of the Court of Chancery for the protection of its wards, and to the conduct of the wife, the Court had jurisdiction to restrain *the wife by injunction* from proceeding, and accordingly granted an injunction. (c)

In modern times, injunctions have been granted to restrain proceedings in Courts of various jurisdiction. Thus, in a late case, where a woman had instituted a suit in the Admiralty Court to recover a sum of money for wages as cook of a small merchant-vessel, the owners defended on the ground that she was the wife of the captain. But evidence of this fact could not be obtained until the suit had advanced beyond that stage at which fresh evidence would be admitted in the Admiralty Court. On these facts being verified by affidavit, an injunction was granted to restrain further proceedings in the suit until answer or further order, the defendants paying into Court the sum recovered and the costs in the Admiralty Court. (d)

An attempt was made in *Glascott v. Lang* (e) to deny the jurisdiction of Equity to restrain proceedings in the Admiralty Court upon a bottomry bond, on the ground that the matter was properly cognizable in the Admiralty Court, which itself acted upon equitable principles, and had power to moderate the amount recoverable upon the bond if the case required it. But the Court held the jurisdiction clear, and said: "Such an instrument, whether it be a bottomry bond or any other species of bond, is a security for money alleged to have been obtained under circumstances which a Court of Equity ought not to give effect to; and the plaintiffs come here asserting their equity to get rid of the obligation, whether as against the possessor or against the property, in the

ordinary course of administration of equity in this Court."

This case is further an authority for the position that in order to induce the Court to interfere, it is not necessary that it should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the Court finds upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a Court of Equity. (f)

It is now a perfectly settled jurisdiction of Equity to restrain proceedings in the Ecclesiastical Court respecting the grant of probate. Thus in a case where there was great presumption of fraud in obtaining the signature of a testator to an alleged will, the next of kin having instituted a suit in the Ecclesiastical Court to recall the probate granted to the alleged executors, a receiver and injunction were granted on the motion of the plaintiff before answer, on affidavit of the truth of the allegations contained in the bill; (g) and it was expressly decided also, in *Ball v. Oliver*, (h) that the principle on which the Court of Chancery interferes to preserve personal property pending a litigation in the Ecclesiastical Courts, is applicable to cases where probate or administration has been already granted, and the suit is to recall it as well as to cases where no probate or administration has been granted.

The principles on which the jurisdiction of the Court is founded, and on which the exercise of that jurisdiction is regulated, are well explained by the case of *Watkins v. Brent*. (i) Two questions arose in this case, one, whether the mere fact of there being *bond fide* litigation in the Ecclesiastical Court as to the grant of probate is ground for the Court to interfere by injunction and receive another, whether, where the execut

(c) *Hill v. Turner*, 1 Atk. 518.

(d) *Jarvis v. Chandler*, 1 Turn. & Russ. 319.

(e) 3 My. & Cr. 451.

(f) Vide the judgment of the Court, p. 455.

(g) *Rutherford v. Douglas*, 1 Sim. & Stu. 111.

(h) 2 V. & Be. 96.

(i) 1 My. & Cr. 97.

obtained probate has agreed with instituting a suit to recall such at the validity of the testamentary which the executor claims shall the suit, that is such a case as to Court to interfere. The first s decided in the negative, and in the affirmative. The Court as no doubt but that, by the rule, if the representation is in con- person has been constituted ex- Court interferes, not because of but because there is no proper receive the assets. But where been granted, the case is other- n there has been an adjudication, s a person legally capable of assets; and then a strong case, r of great danger to the property litigation, must be made out to Court to interfere. And in the e, although there had been such , the Court was of opinion, that round to interfere, because the his agreement to let his title be l treated himself as not complete

(To be continued.)

## PROBLEM VIII. VOL. 3.

### LIVERY OF SEISIN.

it necessary—To whom may it ow is it made?

### EDITOR OF THE LEGAL GUIDE.

TO PROBLEM 4. VOL. II.  
cases may an action be brought who has entered into a special inst the person with whom he d, while the plaintiff's own side ct remains unperformed?

question whether a plaintiff can action on a contract which he

skins v. Brent, 1 Myl. & Cr. 97.

has entered into—his own side of the contract remaining unperformed—always turns on the point whether the act to be performed by the plaintiff was to be performed as a condition precedent to the defendant's performance of the contract, I shall first state the rule laid down by Lord Mansfield for determining what will constitute a condition precedent, and which rule applies to either covenants or agreements; and I shall then proceed to state the cases which have determined what is and what is not a condition precedent.

First, then, it has been laid down by Lord Mansfield, that there are three kinds of covenants: "1st. Such as are called *mutual and independent*, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2nd. There are covenants which are *conditions and dependent*, in which the performance of one depends on the prior performance of another, and, therefore, till the prior condition is performed, the other party is not liable to an action on his covenant. (a) 3rd. There is also a third sort of covenants, which

(a) The two following cases are in accordance with this rule, and serve to illustrate it. Where a defendant agreed to sell plaintiffs a certain quantity of sponge, and plaintiffs agreed to sell defendant a quantity of ochre, to be delivered, free of expense, on or before a certain day, it was held that the delivery of the ochre by that day to the extent of the value of the sponge was a condition precedent to the delivery of the sponge, and that the plaintiffs, not having made such delivery, could not recover for the non-delivery of the sponge. (*Parker v. Basstins*, 4 Bing. 280; 12 Moore, 529.) So where it was a part of a condition precedent to the claim of a sum of £80, in addition to the purchase-money, for a new house, that the pavement in front of the adjoining houses should be laid down by the 21st of April, it was held that the delay of four days, though occasioned by bad weather, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim. (*Maryon v. Carter*, 4 C. & P. 285.)



are *mutual conditions* to be performed at the same time; and in these, if one party were ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. The *dependence* or *independence* of covenants, however, is to be collected from the evident sense and meaning of the parties; and however transposed they may be in the agreement, their *precedency* must depend on the order of time in which the intent of the transaction requires their performance." (*Jones v. Barkly*, Dougl. 690, 691.)

Secondly. What is, and what is not, a condition precedent.

1st. If a day be appointed for payment of money, and the act for which the payment is to be made cannot be done before the day appointed, then, though the agreement be to pay the money for the doing the thing, yet the action may be brought for the money before the thing is done, because the agreement is positive that the money shall be paid at the day appointed. This rule was laid down by Lord Holt, when his Lordship observed (in reference to an objection that may be taken to it, on the ground of its being unreasonable,) that the bargain of every man ought to be performed as he understood it; and if a person will make such an agreement as to pay his money before he has the thing for which he ought to pay, and will rely upon the remedy he has to recover the said thing, he ought to perform his agreement. (*Spiller v. Westlake*, 2 B. & Ad. 155; *Thorpe v. Thorpe*, Salk. 171.) And the same rule holds where no time is fixed for the performance of that which is the consideration of the money or other act. (1 Saund. 320, a.)

2nd. That though a day certain be appointed for payment of the money, yet if the day is to occur after the time in which the consideration ought to be performed for which

the money should be paid, the performance of the consideration ought to be averred in an action brought for the money; in other words, that it is a condition precedent, or condition dependent, coming within the operation of Lord Mansfield's second rule as above stated.

3rd. That where the plaintiff's covenant or proviso constitutes only a part of the consideration of the defendant's contract, and the defendant has actually received a *partial benefit*; and the breach on the part of the plaintiff may be compensated in damages; an action may be supported against the defendant without averring performance by the plaintiff. (1 Saund. 320 b.; *Boome v. Eyre*, H. Bla. 273; *Campbell v. Jones*, 6 T. R. 572; 10 East, 295, 556, 563; 3 M. & S. 308; *Fothergill v. Walton*, 8 Taunt. 576.) But in these cases, it seems necessary to aver in the declaration performance of, at least, a part of that which the plaintiff covenanted to do, or to show that the defendant has otherwise received a partial benefit. (1 Saund. 320, c. d.; 10 East, 295; 6 Moore, 114.)

4th. Where two acts are to be done at the same time, as when A. covenants or agrees to convey an estate, or to deliver goods, on a named day, or generally; and, in consideration of this, B. covenants to pay A. a sum of money *on the same day, or generally*, neither can maintain an action without averring performance of, or an offer to perform, or at least a readiness to perform, his part, though it is not certain which of them was obliged to do the first act; and this rule particularly applies to contracts of sale. (1 Saund. 320 d. note 4; 2 id. 352, n. 3, and 108, n. 3; *Rawson v. Johnson*, 1 East, 203; 8 T. R. 366; 7 T. R. 130; 7 Taunt. 314; 8 Taunt. 62; and see Chitty on Plead. 6th edit. vol. i. p. 324.)

C. P.

## Law Reports.

## OF CHANCERY.—Nov. 20.

WELLESLEY v. WELLESLEY.

*from the Vice-Chancellor.*

*Declaration—Construction of Covenant to Secure an Annuity for the separate Wife by charge on real estate—It shall operate on the first estate of the Husband—Practical Point of Parties—Demurrer.*

An appeal from the decision of the Vice-Chancellor made in this cause (a). The bill was filed by the Hon. Mrs. Wellesley (formerly High) and Colonel Paterson, her husband, in a separation deed, executed by her against her husband, the Hon. Colonel Wellesley, and his eldest son, in pursuance of a deed which the father and son executed on the 1st of December, 1834. By the separation deed Mr. Wellesley covenanted that he would pay to his wife, on the 1st of February, 1835, either by a charge on real estate or by an investment in the funds, by the best means then in his power, a payment to Col. Paterson, during the life of Mrs. Wellesley, of £1000. a-year, in separate use. The deed also contained a covenant that Mr. Wellesley would pay to Mrs. Wellesley's solicitor £1000. for her own use, within a year. Col. Paterson, on the other hand, covenanted to indemnify Mr. Wellesley against the debts of Mrs. Wellesley. Mrs. Wellesley, under the marriage settlement with her husband, was tenant for life of considerable real estate, with remainder to his eldest son and the eldest son on coming of age, as tenant in tail male in possession. In December, 1834, Mr. Wellesley and his son, who had come of age, executed a deed by which the family estates in Essex, to which they were entitled, were mortgaged to the Amicable Insurance Company for £462,000. The trustees were to receive and to apply the proceeds of the mortgage in discharge of trusts for creditors, with an annuity of £1000. a-year for Mr. Wellesley himself, and £500. a-year for Mr. Wellesley to charge the mortgage on the jointure of £1500. a-year for his wife, or any wife he might hereafter marry. As Mr. Wellesley not having performed on the 1st of February, 1835, the bill was filed to attach his interest in the mortgage for satisfying the covenant, or to exercise his power of jointuring to himself the £1000. a-year. There had

been a former bill against the trustees of the Amicable Insurance Company, which sought to affect the estates with the covenants. But that bill had been abandoned as soon as the real nature of the arrangement of Dec. 1834, became known to the plaintiff. The trustees demurred for want of equity and for want of parties, and the Vice-Chancellor over-ruled the former demurrer and allowed the latter, with liberty generally to amend. The bill had accordingly been amended, and the trustees had again demurred in like manner as before.

Mr. Wigram, for the trustees, now appeared to support the demurrer, on the ground that the covenant of Mr. Wellesley was a personal one, and contended that the Court would not at once transfer the liability to his lands, as if that could be done for the wife it might be extended to all other creditors, which was contrary to all the rules of the Court. (*Freemount v. Dedire*, 1 P. Wms. 429.; *Ravenshaw v. Hollier*, 7 Sim. 3.) He did not deny the liability of Mr. Wellesley, nor that the annuity of £1,000. ought to have been secured long ago. But his clients, who had nearly wound up the trust, objected to being embarked in a suit of indefinite length. A very large sum of money had been raised, and placed in their hands for the payment of debts, but there was nothing in the transaction which was open to any objection. The younger Mr. Wellesley had concurred in giving facility to the arrangement, and the assets of his father had been so marshalled as to disencumber freehold estates, the result of which was, that he had received a full equivalent.

Nov. 22.

The LORD CHANCELLOR called the attention of counsel to the irregularity of the order of the Vice-Chancellor, and of the appeal. There was but one demurrer, but the order was as if made on two demurrers—viz., allowing the demurrer for want of parties; disallowing it on the other ground, want of equity. The demurrer was, in fact, allowed; it must be so taken in point of form and practice. But the Vice-Chancellor in allowing the demurrer gave the plaintiff leave to amend the bill. That was last July. The bill was amended by adding parties, and these parties so added demurred to the amended bill in September last, acquiescing so far in the order to amend what the present motion sought to set aside. His Lordship, for the sake of maintaining the regularity of the practice of the Court, would not now discharge that part of the order. He would give them his opinion to-morrow morning on the other points of the case.

Nov. 23.

The LORD CHANCELLOR gave judgment this

(a) Ante, vol. ii. p. 341.

morning. The demurrer was put in by two defendants who are trustees of property over which Mr. Wellesley obtained power of charge under a deed executed in December, 1834. The question was whether the demurrer was right. The title made by Mrs. Wellesley, the plaintiff, was under a deed of separation, dated in June, 1834, by which Mr. Wellesley covenanted that he would well and effectually secure to her an annuity of £1,000. on estates of inheritance in England or Wales, or on a competent sum, to be for that purpose invested in the public funds, or by some other means. At the time when this contract was entered into Mr. Wellesley was only tenant for life. By an arrangement entered into between him and his eldest son in December, 1834, Mr. Wellesley obtained a power of jointuring his present or any after-taken wife to the amount of £1,500. a year out of these estates. It was contended in the agreement that this latter deed was to be taken as part of the deed of June, 1834; which was denied on the other side. The bill, after stating the deeds, stated that the demurring defendants were trustees of the deed of December, 1834, giving Mr. Wellesley the power of jointuring, and that he refused to make use of that power to perform the covenant in the deed of June, 1834; and that the trustees, out of the £462,000. to be raised by them out of the estates, were about paying the surplus, after paying debts and discharging the estates, to Mr. Wellesley. The bill stated an acquisition of property by Mr. Wellesley, in 1835, whereby he was enabled to execute his covenant, but that he refused so to do, and that the defendants were trustees of that property. The bill then stated a part performance of the covenant by the purchase of certain lands to secure the payment of it. Now, if it appeared that, at the hearing of the cause, the court had no power to enforce the covenant on the lands, and that it was a mere personal covenant as was argued, in that case the demurrer ought to be allowed. But if the court has power to affect the lands by its decree against Mr. Wellesley, then the trustees were properly made parties to the suit, and their demurrer must be over-ruled. If a party enters into a contract, which he disables himself from performing, the court will compel him to perform it if he shall become able. Should the plaintiff, on the hearing of this cause, obtain a decree of specific performance against Mr. Wellesley, can it be doubted for a moment that this Court will confirm the decree against the lands? If there could not be a doubt the plaintiff must have a decree against Mr. Wellesley for the performance of the contract, and that this Court would make that decree and charge on the lands, the trustees of those lands were properly made parties. His Lordship, after going through

several cases that were referred to in the argument, and to other cases in support of his opinion that the contract set forth, and the case stated by the bill, would warrant the Court in making a decree to compel Mr. Wellesley to act in performance of his contract over the lands he had in 1835, of which the defendants were trustees.

Demurrer over-ruled.

## COURT OF QUEEN'S BENCH.

Sittings at Nisi Prius before Lord DENMAN.

RICKET v. EDGINTON.

*INNKEEPERS—Their liabilities for the safe custody of Goods of Travellers.*

Mr. Erle, for the plaintiff, stated that this was an action to recover the value of certain property committed to the care of the defendant, an innkeeper, by the plaintiff, a travelling linen-draper. It appeared that the plaintiff, on the 13th of December, 1837, went with his horse and cart to the Sturges Castle Inn, near Oxford, kept by the defendant. The cart was put into a barn and locked up. The plaintiff slept in the inn, and on going to the barn the next morning he found it open, and the brother and nephew of the defendant at work in it winnowing. The cart had been drawn out, and on examining it he found that all his goods had been taken away. Search being made, part of his property was found in the houses of the brother and nephew of the defendant, and they were subsequently prosecuted and convicted of the robbery. It appeared from the pleas that the defence was first, that the plaintiff was not in the defendant's house as a traveller; and, secondly, that the barn had been given to him for his separate use, and that he had undertaken all the responsibility of the safe custody. The loss sustained by the plaintiff exceeded £100.

Mr. Cresswell, for the defendant, submitted that there was not that confiding of the property to the defendant which would make him responsible for any loss alleged to be sustained by the plaintiff. The barn was no part of the inn; it was out of the inn, and several yards distant from it; and in order to make the defendant responsible, it should be shown that the goods were confided to him in his inn by the plaintiff in the character of a traveller or guest.

Lord DENMAN observed, that this point might be left to the jury.

Mr. Cresswell submitted that it was merely a question of law, and trusted that the Court would allow him to move to enter a verdict for the defendant on that point before the full Court.

Lord DENMAN said, the learned gentlemen might make such a motion, if he could show that there was no ground for going to the jury.

swell then addressed the jury, and that the plaintiff could have no ground of action unless he had unloaded his goods into the inn, and put them into the custody of the defendant. And, at the request of a traveller, in order to save him trouble and expense, permitted his goods to be put in a barn or any detached building, the liability of the landlord was entirely discharged.

Otherwise, it might as well be considered that if a person requested permission to lodge in an inn yard for a night, and was exposed by the weather in the morning, the innkeeper would be liable to make reparation. The witnesses for the defence were called to show that the plaintiff had undertaken to place his goods in the barn, and that the barn was a building from the inn. In cross-examination, it was elicited that there was no other building than the barn in which to place his goods that night, and that the key of the barn was in the hands of the innkeeper; and further, that the defendant had been convicted of the robbery while he was being dishonest in the inn, but the jury were still continued to employ them.

MAN left it to the jury to say whether the goods were in custody of the innkeeper or the plaintiff himself.

For the plaintiff—Damages £10.

## COURT OF COMMON PLEAS.

Nov. 28.

Sittings at Nisi Prius.

BRIGGS v. GLOVER.

*As to the Plaintiff's BILL of Costs.—Whether an action can maintain an Action against the Defendant for Costs incurred in an Action had received notice not to proceed*

An action brought to recover 116*l.* amount of an attorney's bill, the greater part of which was incurred under the following circumstances. A sum of 9*l.* 4*s.* was due to the plaintiff from a Miss Woodcock, as administrator of the effects of her father, who had been an innkeeper at Leicester, where all the goods were lodged. Mr. Glover directed the plaintiff to pay that sum, and proceedings were taken thereon, out of which an action was brought for those proceedings most of the costs of which were incurred, to recover which the action was brought. Before that trial terminated, a rule was moved for calling the plaintiff to stay proceedings in it, and the rule was made absolute by the Court, upon payment of the costs. Of the amount now sought to be recovered, 58*l.* were incurred in the management of that rule. Such was the nature of the action now brought; and numerous witnesses were called to prove the facts of the case.

On behalf of the defence it was admitted that the plaintiff was retained as attorney in the claim made on Mr. Woodcock's estate, and that the defendant had instructed Mr. Briggs to proceed till notice of trial was given. After that stage of the proceedings, the defendant directed the attorney to press the matter no further, as he had no hope of gaining. The plaintiff, however, persevered, and application was made to this Court, calling upon Mr. Briggs to stay proceedings. There was, therefore, no ground for charging the defendant with the entire costs of an action that was persevered in against his will. The defendant, however, paid into court 21*l.* 15*s.*, thereby admitting his liability to that amount, but denying that he was responsible for the whole sum now sought. Evidence having been called for the defendant, and Mr. Crowder being heard in reply,

J. ERSKINE said this was an action to recover an amount for work and labour done by the plaintiff as defendant's attorney. With respect to the 58*l.* costs incurred in the rule to stay all further proceedings, his lordship thought that the plaintiff was not entitled to recover one farthing. The defendant himself took part in that application to the Court against his own attorney, in the action arising out of his claim on Miss Woodcock; it would, therefore, be very strange now to call upon him to pay the costs of that rule. The jury could not, therefore, find for the plaintiff upon that part of the case. The next branch of the bill was as costs of the action of Glover v. Woodcock, amounting to 57*l.* The first question would be whether the plaintiff was entitled to recover the costs of that action. It would be for the jury to say whether there had been a positive revocation by the defendant of his retainer to his attorney to proceed in that case, or whether the plaintiff (as defendant represented) agreed to go on with it at his own risk. The remaining sum of 1*l.* 10*s.* in dispute was demanded for services done by Mr. Briggs in an action against a Mr. Hall, but which dropped in an early stage. There was no doubt the plaintiff should have a verdict with damages to that amount at least, as he was undoubtedly entitled to that sum.

The jury returned a verdict for 4*l.* 18*s.* 8*d.*, in addition to the costs in the action against Miss Woodcock up to the 23*d.* of July, when the defendant revoked his retainer—the amount to be settled by the Master, and the verdict to be entered according to the result.

The case occupied the entire day, and was not terminated till near seven o'clock.

## COURT OF EXCHEQUER.—Dec. 16.

Sittings at Nisi Prius

SCHWABACHER v. FLEMING.

NECESSARIES for an under-graduate of Trinity College, Cambridge. PLEA, INFANCY.

This action was brought to recover the following bill of particulars:

" Wines (Champagne and Hock)	£15	1	6
" Cigars and case		3	1 0
" Eau de Cologne		0	10 6
" Liqueurs		2	2 0

£20 15 0"

The plaintiff is a dealer in wines and cigars in Cambridge, and the defendant in 1834 and 1835 was an under-graduate of Trinity College in that university. The goods in question were supplied during the residence of the defendant in lodgings, during two entire terms, and a portion of a third, in the years above-mentioned. He is the son of one of the members for South Hants, and during his stay at college he was attended by a livery servant, and, as a witness said, "kept the first of company in the university."

Evidence of the delivery having been proved,

Mr. Andrews avowed at once that this action was defended by Mr. Fleming, the father of the defendant, who had the spirit and the moral courage to step forward for the purpose of endeavouring, if possible, to put an end to, or at least to check, the reckless system which but too many tradesmen pursued with regard to the supply of goods to minors at college. For this he was quite sure Mr. Fleming deserved, and would receive, the thanks and the gratitude of many an anxious parent, whose hopes and plans for the advancement of his children had been blighted by the system of extravagance too often pursued at the universities. For what did parents send their sons to college? Was it, by patient exertion and persevering industry, to fit them for honourable employment in after life; or was it that they might spend two or three years of the most important period of their lives in idleness and luxurious indulgence? Was it that they might there pursue their course of study in a laborious and thoughtful and honourable manner? or was it that they might pass their nights in drinking expensive wines, and in the idle habits thereby engendered, and their days in consequent languor and inactivity? Look at the plaintiff's bill—expensive wines, liqueurs, eau de Cologne, and cigars! Were they necessities for a youth of 18 at an University? He hoped the result of this trial would convince young men, and the tradesmen who trusted them, that they were not.

GURNEY, B. told the jury that the question was entirely one of fact for them; but at the same time he must say that in his opinion

not one of the articles in the plaintiff's bill could be considered as a necessary for an infant. No case had ever been decided which showed that wines of this description or cigars were necessary for a youth at the University.

Verdict for the defendant.

Mr. Baron GURNEY.—In my opinion a most proper verdict. It will have a most beneficial tendency. It is very proper.

Mr. Andrews asked the learned judge to certify that the case was a fit one to be tried by a special jury.

Mr. Baron GURNEY.—Certainly.

## SHERIFFS' COURT, LONDON.—Dec. 10.

EWENS v. SLOMAN.

SHERIFF LAW.—*Whether a Sheriff's Officer is justified in arresting a party without producing his warrant.*

This action was brought to recover compensation from the defendant, a sheriff's officer, for a false arrest. It appeared that on the 3rd of April last, the plaintiff and defendant happened to meet in the banking-house of Messrs. Wright and Co., Henrietta-street, Covent-garden. The defendant, having a writ against the plaintiff, told him that he had such a process against him, and took him into custody. The plaintiff asked to see the warrant. Defendant took his pocket-book from his pocket, but found that he had not the warrant then about him. A clerk of Messrs. Few and Hamilton, solicitors, happening to be in company with the plaintiff, gave it as his opinion that the arrest was illegal. The plaintiff refused, therefore, to submit. A struggle then took place; a policeman was called in; and the parties went to the station-house in Bow-street. On application to the magistrates, they refused to interfere; and the plaintiff was subsequently conveyed to the defendant's lock-up house. On searching the office, it was ascertained there were five other detainers against the plaintiff, who got himself removed by *habeas corpus* to the Fleet Prison. He then applied to the Court of Common Pleas to be discharged from one of the detainers, he having been at first illegally arrested, the costs of that application being £22. The Court decided that he was entitled to his discharge, and directed the defendant to pay the costs. The plaintiff then applied to the Court of Exchequer to be discharged from another execution issuing out of that Court. The judges refused to discharge him, conceiving that he was properly detained. The costs of that application amounted to £45. 3s. 4d. The plaintiff then applied to the Court of Queen's Bench to be discharged from other executions issuing from that Court. His costs were disallowed, but he was discharged. He now brought his action for the amount of the costs he had been put to in procuring his release.

Prison, as well as compensation. The defendant, by allowing default, admitted the important

for the defendant, contended of the Sheriff of Middlesex, a lity was placed upon him, inas- of the parties who had executions tiff could prove that the defendant e plaintiff's company, the sheriff orne liable to the creditors of the There was no *malus animus* in wards the plaintiff. If the de- d, it was an error of judgment in rge of an unpleasant duty. e plaintiff—damages 100 guineas.

#### COMMISSION, MONMOUTH. Tuesday, Dec. 10.

*not issued from p. 108.)*

d, therefore, at once to the only in which can apply to the circum- resent case—that of levying war en in her realm, which, as before direct and substantive branch of the earlier statute, and the bare l intending of which, for the pur- the objects mentioned in the later e treason by that statute. And, the limits and boundaries of this on, we are not left without lights teps, so clearly has the law been ecisions of courts of law in more und the expositions of those text

subject, who have been held in neration both by their contempo- posterity, amongst whom I shall he names of Lord Chief Justice Michael Foster. I shall proceed, ll your more particular attention nces in which the law has been etted upon this head of treason, nable you to apply the evidence I hear to the several indictments. I suppose I cannot do better than avail

most part, of the very words of ater upon the same subject. It aid down by undoubted authority,

number of persons assembled er armed with military weapons ur by dint of numbers or superior t any object or matter purely of e, as, for example, to prosecute arrel, or to take revenge for some to destroy some particular en- remove some particular nuisance, accomplish some end in which the assembled together had, or sup- any private interest, such acts of gression, however the authors of

them may be punishable as for a high misde- meanour, do not amount to a levying of war within the statute of Edward III. But every insurrection which in judgment of law is intended against the person of the King, whether to de- throne or imprison him, or to oblige him to alter his measures or government, or to remove evil counsellors from about him—all such risings amount to a levying of war within the statute. So insurrections to throw down all inclosures, to alter the established law and change religion, to enhance the price of all labour, or to open all prisons—all risings in order to effect these inno- vations of a public and general concern by an armed force are, in construction of law, high treason within the clause of levying war; for, though not levelled at the person of the king, they are against his royal majesty; and, besides, they have a direct tendency to dissolve the bonds of society, and to destroy all property, and all government too, by numbers and an armed force. Insurrections, likewise, for redressing national grievances, or for the reformation of real or ima- ginary evils of a public nature, and in which the insurgents have no special interest—risings to effect these ends by force and numbers are, by construction of law, within the clause of levying war, for they are levelled at the king's crown and royal dignity. And, accordingly, it was held in the time of Queen Anne, that a large body of men tumultuously rising and assembled together with the avowed purpose of pulling down all the meeting-houses of Protestant Dissenters, and pro- ceeding to pull down several, until prevented by force, brought the parties who were guilty of that act within the branch of the statute of levying war against the Queen. And, in a more recent case, where a riotous multitude, headed by Lord George Gordon, and acting in concert, with the declared design of pulling down or destroying all chapels belonging to those of the Roman Catholic per- suasion, proceeded to put that design in force, there was no doubt but that the facts, if proved against the parties accused, amounted to the offence of high treason, by levying war against the king. Gentlemen, an assembly of men, armed and arrayed in a warlike manner, with any treasonable purpose, is a levying of war, although no blow be struck; and the enlisting, and drilling, and marching bodies of men are sufficient overt acts of that treason without coming to a battle or action. And if this be the case, the actual con- flict between such a body and the Queen's forces must, beyond all doubt, amount to a levying of war against the Queen, under the statute of Edward, and to the effect of compassing or de- vising to levy war within the statute of Geo. III., provided the design and object and intention of the parties be such as is specified in that act; and, as has already been adverted to, it is quite unnecessary to constitute the guilt of treason that

the tumultuous multitude should appear to be accompanied with the pomp or pageantry of war or with military array. Insurrection and rebellion are more humble in their first infancy, but all such external marks of force will not fail to be added with the first gleam of success. In case, therefore, any indictment for high treason should be founded on the levying of war, or the compassing or intending to levy war against the Queen, you will, in the first place, direct your attention to the evidence which shows the object and motive of the rising, whether it was to effect some general and public end, in which the whole community are concerned equally with the insurgents, such as the introduction of any great change or innovation in the government or the laws of the land by dint of numbers or violence, or whether it was confined to the effecting of any private or local or particular object; and it will be convenient that you should in the next place advert to the overt acts alleged on the face of the indictment; and then determine for yourselves whether they or any of them are proved by two witnesses in the manner before adverted to, one of such overt acts being of necessity to be proved to have taken place in this county, in order to give you jurisdiction. Gentlemen, it may be proper to inform you that, in the case of treason, the law knows no distinction between principal and accessory: all who partake in the treason incur the same guilt, and are liable to the same punishment. The treasonable design once established by the proper evidence, the man who instigated, incited, procured, or persuaded others to commit the act, though not present in person at the commission of it, is equally a traitor, to all intents and purposes, as the man by whose hand the act of treason is committed. He who leads the armed multitude towards the point of attack, and then retires before the blow is struck—he who remains at home planning and directing the proceedings, but leaving the actual execution of such plans to more daring hands—he who, after treason has been committed, knowingly harbours or conceals the traitor from the punishment due to him—all these are equally guilty in the eye of the law of the crime of high treason. Gentlemen, I am not aware that any case will be brought before you where the charge will be that of misprision of treason. If such, however, should be the case, it will be unnecessary to say more upon that species of offence than that it presupposes a treason to have been actually committed by others, and that the person charged with the offence, knowing both the traitors and the treason, but without either himself consenting or being a party to the treason, has refused or neglected to make a full and fair disclosure of such his knowledge within convenient time to a magistrate, or some one in authority. It is sufficient to describe the offence without entering into any further dis-

cussion. Gentlemen, it is very possible that bill of indictment may be brought before you charging acts of violence committed by some of the individuals who formed a part of the assembled multitude as felony only, not as treason; for he who shoots, or attempts to shoot or wound another is, as you well know, under certain circumstances guilty of felony, notwithstanding the very same act, when considered with reference to other circumstances, may amount to the crime of high treason. Again, bills of indictment may be preferred against some who participated in the unlawful meeting, but to a less degree, charging them only with the offence of riotously and seditiously assembling themselves together. But with respect to such charges, to gentlemen conversant as you are with the laws relating to offences of that nature, I hold it to be unnecessary to offer a single observation. Gentlemen, I feel I have already trespassed too long upon your attention; but the importance of the subject which I have felt it incumbent on me to discuss, with reference to the just performance of the duties of which you are about to enter, and the rare recurrence (for which we cannot be too thankful) of any occasion which calls for such discussion must plead my excuse. I cannot, however, conclude my observations without expressing the sincere regret and pity which I feel—not alone I am sure, but in common with yourselves, and with all other men of sound principles—on the occasion of the recent disastrous occurrences. I would add, also, my most earnest hope that it may be found in the result that the great majority of those who may have been involved in the guilt of these transactions have been misled by the arts of wicked and designing men, and have sinned thus through ignorance and blindness, rather than from premeditated guilt; and I can suggest a remedy which can be applied successfully to counteract a state of mind and feeling so unhealthy and diseased, and infecting so large a portion of the community, except the diffusion amongst them of the benefits of religious instruction, and of sound religious education amongst the rising generation; so that as the younger part of the community advance to manhood, they may feel the conviction of the wholesome truth, that they are bound to yield obedience to the laws of the country, not from the terror only which the law inspires, but from a much higher and more binding motive—the fear of the Almighty, and from the thorough belief that “the powers which be are ordained of God.” Gentlemen, in conclusion I entreat you that, in approaching this investigation, you will dismiss from your minds all which you may have heard upon the subject before you entered into this court; and that in the performance of your important office, whilst you will rejoice when the weight of evidence is so light that you can, consistently with your duty, at once

erty accused to his liberty and his ill at the same time watch over his jealousy; that you will weigh the right before you with a firm, steady, unimpaired mind, looking to the performance of your duty, and to nothing beside, regardless of all consequences which may result from the performance of it.

#### REVIEW OF NEW BOOKS.

AND PROGRESS OF THE LAWS OF ENGLAND AND WALES, with an account of the History and Customs, Warlike and Legal, of the several Britons, Saxons, Danes and who now compose the British Nation. By OWEN FLINTOFF, Esq. M.A. Barrister-at-Law. London: John Richardson, Law Booksellers, 194, Fleet-street. 40.

Had occasion before to notice in my terms, the first vol. of *Mr. Flintoff's* Laws of Real Property, and we before us an interesting volume, in a compact form, the origin and the Laws of England, and the customs of our ancestors, the earliest notice of the British islands, from *De Mundo*, which is general to Aristotle, thence to the invasion of the Saxons, and from thence to the present. The author says—

"The Saxons have any other than a vague and splendid period of Britain's History. The provinces obtained the rights of Roman citizenship. Still less do they sufficiently value the valour of their British ancestors, who bravely withstood the Romans, or nations offered but a comparative resistance; and in later times regeneration after generation the hosts of Saxons."

As to the *legal part* of the work, the author, only tracing the progress of the law to the culminating period of the 14th century, and then descending again to the present; and in speaking of the Statute in Relief Act and the Reform Bill, the author has traced the history of the House of Commons. The work is opened by a brief explanation of the divisions of common and statute

law; after which we have a concise, but nevertheless elaborate, account of the "origin, history, and customs, warlike, domestic, and legal, of the several nations of Britons, Saxons, Danes, and Normans, who now compose the British nation;" concluded by a short treatise on the ancient and modern laws of this country, in which are introduced many sensible remarks on the recent statutory alterations. In his account of the Britons, whose descent he traces (we cannot say entirely to our satisfaction) through the great Cimmerian nation up to Gomer, the son of Japhet, our author has given us much very curious information respecting their customs, from which it appears that the early inhabitants of this enlightened isle in no very slight degree resembled the present uncivilized tribes of the western world.

The following is the author's description of the simple laws of the ancient Britons, and the remarkable circumstance of many of them continuing unchanged even to the present time, p. 46:—

"If again we turn to their ancient laws, we shall find these also existing to a great degree amongst their descendants. Thus they resembled the Saxons in allowing a homicide to redeem his crime by making compensation to the friends of the deceased, agreeably to the practice which prevailed in the remote Eastern regions, from which their ancestry had travelled, in the use of the trial by ordeal, and by compurgation, which were the chief features of the law as to crimes and punishments, and of its administration. Amongst other principles which we find laid down in the laws of Hoel, is one, that a witness to an accusation must swear that he knew and saw what he swears to, agreeably to the present well-established rule; and another, that the testimony of one man should not be taken. So the husband and wife could not give evidence respectively against one another; nor could the wife be brought forward to give evidence without her husband; the like thing applying in the case of an infant, for whom his father or guardian must have appeared. Although, however, the wife was considered as part of her husband, yet she had certain rights of her own. Thus the wife of the king could dispose of the thirds given to her by the king; and the wife of a freeman could dispose of all her paraphernalia and such like goods; but this



did not hold in the case of the wife of a villanus or bondsman. The wife had also a right to all her articles of dress, to which her husband could not lay claim; and it appears she was entitled to a dowry and a present from her husband immediately after the marriage; besides which she received on that occasion an outfit from her own family and connexions—a custom which now remains, it is said, in some parts of Wales. Moreover, on the death of her husband, the wife could claim all his goods except the corn; and if they had lived together until that occurrence, and there was no heir, half of the substance fell to the surviving wife. Similarly, if within seven years of the marriage a separation took place, the wife could claim her dowry and paraphernalia, unless she had voluntarily deserted her home. In this case, however, or in the case of her committing adultery, she lost all her dowry and bridal presents—a practice which has continued, and now exists amongst us.

“Among other customs the origin of those now existing was this, that a person might be called upon to discharge the debts of the deceased, but only in the case of his having inherited property sufficient to satisfy them, or of his having voluntarily become pledge or surety for their payment. It also appears that there were three classes, viz. a foreigner, a noble, and the king, who were not obliged to discharge the debts of the deceased, although his goods fell to them, through failure of heirs. There were also three occasions on which one might have used the property of another without incurring any punishment, viz. either when anything was common between two persons, and one of them consumed it, there being nothing agreed on to the contrary; or when one seized the horse of another in order to carry the alarm of the approach of an enemy; or lastly, when one so acted in order to fetch a priest to a person on the point of death. We may also mention amongst the customs which now exist amongst us, that a person might detain the cattle of another trespassing on his land, and demand compensation for the injury. And so a person might exact a fine or compensation from another who ploughed up his land without his permission.

“There were three things which the law was said not to be able to reach or alter, viz. the purchase of land, effected without fraud and capable of proof; the judgment of the lord deciding according to right; and inveterate custom.”

The author then proceeds to show other parts of the jurisprudence of the Ancient Britons, which still exist principally in their territorial organisation, and the tenure of their lands. In noticing the different sorts of crimes recognized by the Saxons' laws, he says,

“The crime of larceny, called by the Saxons *Hale*, might at one time have been committed by a child ten years old, but afterwards it was not imputed unless the child was twelve years of age; should it have happened that all the family of the offender were privy to the offence they were all punishable by being made slaves of; but where there had not been that privy, the mulct or fine was at one time sixty shillings, at another time one hundred and twenty shillings. Such regard was paid to the character of a wife, and the subjection she was supposed to be in to her husband that when any stolen article was found in the house, and not manifestly in her separate custody, the law considered her as no party to the stealing.”

He concludes by describing the establishment of the Common Law and the Statute Law, and shews the rise and progress of the latter to the present time.

We have now gone through the book, which evinces in all its parts, great industry, considerable talent, and a perfect knowledge of the subject. It were impossible that in a work of this nature, we should not trace some passages of *Blackstone*, and other familiar learned writers, and the author in his preface (we are glad to see) has candidly admitted the fact. This in itself is a great support to the work—it is the great change that has been worked in the laws in recent times, and their comparison with what the laws were—*how they did work, and how the new laws do work*—this is what we wish to see constantly brought before the public and to the profession such information becomes of daily paramount importance. It is to the industry and research of authors such as Mr. Flintoff, that the Profession are indebted for such information. No educated man should be without this book. We pronounce it to merit the attention of every person, whether professional or not, for its historical and legal information, and above all, for the small space in which it is contained, and the price is within reach of all. To students we recommend it as a volume of wholesome and sound instruction that will help them over many difficulties in their legal studies.

# ARTICLED CLERKS APPLYING TO BE ADMITTED ATTORNIES IN HILARY TERM, 1840.

(Continued from p. 111.)

## *His Name and Residence.*

## *To whom Articled or Assigned.*

George, the younger, 15, Ely Place,	George Thomas, the elder, Carmarthen; assigned to Samuel Walker, 29, Lincoln's Inn Fields.
William Edwin, Wells.	George Twynam, Winchester; assigned to Benjamin Hope, Wells.
Edward, Counter Hill; New Cross	Archibald Keightley, 43, Chancery Lane.
Thomas Norman, 28, Southampton	Julius Gaborian Shepherd, Faversham.
Emiah, 164, Fleet Street; Ryde;	William Butt, Ryde.
set; and William Street.	
Joseph, 1, Francis Street, Gower	Peter Williams, Holywell
ord Square.	
George, 5, Warren Street, Pen-	Cecil Proctor Wortham, Buntingford.
is, 11, St. James Place, Hamp-	William Robinson, Dudley.
; Dudley; and Kingswinford.	
s Call, 115, Bunhill Row.	Robert Weddell, Berwick-upon-Tweed; assigned to William Pringle, King's Road, Bedford Row.
	George Saul, Carlisle, assigned to John Saul, Carlisle.
rd, Carlisle.	
mund, 11, Great Russell Street,	Richard Wardroper, the elder, Midhurst; assigned to Chas. Jas. Palmer, Bedford Row.
m Webb, 15, Cumming Street,	Charles Henry Webb, Stafford; assigned to Gay
; Stafford; and Hampton Street.	Hiern, Stafford.
7, South Molton Street.	John Whall, Worksop.
s Francis Sawdon, 87, Fenchurch	Samuel Spode, Sudbury; assigned to Francis
	James Osbaldeston, St. Albans.
ohn Richard Lambert, North	Walter Prideaux, Goldsmiths' Hall.
minster.	
n, 25, Frederick Place, Hamp-	Bernard John Wake, Sheffield.
Sheffield; Eccleston Street.	
Hippolite, Lincoln Chambers,	James Leman, 51, Lincoln's Inn Fields.
n Fields.	
George Bancroft, Manchester.	William Casson, Manchester.
Muskett, 14, Wakefield Street,	Nathaniel Palmer, Great Yarmouth; assigned
ire; Great Yarmouth; 8, Mont-	to Robert Jackson, 40, Bedford Row.
, South Lambeth; 5, Warwick	

## *Added to the List pursuant to Judges' Orders.*

n, Liverpool.	Charles Wood, Manchester.
: Jennings, 20, Stamford Street.	Frederick Chase, Luton.
ell Martyn, 7, Furnival's Inn;	James Edward Jackson Riccard, South Mol-
on; 43, Southampton Buildings;	ton.
derick Street.	
y Edward, 5, York Place, New	James Wittit Lyon, Spring Gardens.
l Little Argyle Street.	
Charles Broadhurst, Ashby-de-la-	Edward Fisher, Ashby-de-la-Zouch; assigned
arwick Court; Derby.	to William Dewes, Ashby-de-la-Zouch.

## *Notices served at the Master's Office on the 30th October.*

the younger, Drummond Street.	Arthur Philip Groom, Henrietta Street.
les, 5, New Milman, Street; and	Isaac Preston, the younger, Great Yarmouth.
outh.	
hard, the Younger, 2, Guildford	Matthew Brettingham Kingsbury, Bungay; as-
l Kersey Priory.	signed to John Chevallier Cobbold, Ipswich;
	assigned to Alfred Cobbold, Chancery Lane.

## NOTICE TO CORRESPONDENTS.

The accumulated mass of correspondence, books, and articles under which our library-table groans, sets our wits in motion as to the best mode of dealing with the *entirety* (as a lawyer would say). We really wish to avoid the charge of *negligence*, for we have many meritorious articles, and our desire is to oblige the writers; but in what way, consistently with our own arrangements for this paper—looking also at its limits, its various requisite matter, and the *tastes* of all our subscribers (for *they* are very manifold)—we confess ourselves at present quite at a loss. *Nous verrons*.

To AUTHORS.—We have also to apologize to authors for our apparent neglect of them and their works. We have not had room; and this is the best, and indeed only excuse we have to make. We will, however, digest some plan, by which a spare corner shall always be found for a REVIEW.

An Observer.—Address “The Editor,” at our publishers’.

S. A. W.—Our industrious correspondent submits for our approval the following proposition:—“That on the last Saturday in every month, we publish a double number at the price of one shilling, for the purpose of working up the arrears of the past month; and that, although it may not be consistent with our *pledge*, he doubts not but that *all* our subscribers would readily *release us* from it.”—We would indeed most cheerfully comply with this suggestion, but that we have very strong *doubts* to the contrary; at all events, our *pledge* shall be held by us sacred, and nothing but the unanimous desire of *all* our subscribers shall induce us to swerve from it.

A. J. H.—We much fear that by extending the size of the aperture to OUR LETTER-BOX, we should open the door to some *petty larceny*, which our correspondents would not thank us for.—Our publishers will, with every courtesy, receive all bulky communications under the size of a mail-coach, and no questions will be asked.

J. A. M.—Alphonso—R.—S. W.—A. J. H.—S. A. W.—H.—An Observer—GREX AMICORUM—all under consideration.

C. S. D.—Our best thanks for your reports. Your request, dated the 10th inst., should have been noticed before, but it had escaped us—*granted*.

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On Jan. 1, 1840, will be published, price 4s, to be continued Monthly, Vol. IV. Part I.

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Vol. III. was published Dec. 1, in cloth bds with Table of Contents.

London: JOHN RICHARDS and Co., Law Bookseller  
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Printed by GEORGE NORMAN, at his Printing Office 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West in the City of London.—Saturday, December 21, 1839

# The Legal Guide.

SATURDAY, DECEMBER 28, 1839.

[No. 9.]

## US OF REAL PROPERTY.

### ESSAY II.

4 Wm. IV. cap. 74.

*On the Abolition of Fines and Recoveries for the Substitution of more  
Modes of Assurance.*

*(Continued from p. 115.)*

#### CTOR OF A SETTLEMENT.

the PROTECTOR of a Settlement may be in fee or in fee simple, so that it be vested in fee simple. The act deprives a bare office, or he may be nominated by the settlor.

PROTECTOR is invested with a charge and unjust. He is placed under the control of the Court of Equity, on of which to aid imperfect tenant in tail to alien the estate tail is rigidly excluded. His office is absolute—he cannot even come out of trust. His office continues until he has absolutely conveyed the estate, or whether it has passed out of law; still he remains until his consent becomes necessary. He may therefore make what he pleases to enable the parties to attain that end, although he may interest himself; and it may so that a Protector has become

Bankrupt, that he may, without any concurrence from his assignees, or being under any responsibility to his creditors, consent that the tenant in tail shall bar a subsequent remainder in tail vested in the bankrupt, and so passed to his assignees, to the prejudice of his creditors.

But this protectorship of a tenant for life after alienation of the life estate will nevertheless be subject to merger, when the office will be at an end. As where the life estate and the estate next in remainder shall be conveyed to *the same person*, the first estate for life will then merge and become extinct, supposing the two estates to have been *legal estates*. We shall again notice this subject.

A *Tenant by the Curtesy* will be the Protector of a Settlement in respect of any estate tail or prior estate created by it, so that if a *feme covert* tenant in tail die, and her husband is tenant by the curtesy, he will be the Protector;—if she should die without issue, and there is a remainder in tail in the settlement, he will be the Protector;—but where the estate is settled to the *separate use* of a *feme covert*, for such an estate as would give the protectorship of the settlement, then *she* alone is the Protector, otherwise she and her husband will together be the Protector.

The interpretation to be given to the word “settlement” is defined by sec. 1 to mean an assurance by which lands are entailed or agreed to be entailed; and it should be observed that heretofore a *termor* could not

make a tenant, to the *precipe*, whereas, under this act, if a person be tenant in tail in possession or in remainder, and has the first estate of freehold or for a *term* of years determinable on life, he can acquire the fee, an *estate for years* determinable upon a life constitutes a Protector—not so, a term of years however long *not* determinable upon life.

Sec. 24. Provided always, That where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed, or directed to be settled, to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement.

Sec. 25. Provided always, That, except in the case of a lease herein-after provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this Act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

Sec. 26. Provided always, That where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed shall not in respect thereof be the protector of such settlement.

Sec. 27. Provided always, That no woman in respect of her dower, and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three) no bare trustee, heir, executor, administrator, or assign, shall be the protector of a settlement.

Sec. 28. Provided always, That where under any settlement there shall be more than one estate, an estate tail, and the person who shall be the owner within the meaning of this act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who if such estate did not exist would be protector of the settlement shall be such protector.

Sec. 29. Provides, and be it further enacted, That where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this Act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Sec. 30. Provides, and be it further enacted, That where any person having either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would under this Act, if this clause had not been inserted, have been the protector of the settlement in which the lands were entailed in which such remainder or reversion may be subsisting and thereby be enabled to concur in the barring of such remainder or reversion which he could not have done if he had not become such protector, then and in every

a person who, if this Act had been made, would have been the proper person to make the tenant to the writ of entry for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry, be the protector of such estate. It provides, and be it further enacted, here, under any settlement of land before the passing of this Act, that, if this Act had not been made, the person who would have been the proper person to make the tenant to the writ of entry or writ of recovery for suffering a common recovery for the purpose of barring any other estate under such settlement, a bare trustee, such trustee shall have the continuance of the estate, and shall give him the right to make the tenant to the writ of entry or other writ, or of such settlement.  
(To be continued.)

PROBLEM IX.  
VOL. 3.

LEGACIES.

In what circumstances is a Legacy subject to satisfaction of a Debt?

FOR OF THE LEGAL GUIDE.

PROBLEM 17, VOL. II.

UPON THE SALE OF GOODS.

What is a Warranty? Shew the duties and liabilities of the parties.

A word warranty, as applied to chattels, is termed a personal warranty, and is either implied or express. *Implied Warranty.*

It is said to be implied, where the general customs annexed to the trade or some customs affecting particular

branches of trade, parties are presumed to contract subject to such customs, although not formally expressed in writing.

Thus an implied warranty is annexed to the sale of all goods and chattels, that they are the property of the seller—and if he sell them as such (knowing them at the time to be the property of another, *Early v. Garrett*, 9 B. & C. 932.), and his title prove deficient, the buyer may have satisfaction from the seller without any express warranty for that purpose, 2 Bl. Comm. 800. 451.; *Cro. Jac.* 474.; 1 Roll. Abr. 90.

But a simple affirmation of a fact will not amount to a warranty. In *Chandelor v. Lopus*, 2 Croke, 2. it was held, that where the defendant had sold the plaintiff a stone; which he affirmed to be a Bezoar stone, but which proved not to be so. No action could be maintained against him, unless he either knew that it was not a Bezoar stone, or warranted it as such.

That parties are impliedly bound by customs affecting dealings in particular trades, will appear by the following cases.

If there should be a custom, to declare at the time of sale, whether goods be sea-damaged; in the absence of such declaration, a warranty will be implied, that they are not so. *James v. Bowden*, 4 Taunt. 847.

If an article were bespoke to answer a particular purpose, a warranty will be implied that it will answer such purpose. *Jones v. Bright*, 5 Bing. 533; *Okell v. Small*, 1 Stark, 108. See *Gray v. Cox*, 4 B. & C. 108.

In every contract to furnish manufactured goods, a warranty is implied that they shall be of a merchantable quality. *Laing v. Fidgeon*, 6 Taunt, 108; *Holcombe v. Hewson*, 2 Camp. 391; *Cooper v. Twibell*, 3 Camp. 286; *Gardner v. Gray*, 4 Camp. 144; *Bridge v. Wain*, 1 Stark. 504.

Where a publican agrees with a brewer to take all his beer of him, the brewer is bound to supply him with beer of a wholesome

quality, *Holcome v. Hewson*, ante. And this rule would apply to any trade where food is supplied.

In all cases of implied contracts, the following maxims should be remembered—

“*Expressio facit cessari tacitum.*”

“*Expressio eorum quæ tacite insunt nihil operatur.*”

The notion that a warranty might be implied from the extent of the prices given, has long been exploded. And the case of *La Newville v. Nourse*, 3 Camp. 351. has decided that a good price is no implied warranty as to the soundness of a horse. But when the terms of a contract are ambiguous, the amount of price may sometimes furnish a clue to the true meaning, *Allen v. Cameron*, 1 Cr. & Mee. 840.

2nd. *An express warranty.*

An express warranty has been defined by Buller, J. in *Pasley v. Freeman*, 3 T. R. 59. to be “every affirmation at the time of sale of personal chattels, provided it appear to have been so intended,” and provided the contract be not in writing, and the affirmation merely oral—for in such case the writing is the only evidence of the contract, *Pickering v. Dowson*, 4 Taunt. 779. A contract cannot be added to by parol evidence, and where there is an express written, (or it seems verbal), warranty the vendee cannot avail himself of representations not embodied therein, and made by the vendor without fraud, *Budd v. Faiuinaner*, C. P. M. T. 1831. Ms. 5 C. & P. 78.; 8 Bing. 48. S. C.

A warranty must be made either before or at the time of the sale; and if made after it would be void for want of consideration, 3 Bl. Comm. 166.; *Fitz. Nat. Brev.* 94 c. & 98 b. 5. H. 7. 41. 9 H. 653.; 12 H. 4. 1.; 42 Ass. g. 7.; 7 H. 4. 15.

Blackstone, in his Commentaries, vol. 3, 166. has laid down, that a future event cannot be warranted, as, that a horse should be sound two years hence; but see *Liddard v. Kain*, 3 Bing. 183.; *Eden v. Parkinson*, Dougl. 705. where the contrary is held.

A sale of goods by sample is in effect warranty, *Parkinson v. Lee*, 2 East. 314. *Palker v. Palmer*, 4 B. & Ald. 307.; but it has been doubted whether such warranty is express or implied.

No particular form of words is necessary to constitute a warranty: the word “warrant” need not be used. Thus an assertion by the vendor of a horse, in the course of dealing, that the vendee might depend upon it that “the horse was perfectly quiet and free from vice,” was held to be a warranty to that effect, *Cave v. Coleman*, M. & R. 2. In sales of horses, a warranty is frequently inserted in the receipt for the consideration money, and this obviates the necessity of an agreement stamp, and is evidence of the warranty; for a warranty does not of itself require an agreement stamp as it falls within the exception in the Stamp Act of agreements relating to the sale of goods. But there is a doubt, if the receipt is not stamped, whether such unstamped receipt would be admissible in evidence to prove a warranty. See *Gray v. Smith*, 1 Cowp. 387; *Wise v. Charlton*, 4 A. & E. 790.

A general warranty will not extend to defects obvious to the purchaser; as if a horse be warranted perfect, and want an eye or a tail, 2 Bla. Comm. 165, 166. The rule of *caveat emptor* applies in such a case.

A person may give warranty either himself or his agent lawfully authorized. One partner may bind another in the course of his business by a warranty, *Sandilands v. Marsh*, 2 Barn. & Ald. 678. And a servant may bind his master, if he do not exceed the authority given him, *Fenn v. Harrison*, T. R. 760.

As connected with this subject, it may be useful to refer the reader to Lord Tenterden’s Act, 9 Geo. IV. c. 14. By sec. 6, it is enacted “That no action shall be maintained whereby to charge any person upon, or on reason of any representation or assurance

on of the act was elaborately dis-  
the case of *Lyde v. Barnard*,  
l. 101.

re-sell the goods, and declare the deficiency, *Maclean v. Dunn*, 61; 4 Bing. 722. S. C.

to debar the vendee from a defence to an action for the price, *Grimald v. White*, 4 Esp. R. 45. See *Baxter v. Butter*, 479; *Groning v. Wendham*, 1 Stark. R. 257; *Hopkins v. Appleby*, 1 Stark. R. 477; *Fisher v. Samuda*, 1 Camp. 190.

In executory contracts, as in the case of manufactured goods not completely accepted, the vendee may return the same if deficient, and thereby wholly defeat the action for the price, although a trial of the article has been made by the vendee, *Street v. Blay, ante*, per Lord Tenterden, C. J.; *Poulton v. Latimore, ante*.

Where goods are sold by sample, they may be refused, or, if received, returned within a reasonable time, if not agreeable to such sample, *Id.*; but not after the exercise of any acts of ownership, in which case the vendee may sue for the breach of contract, **Parker v. Palmer, 4 B. & Ald. 387.** In sales by sample, the contract may be rescinded if the vendor refuses to allow the vendee to inspect the whole of the goods in bulk, after a sample given, **Lorymer v. Smith, 1 B. & C. 1; 2 D. & R. 23. S. C.**



If a bill of exchange have been given in payment, and an action is brought thereupon, the vendee cannot defend such action *pro tanto* on the ground of a deficiency in the quality or value of the goods, and in such a case must bring a cross action for breach of contract; but he may *in toto*, if he can shew a total failure of consideration. *Morgan v. Richardson*, 1 Camp. 40 n.; *Tye v. Gwynne*, 2 Camp. 346; *Obbard v. Beet-ham*, M. & M. 483; *Archer v. Bamford*, 2 Stark. 175; *Spiller v. Westlake*, 2 B. and Ad. 155.

In an action upon a warranty nominal damages are recoverable, although, upon a re-sale of the goods, the vendee may have acquired a profit, *Street v. Blay*, per Parke J. *ante*. J. A. M.

### Law Reports.

#### COURT OF CHANCERY, Dec. 16.

##### RUSHTON v. COBB.

##### APPEAL FROM THE VICE-CHANCELLOR.

**LEGACIES.**—*Wherever a Legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not allow him to avail himself of it, and therefore he cannot demand his legacy.*

This was an appeal from a decision of the Vice-Chancellor, affirming the validity of two legacies of £2,000. and of £500., bequeathed to Lady Fanny Campbell, by the late Mr. Cobb, an attorney, of Margate. The circumstances of the case are peculiar. In the year 1829, Lady Fanny Campbell, the widow of the late Major-General Sir Neil Campbell, married a Mr. Rushton. The marriage was a private one, few of their friends knew it; Lady Campbell did not take her husband's name, and in about two months she was deserted by her husband, and has never since seen him. Lady Campbell shortly afterwards went to Margate, where she became acquainted with Mr. Cobb, an attorney residing there. The intimacy was so close, that he appears to have even meditated a proposal of marriage, but from some cause unexplained that proposal was not made, and Lady Campbell having left Margate, received in 1834, a letter from a Mr. Wright, announcing the death of Mr.

Cobb, and the bequeathing of the legacies in question. The interest of the two thousand pounds was to go to trustees to be paid so long as Lady Campbell continued unmarried; and if she married, then the trustees were to recall the bequest. The five hundred pounds were given absolutely, subject to the payment of any warrant of attorney that Mr. Cobb might hold at the time of his death. It was shortly afterward discovered that Lady Campbell had a second husband, Mr. Rushton, who was still alive, and resident in Sierra Leone, and it was also discovered that there was a warrant of attorney for £389. among the papers of Mr. Cobb. Under these circumstances, the executors refused to pay the legacies, and on a bill being filed, the Vice-Chancellor at the hearing decreed against them. The appeal was against the whole decree.

Mr. Wakefield supported his Honour's order and argued that identity of person was all the law required, and that as Lady Campbell had not put any fraud on Mr. Cobb, and could have had no idea that she would be remembered in his will, there was nothing to affect the validity of the bequest. According to the civil law an covenant affecting marriage or intended to prevent marriage was always struck out of a will and the Courts of equity adopted this rule of the Courts of civil law, and gave effect to them. Several cases of this description were to be found in the books, and they, therefore, contended that the gift was good, and the condition annexed to it bad in law and equity. With respect to the warrant of attorney, it bore on the face of the evidence of having been cancelled.

The LORD CHANCELLOR in giving judgment said, the question regarded the validity of two different legacies left by Mr. Cobb, a gentleman of property, who formerly resided at Margate, by his will, to Lady Fanny Campbell. His executors, the defendants in the cause, resisted the payment, insisting that the plaintiff had no good title, the legacies having been left to her by the name of Campbell, and in the supposition that she was a widow, whereas, in fact, she was then married to her second husband, Mr. Rushton, and it was in that character she sued for the bequests in the will. One of the bequests was of a sum of £500. absolutely, and the other was of a sum of £2,000. while she, the legatee, remained single and unmarried. There was no proof that she assumed the character of being single with a view to impose on the testator; and his misapprehension of the real state and condition of the legatee did not make the legacy void. His lordship would apply as a test to the case, the words of Lord Alvauley in *Kennell v. Abbott*, 4 Vesey, 302: (1)—“That wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which

supposed the motive of the bounty, not allow him to avail himself of it, he cannot demand his legacy." notwithstanding her marriage with, still called herself Lady Campbell, representation to the testator. But that she assumed in some degree before that she had not married again, proved by the evidence; and at all assumed character was not alone the testator's bounty. There were such as "*Standen v. Standen*," in which it was held that a wrong description of not destroy their legacies. The legacies of this kind, must that the assumed character was the testator's bounty. There was in the evidence in this case that the bounty attached to this legatee. His condition did not make the

As to the other part of the case, directed the interest and dividends of be paid to her as long as she should be and unmarried. It was argued not a condition subsequent, but a There were many cases in which it notwithstanding conditions of that ed by testators, the legatees took plutely, as in the case of "*Marple v. Marple*," in 1 Maddock, 590. The tes-ached to Lady Campbell, but there on to believe his attachment would if he had known of her marriage. ancillor was right in declaring her th, and though it was a difficult case, correct judgment in favour of the ordship would not put the expense

dismissed with costs.

cause arose upon the will of Cath-ian, who supposed herself to be Edward Lovell, with whom she ated a marriage. It appeared s a married man at that time, e was in fact a single woman, a gross fraud as to her. She will in execution of the power by the articles executed pre-the supposed marriage, and not she was a single woman, by which thed "to my husband, Edward 50." She afterwards died, leav-ard Lovell surviving her. Upon he questions in that case arose.

The first question was, whether this legacy of £150. was or was not a legacy, which Edward Lovel could claim under the circumstances, that it was given to him as *the husband* of the testatrix, though he did not possess that character. Lord ALVANLEY, M. R. said, he thought it a case rather novel in its circumstances, and that scarcely had afforded any decision in the law of England; though there were some *dicta* in the *civil law* that seemed to bear upon the point.

It was argued at the bar by Mr. Woodde-son that the books of the *Common Law* were barren upon such questions; that *Swinburne* collected the authorities from the *Civil Law* and that in the *Digest* (Book xxxv. tit. 1. b. 72. s. 6.) this rule is laid down:—" *Falsam causam legatæ non obesse verius est; quia ratio legandi legato non coheret; sed plerumque doli exceptio locum habebit si probetur alias legaturus non fuisse.*" The *Code* (Book vi. tit. 42. l. 227.) says, "*Fidei commissum ejus qui reliquerat penitentid probata successores numquam præstare compelluntur,*" and that the word "*probata*" is rendered "*probable*," which is the true sense; not "*demonstrated*."

Lord ALVANLEY thought the passage cited from the *Code* did not much apply, and that the meaning of the passage cited from the *Digest* was, that a false reason given for the legacy is not of itself sufficient to destroy it; but there must be an exception of any fraud practised, from which it might be presumed the person giving the legacy would not, if that fraud had been known to him, have given it. That from a book of great authority seems to be the principle of the *Civil Law*. His Lordship continued. The question is whether, according to the law of England, that can apply to a case like the present, and whether the law will permit a man, who obtains a legacy in such a manner, to have the benefit of it. I have not been able to find anything that bears any very decisive analogy to this, but upon general prin-

ciples I am of opinion, that it would be a violation of every rule that ought to prevail, as to the intention of a deceased person, if I should permit a man availing himself of that character of *husband* of the testatrix, and to whom, in that character, a legacy is given, to take any part of the estate of a person whom he so grossly abused, and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine, that, where from circumstances not moving from the legatee himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon, and the child was not his own, I am not disposed by any means to determine, that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it: and which might entitle him, although he might not fill that character in which the legacy is given. My decision, therefore, totally avoids such a point. Neither would I have it understood, that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband, and under that name. He was the husband of another person. He had certainly done this lady, the grossest injury a man can do a woman, and I am called upon now to determine, whether the law of England will permit this legacy to be claimed by him. Under these circumstances I am warranted to make a precedent, and to determine that wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which

alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it; and therefore he cannot demand his legacy, upon the principle I have mentioned from the *Digest*, and that ought to govern courts of justice, his lordship was of opinion the legacy could not be claimed.

A case\* something like this occurred, which took up so much time before the Lords Commissioners, upon an application for a writ *de ventre inspiciendo*, against a woman who had lived with Mr. Fellowes, and had made him believe she had been brought to bed of several children; which he was weak enough to suppose his. It was not a question, whether they were his children. But there were no such children. She had shown him children as her's, which were not her's, and he gave legacies to them, as her children by him. It was held that they were not entitled. There two things were wanting. The testator was not merely deceived as to their being his children, but he was deceived as to the other ingredient of the character in which he gave them the legacies; for they were not the children of that woman.—

Editor.

#### COURT OF REVIEW.—Nov. 23.

##### FIAT AGAINST WILLIAM MARSTON.

JOINT STOCK BANKING COMPANIES.—*Liability of Shareholders to the Debts of the Company—Death, Bankruptcy, or Sale of Shares does not affect the identity of a Partnership established under the Joint Stock Banking Act, 7 Geo. 4, c. 46.*

This was a petition of Charles Marston, praying that a proof made by John Whittenbury under this fiat, dated August 19, 1839, might be expunged, and that a substitution of assignee might take place, the choice having been turned by the debt now impeached. The bankrupt was a member of the Imperial Bank of England, the Northern and Central Bank of England, and the North of England Bank, all established under the Joint-stock Banking Act, 7 Geo. IV. c. 46. The bankrupt was one of the registered officers

\* *Ex parte Wollop*, 4 Bro. C.C. 90.

Bank, which stopped payment in violation to which he had paid up all due on his shares. At a meeting under this fiat, Mr. Whittenbury gave for £3,047, on a debt due bankrupt and other members of the in certain bills of exchange which incurred. The proof was admitted creditors, for the purpose of enabling vote in the choice of assignees, control over the bankrupt's cer-

niership. There was nothing which could avail the petitioner in the 62nd section; and there was no ground for expunging the proof thereunder. The allegation that the proof had been received on a defective deposition was immaterial; no creditor had a right to say a commissioner had admitted a proof on defective evidence, unless he succeeded in negating the right to prove. The petitioner had made out no title for expunging the proof, or disturbing the choice of assignee.

*lardon and Bacon*, in support of urged the following points:—1st. can be established by a creditor of anking company, until judgment recovered under the powers given against the public registered officer. such a creditor asserting a right the 62d section of the Bankruptcy Act by the dissolution of the firm, of the bankruptcy of members. affidavit of debt in this case was ctive, but insufficient to support ording no evidence of notice of e bills of exchange. 4th. That en a previous fiat against a member y, a second fiat ought to have ame Commissioners as the first, t to the same assignee.

said this was one among many melancholy proof of the danger of n commerce entering into joint-companies. They were likely to on for the debts of the company, ficates endangered thereby in the ruptcy. The ancient law of the protection, but it had been broken rrent of unforeseen evils let in. e case before the Court, it left bht. He (Sir J. Cross) was of nt-stock banking companies had he 62nd section of the act, suing er affecting the whole company, mpanies under the statute holding with ordinary firms. The re- only an ultimate interest in the event of a surplus; but had an t under the 62nd section to come e of assignees and question of cer- s contended that the operation of plied only to snbsisting partner- the authority of the Vice-Chan- in *Morris v. Desormaux*, Mont. to the respondent's case. But mpany was a subsisting partner- purposes of this creditor, the act d for perpetuity, notwithstanding ers. Death, bankruptcy, or sale ot affect the identity of the part-

SIR G. ROSE concurred. Both the petitions in this matter might be disposed of at once. An order for the delivery of the proceedings on the application of the assignees followed as a matter of course, and must have been made with costs, if costs had been prayed. There could be no defence against *de facto* assignees demanding possession of the proceedings. The other petition, which had been discussed, must be dismissed with costs.

#### CONSISTORY COURT.—Nov. 8.

##### SPRY V. FLOOD.

*RECTOR'S RIGHTS in an ANCIENT Parish Church, and in a NEW Church built by Act of Parliament.—To what extent the ordinary Jurisdiction of the Court is ousted by private Acts of Parliament.—Whether the Vestry have a right to let all the Pews, except such Seats as are to be appropriated to the Poor.*

Libel for perturbation of church seat by the Rev. John Hume Spry, D.D., Rector of St. Marylebone, against Mr. Christopher Flood, the Vestry-clerk of that parish, which pleaded that the minister incumbent of every parish is entitled to convenient sittings in his parish church, for the use of his family, of common right; that such right is originally in the minister incumbent, and, unless specially divested, he ought to be protected in its enjoyment; that the parish church of St. Marylebone was built in 1817, by virtue of an act, 51 Geo. III. c. 151, which authorized the vestry to let the pews to the inhabitants, and that previous to their doing so, they set apart, or purposed to set apart, two pews to the use of the minister and his family; that Dr. Luke Heslop, the incumbent, (then perpetual curate, but afterwards rector, on the parish being made a rectory by 1 & 2 Geo. IV. c. 21.) accepted (so far as he could bind his successors) and took possession of the two pews; that the present incumbent, who was instituted and inducted to the rectory in 1825, also took possession of the two pews, and occupied the same by himself and family till the 15th June last, when the vestry-clerk, notwith-

standing the protest of Dr. Spry, took forcible possession of one of the pews, by locking it up with a padlock.

Dr. LUSHINGTON.—The sole question for the Court to decide is whether the libel, taking the facts stated therein to be true, is or is not an admissible plea. Before I speak more particularly of the contents of the first article (pleading the right of the incumbent by the common law), I will state my notions of the rights of a rector or vicar in an ancient parish church, this being a new church built by Act of Parliament, and substituted in lieu of the ancient parish church. I apprehend the rector would be entitled, according to the common law of the land, to the chief seat in the chancel, whether he be endowed rector or spiritual rector only, unless some other person be in a condition to prescribe for it for himself from time immemorial; and that the Ecclesiastical Court, in the exercise of its ordinary authority, would allot to him such right, and protect him against the disturbance of it. Whether, under any circumstances, the rector or any one else can properly be displaced from a pew, except by the churchwardens, and how far churchwardens could interfere, of their own authority, with a possessory right, are questions upon which I do not mean to enter. It was the opinion of Lord Stowell that they could not do so, without reference to the ordinary; perhaps later cases, and the necessity of the times, may have extended that power, and it may be competent for them to act without any authority of the ordinary previously conferred.

Now, it is contended on behalf of Dr. Spry, that, from the facts stated in the libel, he has a possessory title; and I certainly am of that opinion. But the right is pleaded in an inconvenient manner; and I am not prepared to assent to the statement of the law, as laid down in the first article, without some qualification. The decision of this point may not be of any great importance with regard to the present case, but it is of importance that the Court should not admit this as an averment of law capable of being substantiated. The term "Minister incumbent" may be of doubtful interpretation; but, if it be intended to include perpetual curates, I should have great difficulty in assenting to the proposition that the family of a perpetual curate has a common law right to sittings in the church. A perpetual curate, as in the case of *The Duke of Portland v. Bingham* (1 Hag. 157.) may be a mere stipendiary curate, the impropriation being in *utroque jure*: for the monasteries had cure of souls, and performed the duties of the church by stipendiary curates, and, since the suppression of the monasteries, the impropriator might have the complete incumbency. It was not till 1756 that Lord Hardwicke interfered to protect the rights

of curates, but these were not common law rights so that if it be meant to say that a curate is to be protected in his title to sittings for his family by common law rights, as existing from the time of Richard II., I should have great difficulty in assenting to such doctrine.

*Addams, D.*—The common law of the church—not from time immemorial—the right to pew did not commence till the reformation.

The COURT.—If it be the common law of the church, I have another view of the case. Supposing he had such right, how would it be enforced? By the medium of the ordinary, who would allot a sitting. Suppose a case of the alteration of a church, where the pew of the rector is taken down, he would appeal to the ordinary, who would allot a pew. But I cannot say he has a common law right to any pew at all. I think, therefore, that the first article had better be omitted. Looking to the facts as they stand in the libel, I have no doubt whatever that if this was a case of possession in an ancient parish church, Dr. Spry would have such a possessory right as it would not be competent to the vestry clerk, or any individual to molest or disturb. The question, therefore, is whether from the peculiar circumstances of the parish, the ancient law is altered, and the vestry clerk is invested with competent authority so to interfere with the possessory right? Now to be sure that a vestry clerk alone should have such authority would be an extraordinary anomaly. It is not indeed contended that a vestry clerk has any such right, but it does not appear that he acted under the orders of the vestry, and it will be too enough to give my opinion whether the vestry have such power or not when I am called upon to decide the question. It is alleged in the libel that Dr. Spry was dispossessed by the vestry clerk, and nothing appears in the libel to induce me to believe that the legislature invested him with authority to disturb possessory rights in the church. But it is evident that I shall have to decide very different questions, and it may be expedient that I state my view of what the questions are. First, to what extent the ordinary jurisdiction of this court is ousted by private Acts of Parliament. Secondly, whether the vestry have a right to let all the pews except such seats as are to be appropriated to the poor. Thirdly, if they have such right, whether they can displace with or without cause, and whether I have or have not, as the Act stands, to judge of their conduct and determination. Lastly, as *Addams* has argued that Dr. Heslop was in possession of the pews, by what he denominates a common or ordinary right, whether in point of fact such a right exists or not. As the case stands, I have no doubt of the admissibility of the libel excluding the first article, and I shall

it with a further slight alteration or "were otherwise purported to be, or as they had authority to do so" being to save the rights of the individual, the former expression not being sufficient. I wish to be distinctly understood, the observations as to the rights of individuals are made only *ex majore cautela* and do not mean to give any opinion as to what the law may be if the question arose. (a)

#### THE SHERIFF OF MIDDLESEX.

WICKDALE v. HANSARD.

##### Libel.

(Continued from page 59.)

of Parliamentary privilege to overthrow a tyranny on its ruins, seems a story to have become so apparent, was soon provided to impede its progress; and we accordingly find that its pretensions were advanced, and checked, on the part of the two Houses, afterwards obliged to abandon, with the power of issuing what decrees, and taking whatever steps in their collective capacity, the one period held, and were suffered to hold, that their members were extraordinary immunities as private individuals; they were not only free from all arrests, but their servants were set free by the law, and every Member's person was the privilege of sanctuary, which was attached to royal palaces. So there are instances of the Commons deciding property between their members and punishing the latter, without any dispute of the title of Members; a despotic, absurd, and barbarous, which may be matched in the history of despotism in the civilized world. But their extravagant claims, although within the last seventy or eighty years, have been silently abandoned, and the freedom from arrest for debt, and individual members, no privilege is attached to the walls of Parliament, except of the two Houses themselves in their collective capacity. Even the extravagant claims of the two Houses have begun to be restrained by bounds than they acknowledged in former times; but of late years, especially the controversy arising out of Sir John Lubbock's publication in 1810, a disreputable doctrine seemed to be once more spreading of high-privilege doctrines; and some

men have professed themselves their champions, as if they thus furthered the cause of popular rights. The accession of power gained by the democratic part of the constitution by the late Reform, has increased this inclination to stickle for extreme rights, and in 1831, a new and unheard of claim was asserted by some Members of the Lower House to be free from the jurisdiction of courts of justice in offences of a very grave nature, namely, those contempts which obstruct the whole course of justice. Mr. Long Wellesley, in 1831, raised a privilege question with the Court of Chancery: he had been ordered by a decree of that Court, affirmed afterwards on appeal in the House of Lords, to give up the custody of his infant children, wards of the Court; he violated the order, took away the infants from those appointed to take charge of them, and removed them beyond the jurisdiction of the Court, to France. He came into court when asked to attend, and declared that he refused to bring them back, or give them up. The Lord Chancellor immediately committed him for contempt to the custody of the Sergeant-at-Arms. Mr. Long Wellesley moved for his discharge: the question was rested upon his privilege as a Member of Parliament; some members of the House took it up, a committee was appointed, precedents were searched for, and a report was made that there was no such privilege. This attempt of Mr. Wellesley, and of those who supported him in the House of Commons, thus signally failed. But the circumstances of its meeting with any support was sufficiently striking, and seemed to show that there existed a disposition to revive antiquated claims of privilege, and even to carry the pretensions of immunity from the laws of the country, on the part of the Members of Parliament, farther than they had ever, in the worst times, been pushed. Accordingly, the defeat of 1831 did not prevent a renewal of the conflict; for, in 1836, Mr. Lechmere Charlton, being a suitor in the Court of Chancery as well as a Member of the House of Commons, grossly insulted, first a Master in Chancery, and then the Lord Chancellor, both acting in their judicial capacity, and when committed to the Fleet for his offence; as a matter of course threw himself upon the protection of the House, whose privileges he counted to be violated in his person. The usual notification of his imprisonment had been made to the Speaker; a form always observed by way of testifying respect for the House, and accounting for the imprisoned Member's absence. It is, indeed, a form which would be observed were a Member committed by a magistrate for robbery: nor, it may be observed, is there a single argument ever urged in favour of privilege which would not serve as a pretence for

allowing all the Members of both Houses to rob and murder with impunity on the highway." In another part his lordship says, "A resolution having been taken in 1836 to publish for sale the papers of the Commons, and in the genuine spirit of retail dealing to give 'the trade,' as it was with technical felicity of phrase termed, the benefit of a discount, the parliamentary shop-keeper was found selling libels against the character of individuals. An action was brought for published slander, and the defendant set up the authority of the House as his protection against answering for the wrong committed. The eminent judge before whom the question was raised performed his duty as faithfully and as firmly as might have been expected from him who had at the bar and in the senate made the name of Denman illustrious for uncompromising integrity and unflinching defiance to the favours of power. He who had so often scorned the assaults of authority, which was lawful in its constitution, although perverted to purposes of oppression, might well be supposed incapable of abating one jot of his resistance, when the threats proceeded from the perpetrators of a lawless usurpation. He bravely told the Commons that the law he was sworn to administer knew of no privilege to commit crimes, and he drove the party to another defence. On that defence he prevailed; but new actions being brought, the House of Commons again appointed a committee to inquire, and an elaborate report was produced and adopted by the House, a report which has ever since been the laughing-stock of all rational men for the absurdity of its conclusions, the illogical texture of its reasonings, the self-destructive inconsistency of its successive positions, and even the gross inconsistencies of its singularly unhappy and scarcely grammatical diction. It, however, asserted plainly enough one pretension, and that was the right of the House to make whatever law it chose for itself upon all subjects, and to assume, by a simple vote of its own, any right whatever. It further declared all who disputed its resolutions, or acted, judicially or otherwise, in opposition to its claims, to be guilty of breach of privilege. Nothing, certainly, could be more high, or more mighty, or more uncompromising than the tone of these resolutions. But it was soon found to be a tone of so loud a pitch, that it could not be sustained above eight-and-forty hours; for after that short interval of triumph of bluster and of brag had elapsed, the gentle and more easily maintained note of submission was sounded. The Lord Chief Justice had in the meanwhile declared in the House of Lords, that he should utterly disregard the monstrous pretensions set forth in the resolution, and when the question arose in the Commons next day, what course should be taken

with the actions brought against their libel-seller it was deemed expedient to forget, suddenly and entirely, the famous resolutions of the day before yesterday, and to direct that the Attorney-General should appear and defend the actions in the Court of Queen's Bench; thus submitting the question of their privileges to the decision of that Court with which they were in open conflict, and which but two days before they had pronounced "guilty of a contempt if it dared to entertain the question." It was all very well to say that the defendants were not responsible for the acts of the House; but suppose they should lend themselves to the act of a housebreaker, it would be no answer to say, "We are not responsible, you must look to Mr. So-and-so." An officer might order his inferior officer, and in times of difficulty the inferior officer would be liable to be shot if he did not obey his superior; but even the private in a regiment could not be authorised to commit a murder or robbery, even if his superior officer told him to do it. And it would be for the jury to say that the present defendants were not to be justified in an illegal act, however high might be the power by which they were ordered. All orders, being legal, must be executed; but if the orders were illegal, the defendants became nominally responsible, although in fact those who gave the orders should be liable for them. The defendants would not do it unless they were indemnified; and the money that should pass to-morrow would be probably put into their hands before they paid it, or at any rate as soon as they produced the receipt. The fact was, that he was contending against the Treasury purse and the Commons' representative of the United Kingdom. He had a right to expect from the jury, in the words of a great statesman, "indemnity for the past and security for the future;" then, and then only, would he be able to remain in the service of those whose services he had well and faithfully performed  
(To be continued.)

#### ARTICLED CLERKS' EXAMINATION.

Serjeants' Inn Hall, before LITLEDALE, PATTERSON, J. COLERIDGE, J. and Mr. BARON ALDERSON.

Dec. 17.

*In the matter of the Petition of an Unsuccessful Candidate at the last Examination.*

Rule H. 6 W. 4. In case any person shall be dissatisfied with the refusal of the examiners to grant a certificate to a candidate, testifying his fitness and capacity

orney, he shall be at liberty to  
mission by petition in writing to  
to be delivered to the clerk of  
Chief Justice of the Court of  
h, upon which no fee or gra-  
e received, which application  
rd in Serjeant's Inn Hall, by  
three of the Judges (a).

the petition stated—

itioner, having complied with the  
the government and direction of  
seeking admission to practise as  
w, on or about the 19th [18th]  
ber, instant, offered himself for ex-  
hereupon, he was examined by the  
as to his proficiency in the several  
v and equity :

itioner, subsequently to his said  
received a letter from Mr. Maugham,  
to the Incorporated Law Society,  
petitioner that he had been re-  
aminers, [or rather the examiners,  
swers insufficient, could not sign  
of fitness to be admitted:]

itioner was ignorant of the grounds  
on, and felt assured, that if their  
d confer upon him the benefit of  
is given by the provisions of the  
rs, the petitioner would be fully  
entent, by his answering, to prove  
n to practise as an attorney :

itioner, from the effects of severe  
reat nervous timidity during the  
mination, underwent such examin-  
ry unfavourable circumstances ; but  
ly and anxious to submit himself  
nation as to their lordships should

itioner's diligence and good con-  
appreciated by his late master, as  
n to procure for the petitioner a  
sional employment upon the pe-  
taining his certificate from the ex-  
h appointment he will be deprived  
nt of his certificate being withheld  
ster Term :

itioner, entertaining the greatest  
he Examiners, nevertheless craved  
himself of his privilege of appeal  
ships against the decision of the  
miners.

ce LITLEDAL said, the Judges  
opinion that the examiners had

come to a correct conclusion ; but, that as  
the party had been unwell at the time of the  
examination, if the examiners from kindness  
to him, thought proper to examine him next  
term, they would recommend the Court to  
dispense with the term's notice. But it  
must be understood that this was merely  
from a consideration of the peculiar circum-  
stances of the case, and should not be drawn  
into a precedent in favour of persons who  
did not sufficiently prepare themselves for  
the examination. The Judges wished it to  
be known also that they considered this ap-  
plication as an appeal upon the examination  
which had taken place, and that they would  
not examine the party themselves.

The applicant entreated the Judges to al-  
low him to be examined before next term, on  
account of the loss he would sustain by the  
delay, and the injury to his health ; stating  
that his object was not so much to get ad-  
mitted next term, as to pass his examination.

The Judges said if the examiners would  
out of kindness take another examination of  
him at any time convenient to them during  
the vacation, the party might be admitted the  
first day of term.

The secretary of the examiners suggested  
to their Lordships to consider whether the  
examiners had any power to proceed on the  
examination except during the last ten days  
of term according to the Rule of Court.

Mr. Justice PATTERSON and Mr. Baron  
ADDERSON were understood to say, that the  
examiners might proceed during the vaca-  
tion, and certify their opinion to the Court ;  
the Judges, however, would not press the  
further examination upon them, but leave it  
entirely to their discretion

We understand that the Examiners will  
hold an early meeting on the subject.

#### NEW POSTAGE ACT.

A TREASURY MINUTE, DEC. 26, 1839.

My Lords read the minute of the 23d of  
August, proposing to receive communications

ing. N. R. 813. ; 1 Mus. Weist. 3. 4. ;  
5. ; 4 Dowl. Rep. 553.



from the public with reference to the letter stamps named in the Act 2 and 3 Victoria, cap. 52, and offering certain rewards for the same.

The communications (more than 2,600 in number) received in consequence of this minute have for a long time occupied the attention of their Lordships. Many of them display much ingenuity. They are highly satisfactory, as evincing the interest taken by men of science and by the public in general in the measures now in progress for the reduction of postage, and they have afforded much useful information with reference to the details of the new arrangements. Upon full deliberation, however, their Lordships do not think it will be advisable to adopt any one of the specific plans proposed, without modification and combination with other arrangements.

After the best consideration my Lords can give the subject, and with the view of awarding most fairly between the parties, my Lords have decided not to give the specific sums mentioned in their minute of 23d August, but have selected four communications which are the most distinguished either for originality or for completeness, and from which my Lords have derived the greatest service, and decided to award the sum of £100. to each. The authors of these four communications are as follows, the names being arranged alphabetically, viz. :—Messrs. Bogardus and Coffin (who have acted together), Mr. Benjamin Cheverton, Mr. Henry Cole, and Mr. Charles Whiting.

My Lords next proceed to take into consideration the several points enumerated in the Minute of the 23d of August, and the suggestions connected therewith which occur in the communications already referred to.

Their Lordships, upon full consideration, have decided to require that, as far as practicable, the postage of letters shall be prepaid, and to effect such prepayment by means of stamps. Their Lordships are of opinion that the convenience of the public will be consulted, more especially at first, by issuing stamps of various kinds, in order that every one may select that description of stamp which is most suitable to his own peculiar circumstances; and with a view of affording an ample choice, their Lordships are pleased to direct that the following stamps be prepared :—

First. Stamped Covers.—The stamp being struck on pieces of paper of the size of half a sheet of 4to. letter paper.

Second. Stamped Envelopes.—The stamp being struck on pieces of paper of a lozenge form, of which the stationers and others may manufacture envelopes.

Third. Adhesive stamps, or stamps on small pieces of paper with a glutinous wash at the

back, which may be attached to letters either before or after they are written; and

Fourth. Stamps to be struck on paper of any description which the public may send to the Stamp Office for that purpose.

The paper for the first, second, and third kinds of stamps to be peculiar in its water-mark or some other feature, but to be supplied to government by competition.

My Lords direct that the Commissioners of Stamps and Taxes, and the Commissioners of Excise, should receive the official directions to take the necessary steps in conjunction with the Board, and with the Postmaster-General, for the preparation of the stamps herein enumerated.

Although the necessary experiments and investigations which have been conducted under the direction of this Board are already far advanced, my Lords fear that a considerable time will be required for completing the preparation of the dies, plates, and machinery (much of which is unavoidably of a novel construction), necessary for the manufacture of the stamps; and being desirous of affording to the public with the least possible delay the full advantage of the intended reduction in postage, their Lordships propose at once to effect such reduction.

On the use of Stamps, however, my Lords have fully decided; they will be prepared with the least possible delay, and when ready due notice will be given of their introduction.

Having, therefore, communicated with the authorities of the Post Office, my Lords are pleased to direct that on the 10th day of January next the following arrangements shall come into operation :—

The scale of weight already established for General Post letters to be extended to the London district and other local post letters.

The charge on all letters passing between one part of the United Kingdom and another, whether by the General Post or the London district or other local post, to be one penny per single rate.

Such postage to be prepaid—if not prepaid, to be charged double on delivery.

Letters between the United Kingdom and the Colonies to be charged, if conveyed by packet and not passing through France, at the rate of one shilling per single rate; and if conveyed by private ship, at the rate of 8d. per single rate, in whatever part of the United Kingdom they may be posted or delivered.

Letters between the United Kingdom and foreign countries (those passing to or from or through France excepted) to be charged as follows :—

If conveyed by packet, and posted at the port of departure, or delivered at the port of arrival

United Kingdom, the present packet rate, or delivered in any other part of the United Kingdom, 2d. per single rate, in the present packet rates, unless where they shall now exist, in which case they are to continue.

Letters by private ship, 8d. per single rate, or part of the United Kingdom posted or delivered.

Letters to Foreign Letters to and from France, my Lords proposing such modifications as may be made into the treaty with that country, of the charge for packet and inland letters, not exceed that rate which is now made in cases where the charge under the present treaty shall be less than such rate.

Reductions do not apply to letters between the United Kingdom, the Mediterranean, Egypt, and the East, which will continue to be charged as at

between the United Kingdom and foreign countries, and will continue to be subject to the same rates with regard to prepayment as at

present states to the Board her Majesty's measures may be taken to her Majesty's privilege of franking, and in conformity with the other regulations they may lay down with regard

are pleased to direct, that from and after the 1st of January next, the privilege of franking parliamentary and official, shall

votes and proceedings of the Imperial or of the Colonial Legislatures of Her Majesty's colonies, if sent in the manner required by law, to be charged as if passing from one part of the United Kingdom to another, or between the United Kingdom and the colonies, provided they pass through France, or to the East Indies, or to the East India Company,—

Letters weighing 2 oz. in weight, 1 penny. Letters weighing 2 oz., and not exceeding 4 oz., 1 penny.

An additional penny for every additional ounce, without limitation as to weight; to be the same whether prepaid or

ships, however, consider it will be the duty of the Postmaster-General should be in cases where it may appear necessary, to postpone the despatch of par-

liamentary proceedings for twenty four hours—their Lordships being aware that the greatest inconvenience frequently has arisen from the very large influx of heavy parliamentary papers. And their Lordships are therefore pleased to call the Postmaster General's attention to this point with a view of his making such regulations as may be required.

The privileges now attached to addresses to her Majesty—to parliamentary petitions—to newspapers, and to the letters of soldiers and sailors engaged in service abroad, to remain unaltered, except that a soldier's or sailor's single letter will be interpreted to mean a letter not exceeding half an ounce in weight.

If any privileged letter or other article become liable to the full letter rates of postage, such rates to be charged according to the scale of rates herein established for letters. The treble duty to which newspapers in certain cases become liable to be calculated according to the same scale.

All privileges except those already enumerated to cease.

The following are exceptions to the regulation which restricts the amount of weight to 16 oz.

1. Parliamentary proceedings as already named.

2. Addresses to her Majesty, and parliamentary petitions.

3. Letters and packets received from or addressed to places beyond the limits of the United Kingdom.

4. Letters and packets, addressed to or despatched by the Government Departments, or such officer as may now have the privilege of franking by virtue of his office. And

5. Deeds, if transmitted under such regulations as the Postmaster-General may consider necessary to prevent abuse of the privilege.

In consideration of the reduction now made in the postage of ship letters, and the probable increase of such letters, the master's gratuities will be reduced to 2s. 6d. per 100 for all letters, newspapers, and other packets conveyed between one part of the United Kingdom and another. At the same time gratuities of one penny per letter or packet, and one halfpenny per newspaper, will be given to the masters of ships trading to the East Indies, on the same conditions as those now applying to other ship letters and papers.

With reference to the arrangements herein made, the Channel Islands and the Isle of Man are to be considered as parts of the United Kingdom, and the Ionian Isles and Honduras as British colonies.

My Lords are of opinion that the whole of these arrangements should apply to all letters and packets posted within the United Kingdom, or



# The Legal Guide.

SATURDAY, JANUARY 4, 1840.

[No. 10.]

## US OF REAL PROPERTY.

### ESSAY II.

4 Wm. IV. cap. 74.

*On the Abolition of Fines and Recoveries for the Substitution of more Modes of Assurance.*

*(continued from p. 131.)*

#### PROTECTOR OF A SETTLEMENT.

PROTECTOR of a SETTLEMENT is defined by the statute—*First*, who shall be appointed; *Secondly*, how he shall give

*Thirdly*, it provides for the protector being under disability; *Fourthly*, enables the settlor to appoint a protector; *Fifthly*, the jurisdiction of the protector. Equity is excluded from all the acts of the protector done in pursuance of this statute.

sec. 30—quoted in our last—makes it clear that in all entails created on or after the 1st December, 1833, intended to be a freehold, it should be ascertained in the manner as was heretofore ascertained in whom the legal estate was vested, so as to make a good title, and not a mere receipt for suffering a common law writ against whom the writ was brought, but against the actual tenant of the land. And that if the tenant in tail had died, and the immediate freehold, it was that he should procure the concur-

rence of the person who had it, in order, by a recovery, to bar an entail.

We noticed in our last the despotic character with which the protector of a settlement, *tenant for life*, is invested; and we observe that Sir *Edward Sugden*, in the last edition of his "*Vendors and Purchasers*," (a) in commenting upon sec. 30, says that provision does not extend to *future* cases: therefore, if tenant for life, or for years determinable on his life, with remainder to his sons in tail, with remainder or reversion to himself in fee, were to sell and convey the life interest and the remainder or reversion, he would still be the protector, and could, at any time during the continuance of the life interest, consent to a statute-deed of disposition by the tenant in tail, which would bar the remainder or reversion; or, in other words, he might in substance re-sell the remainder or reversion to the tenant in tail, for he may make what bargain he can with the tenant in tail, and a covenant with the purchaser *not* to exercise his power of consenting would be simply void. This operation of the statute should not be lost sight of in practice.

This protector may nevertheless be excluded by the *settlor*; as we shall show as we proceed with the statute. Where there is a plurality of owners, each owner, by sec. 23, is constituted *sole* protector in respect of his disposable share of the estate.

(a) Vol. 2, p. 261.

Sec. 32 enacts, That it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons *in esse*, not exceeding three and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons *in esse*, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die, or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person who but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquish-

ment of the office by deed, and no other person shall have been appointed in the place.

Sec. 33 provides, That if any person, protector of a settlement, shall be lunatic, idiot or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper, or the Lord Commissioners for the custody of the Great Seal of Great Britain, for the time being, or other the person or persons for the time being intrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot or of unsound mind as aforesaid; or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person, not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then the Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid; or if any settlor entailing lands shall in the settlement by which the lands shall be entailed declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement shall not be such protector, and shall appoint any person to be protector in the stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where the estate shall be subsisting under a Settlement prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to

the settlement, and there shall  
by time to be no protector of the  
to the lands in which the prior  
subsisting, the said Court of  
all, while there shall be no such  
d the prior estate shall be sub-  
e protector of the settlement as

provides, That if at the time when  
actual tenant in tail of lands  
ement, but not entitled to the  
reversion in fee immediately  
the determination of his estate  
desirous of making under this  
tion of the lands entailed, there  
protector of such settlement, then  
such case the consent of such  
ll be requisite to enable such  
in tail to dispose of the lands  
e full extent to which he is  
authorized to dispose of the  
ch actual tenant in tail may,  
consent, make a disposition  
t of the lands entailed, which  
d against all persons who, by  
estate tail which shall be vested  
e claimed by, or which but for  
act or default would have been  
might have been claimed by,  
making the disposition at the  
aking the same, shall claim the

provides, that where an estate tail  
en converted into a base fee, in  
long as there shall be a protec-  
lement by which the estate tail  
the consent of such protector  
site to enable the person who  
een tenant of the estate tail if  
not been barred to exercise, as  
in respect of which there shall  
ector, the power of disposition  
contained.

(To be continued.)

## PROBLEM X.

VOL. 3.

### DAMAGE FEASANT.

Describe what it is. What kind of thing  
is capable of being *damage feasant*?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XXVI.

VOL. 2.

### SOCAGE TENURE, DESCRIBE WHAT IT IS.

Socage (*socagium à soca*, a plough) is a  
tenure by which tenants held their lands to  
plough the land of their lords, with their  
own ploughs, and do other inferior services  
of husbandry at their own charge, which  
slavish tenure was afterwards, by the mutual  
agreement of lord and tenant, turned into  
the payment of a sum of money yearly, and  
from thence it was called *Liberum Socagium*, or Free Socage: whereas, the other  
was termed *Villanum Socagium*, or Villain  
Socage.(1) Free socage was a tenure of  
freehold, by a certain rent, for all services,  
and to pay upon the death of the ancestor  
a double rent for a relief, and to be free from  
wardship, &c. And Socage was a tenure  
of so large an extent, that Littleton tells us  
the lands in England which were not held  
in knights' service, were held in socage. It  
seems, the lands were divided between these  
two tenures, and as they were of different  
natures, so the descent of these lands was in  
a different manner; for the lands held in  
knights' service descended to the eldest son,  
but those in *villain socage* equally among all  
the sons; and if there was but one message  
or tenement, the eldest son was to have it,  
paying the rest the value, &c. Littleton, 117.  
When the tenant holdeth of the lord by cer-  
tain services, for all manner of services, it is  
socage. If a man hold by fealty only such  
service, is tenure in socage. And tenure by  
petit serjeantry and in burgage, are but  
socage tenure in effect. But grand ser-

jeantry, holden of the King and Frankalmoign, which is a spiritual service, is not in socage, Litt. 177, 118, 160.; 1 Just. 86. The tenure of Free Socage is likewise called common socage. And all tenures are adjudged and taken, to be for ever free, turned into free and common socage, Stat. 12.; Car. 2, c. 24. Having thus attempted to give a brief outline of Free Socage, I shall now proceed with Villain Socage. Villain (*villanus* from *vilain*, i. e. *vilis*) signifies a man of servile or base condition, a bondman or servant. Of these bondmen, or villains, there were two sorts in England, one termed a villain in gross, who was immediately bound to the person of the lord and his heirs, and the other a villain regardant to a manor, being bound to his lord as a member belonging and annexed to a manor, whereof the lord was owner. And he was properly a pure villain, of whom the lord took redemption to marry his daughter, and to make him free, and whom the lord might put out of his lands and tenements, goods, and chattels, at his will, and chastise, but not maim him; for if he maimed his villain he might have appeal of *mayhem* against the lord, as he could bring appeal of the death of ancestor against his lord, or appeal for a capital offence done to his wife, Bract. Lib. 1, c. 6. Some were villains by title or prescription, that is to say, that all their blood had been villains regardant to the manor of the lord time out of mind, and some were made villains by their confession in a court of record. Though the lord might make a manumission to his villain, and thereby infranchise him: and if the villain brought an action against his lord, other than an appeal of *mayliem*, &c. and the lord without protestation made answer to it, by this the villain was made free. Villain estate was contradistinguished to free estate by the statute 8 H. 6, c. 11.

And the villain were such as dwelt in villages, and of that servile condition that

they were usually sold with the farm to which they respectively belonged, so that they were a kind of slaves, and used as such. Villenage is derived from villain, and was a base tenure of lands or tenements, whereby the tenant was bound to do all such services as the lord commanded, or were fit for a villain to perform. The division of villenage by Bracton was into *Prorum villenagium* & *quo præstatur servitium incertum et indeterminatum et villenagium socagium*, which were to carry the lord's dung into his fields, to plough his ground at certain days, sow and reap his corn, &c. and even to empty his jakes, as the inhabitants of some places were bound to do, though afterwards turned into a rent, and that villanous service excused. Every one that held in villenage was not a villain or bondman, for tenure in villenage could make no freeman villain unless it were continued time out of mind, nor could free land make a villain free, Brac. L. 2, c. 8. Copyhold tenures seem to be sprung from villenage, F. N. B. 28. And the slavery of this custom hath been long ago taken off, for we have hardly heard of any case in villenage since Crouche's case in Dyer's Rep. There are not properly any villains now, and the title and tenure of villenage are abolished by the statute of Car. 2.

S. A. W.

(1) From which have sprung the present Copyhold tenures, by copy of Court Roll at the will of the lord, and though they are in general still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; the customs whereof are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And as such tenants had nothing to shew for their estates but these customs and admissions, in pursuance of them entered on the rolls, or

of such entries witnessed by the common law (12 E. R. 62). Evidence  
 ey came to be called tenantsby of reputation of the custom of a manor;  
 ury Roll, and their tenure itself that in default of sons, the eldest daughter;  
 .—ED. and in default of daughters, the eldest sister,  
 and in case of the death of all the descen-

EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM  
 3, VOL. III.(1)

ged by your permission to occupy  
 e Legal Guide in answering the  
 f this Problem. Copyholds del-  
 ing to the rules of the Common  
 ss there are contrary customs of  
 ty, but such customary inheri-  
 ot be assets to charge the heir in  
 t, &c. (4 Rep. 22. Kitch.). A  
 year of copyhold lands which  
 by the Common Law shall be  
 hands of an executor, (1 Vent.  
 holders hold their estates free  
 being created by custom, which  
 to title of dower, (4 Rep. 24).  
 heritances have no collateral  
 ich do not concern the descent,  
 ke them assets, or whereof a  
 endowed, a husband be tenant  
 tesy, &c. (Cro. Eliz. 361).  
 e an estate tail on copyhold  
 tom, with the co-operation of  
 2. And as a copyhold may be  
 custom, so by custom the tail  
 off by surrender. Where by  
 m a descent of copyhold may  
 to the rules of common law,  
 shall be construed strictly;  
 ere is a custom within a manor,  
 all descend to the eldest sister;  
 is neither a son nor daughter,  
 extend to an eldest niece; but  
 such son, daughter, and sister,  
 st descend according to the

dants of the eldest daughter or sister, the  
 descendants of the other daughters or sisters  
 respectively, of the person last seized, should  
 take, is proper to be left to the jury, of the  
 existence of such a custom, as applied to a  
 great nephew (the grandson of an elder  
 sister), of the person last seized, although  
 the instances in which it was proved to have  
 been put in use, extended no farther than  
 those of eldest daughters and eldest sisters,  
 and the son of an eldest sister (Doe d. Fos-  
 ter v. Sisson, 12 E. R. 62). The existence  
 of such custom in adjacent manors, seems  
 to be no evidence of the custom in the par-  
 ticular manor (Ib). Copyholds descending  
 by custom to all the children equally of the  
 tenant last seized, one of the parceners may  
 maintain ejectment on his single claim for  
 his own share (Roe d. Raniper v. Lamdale,  
 10 East's Rep. 39). The customs of manor  
 as to descent are very various. In some  
 manors it is according to the custom of Gavel-  
 kind; in others according to that of Bor-  
 ough English; in others according to the  
 rule at common law. The words of descent  
 may also vary in the same manor, and it is  
 not competent to a person to alter the cus-  
 tomary mode of descent (Co. Litt. 27.;  
 Rob. Gav. 92.; 2 Walk. Cop. 45. 4th ed.)  
 The distinction between Custom and Pre-  
 scription is to be borne in mind, the former  
 being always local, the latter personal. The  
 proof of a custom lies upon him who alleges  
 it, and a series of entries in the Court Rolls  
 is the best and most direct evidence of a  
 custom (3), 2 Wat. Cap. 48. (4th ed.)

H. T. D.

p. 63.—ED.

statute 3 and 4 W. 4, c. 106, ss. 1, 9,  
 the rule as to the exclusion of the half  
 plied to lands of this tenure.—Editor.

(3) All customary modes of descent, except com-  
 mon law customs, as Borough English and Gavelkind,  
 must be established by proof. See Doe dem. Foster  
 v. Sisson, 12 East. 62.—ED.



## ON THE LAW OF INJUNCTIONS.

## ESSAY I.

OF THE JURISDICTION OF THE COURT OF  
CHANCERY TO RESTRAIN PROCEEDINGS IN  
OTHER COURTS.

BY C. S. D. Esq. Barrister-at-Law.

(Concluded from p. 117.)

There are several instances of injunctions to restrain proceedings in Scotland and Ireland. (a) And in *Lord Portarlington v. Soulbby*, (b) where the action was brought in Ireland, the question of jurisdiction was elaborately discussed. Lord Brougham said, that the Court had jurisdiction, not upon any ground of superintending authority residing in the Court of Chancery over courts in Ireland, but on the ground that the defendants were within the power of the Court, and "the jurisdiction," said his Lordship, "is to stay the *defendant* from proceeding, not to stay the *foreign court* from exercising its jurisdiction." His Lordship observed in the course of his judgment, "In truth nothing can be more unfounded than the doubts of jurisdiction. That is grounded, like all other jurisdiction of the Court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the Court. If the Court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if, for instance, as in *Penn v. Lord Baltimore*, (c) it can decree the performance of an agreement touching the boundary of a province in North America; or as in the case of

*Toller v. Carteret*, (d) can foreclose a mortgage in the Isle of Sark, one of the Channel islands, in precisely the like manner it can restrain the party within the limits of its jurisdiction, from doing any thing abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the institution or prosecution of an action in a foreign court." (e) Upon the same principle the Courts of Equity have, under circumstances, restrained parties within their jurisdiction from proceeding in other foreign courts. In a very late case by Lord LANGDALE, M. R. (f) the defendants in equity had instituted proceedings in the Court of Demerara, involving, in the opinion of the Court, questions regarding the law of Holland, and also the law of England, and further questions of account which could only be taken in this country. Under these circumstances his Lordship restrained the defendants from prosecuting proceedings in Demerara, putting, however, the plaintiff on terms to submit to and carry into effect any order which the Court might think fit to make in respect to the proceedings in Demerara.

In *Jackson v. Leaf*, (g) a doubt was expressed by the Court, whether the Court of Chancery will enjoin a party from proceeding in another court of equity. In that case several legatees had instituted a suit in the Exchequer for the administration of the testator's estate, and pending that suit, some of the residuary legatees filed their bill in Chancery and obtained a decree. On motion made by the executor, the defendant in Chancery, to restrain the other legatees from proceeding with the suit in the Exchequer. An order was made by consent of the plaintiff in the Exchequer that the plaintiff

(a) *Wharton v. May*, 5 Ves. 71; *Beauchamp v. Marquis Huntley*, Jac. 546; *Harrison v. Gurnen*, 2 Jac. & W. 563; *Campbell v. Houlditch*, cited by the Court in *Lord Portarlington v. Soulbby*, 3 My. & K. 108.

(b) 3 My. & K. 163.

(c) 1 Ves. sen. 444.

(d) 2 Vern. 404.

(e) See *Lord Portarlington v. Soulbby*, p. 108.

(f) *Bunbury v. Bunbury*, 1 Beavan, T. 12, 4 vol. 2, p. 367.

(g) 1 Jac. & W. 220, per Lord Eldon, p. 232, see the note of the learned reporter.

the Exchequer should be stayed, the plaintiff in the Exchequer should be restrained from commencing any other action in that manner, touching the legacies of the testator. They were to go in under the decree in Chancery, and be paid their costs of the Exchequer suit up to the time of their having notice of the decree in Chancery, and their costs of the motion for a decree. It is, however, settled that the Court will exercise jurisdiction to restrain a plaintiff from bringing a bill in Chancery and afterwards filing a bill, and the executor is bound to pay the costs of the second directly, and a decree is made in it is competent for the executor to restrain the first from proceeding when a creditor is thus put to expense. The course is to pay him the costs incurred prior to his having notice of the decree. (h) The point doubted in *Lif* arose, and was determined in *Earl of Ormonde*. (i) In that case suits in England for the fulfilment of the trusts of the will of the testator had states in England and Ireland. A decree had been made in those courts in favour of the plaintiff, and the defendant was restrained from carrying on a suit in Ireland of himself and other creditors in the court in the English suits, and the defendant was allowed out of the estates in the suit up to the time when he had notice of the decree; but he was ordered to pay the costs of the application for the injunction; and he was aware of the decree, and having come under it, and proved under it, he was ordered to have put the plaintiff in the suit, to the expense of making application. In *Harrison v. Gurney* the case was the same in nearly every respect, as the above case, and a similar

order was made generally, where a suit has been instituted in equity, involving inquiries into claims against the estate of a party to the suit, and such claims have been put in course of investigation, the Court will not allow an action to be brought upon them, but will consider them as properly within its jurisdiction; thus, in a creditor's suit, the usual decree having been made, and no claim of any debt or damages brought in, the Master made his report. The cause was heard on further directions, and the executors paid in their balances. Afterwards the lessor of the testator brought an action against the executors for breaches of covenant. The Court granted an injunction to restrain the plaintiff at law from going on with his action, saying, "It might be ascertained by the Master as well as it could by a jury, when any breach of covenant had been committed, and what was the amount of the damages." (l)

A party, against whom a decree had been made, may be restrained by special injunction from bringing an action, for it is an infringement of the rules of the Court to bring an action while the Court is working out a decree, and where a proceeding is before the Court, and the Court has full power to do justice, a party ought not to resort to any other tribunal. (m) If there be delay in the Master's office in working out a decree, the party complaining should apply to the Court for leave to bring an action, and the Court may under circumstances, direct such action to be brought. (n)

Although a solicitor may undoubtedly originally bring an action to recover his costs for business done in a suit in equity, yet if he refers it to the Master under an order of this Court to tax his costs, he thereby admits

(h) 2 Jac. & W. 563.

(i) *Sutton v. Mashileo*, 2 Sim. 513.

(m) *Frank v. Hasnett*, 2 M. & R. 618.

(n) *Ibid*.

*Earl of Ormonde*, 2 Jac. & W. 229, and *Parton v. Ves.* 520.  
and W. 54

the jurisdiction of this Court to enforce payment of the taxed bill by process of contempt, and the Court will not allow him after the bill has been taxed to proceed in his action.<sup>(o)</sup>

Under this division of the subject, fall to be considered, the cases in which the Court will restrain proceedings in any other Court against the acts of its officers; that a power should be vested in any Court to deny an inquiry into a wrong committed under its ordination, or by its officers, by any tribunal but itself, may appear to many an anomaly in the organization of justice in a free state. But however this may be, it is well settled upon authority that, where the process of the Court of Chancery has been either issued irregularly, or being regularly issued, has been irregularly executed, the Court has jurisdiction to restrain the party who has been taken under such process from bringing an action at law against the person executing it, and to draw to itself the conclusion of the case, and will refer it to the Master to consider what will be a reasonable satisfaction to the party suffering.<sup>(p)</sup>

In *Aston v. Heron*, the principle on which the Court of Chancery proceeds, in respect of this branch of its jurisdiction, was elaborately discussed by Lord Chancellor Brougham. His Lordship admitted, on the authority of *Baily v. Devereux*, and *Frowd v. Lawrence*, and *May v. Hook*, that the Court has undoubted jurisdiction to exclude

all other jurisdiction in every thing relating to its process, not only preventing any Court from judging whether or not its orders were regular, but from examining into the regularity of their execution, and not only preventing such examination, but shutting out redress at any hands but its own, were a wrongful act is admitted to have been done under colour of obeying its commands. But his Lordship laid down the following distinction, that where the title of the officer of the Court is questioned, the Court has no choice, and cannot give up the jurisdiction. But when the process has been irregularly issued, there it is matter of discretion with the Court whether it will decree to itself the examination of the matter, or leave it to other tribunals, and is not bound to exclude concurrent jurisdiction. And he said the Court would require a case to be made against the officer of the Court, to induce it to leave the matter to be examined elsewhere. On these principles the order in *Aston v. Heron*,<sup>(q)</sup> was grounded. The case was—A receiver had been appointed by the order of the Court, and levied a distress upon a tenant of the estate of which he was a receiver. The tenant brought an action of trespass against the receiver and bailiff, and on a bill to restrain these proceedings, Sir L. Shadwell, V. C. granted an injunction, and afterwards refused to dissolve it. A motion was then made before Lord Brougham to discharge the order of the V. C. refusing to dissolve the injunction. It did not appear by the affidavit what acts of the receiver were irregular, but they consisted merely of a vague and general declaration that he had put in the distress irregularly. On this state of circumstances Lord Brougham held that the Court should exercise its jurisdiction, and he accordingly refused to dissolve the injunction with costs.

C. S. D.

(o) *Walton v. Johnson*, 2 Sim. 456.

(p) *Frowd v. Lawrence*, 1 Jac. & W. 655.; *Bailey v. Devereux*, 1 Vern. 269, and 1 Jac. & W. 660.; *May v. Hook*, 1 Dic. 629, and 1 Jac. & W. 663.; *Frowd v. Lawrence*, was a case of an attachment irregularly issued, which had been set aside with costs, and afterwards the defendant commenced an action against the plaintiff and the Sheriff for false imprisonment; and another against the plaintiff for maliciously suing out the attachment. Lord Eldon, on the authority of the two preceding cases, granted an injunction, restraining the proceedings at law, and observed, that "though the jurisdiction was very strong, he was not at liberty to give it up."

(q) 2 My. & K. 390.

## Law Reports.

S' COURT.—Dec. 16.

ADDIS v. CAMPBELL.

*Amending Bill after Replication—Affidavits not positive, or pledged whether allowed.—Whether defendant file an affidavit to oppose a plaintiff's affidavit, pledged to belief.*

The bill was by the heir at law, of the suit was to set aside a deed of the year 1818, by the father of the father of one of the defendants, alleged that the transaction was against the plaintiff's father, and the father of the defendant Crook real and personal estate claimed to thereout. The bill was filed in four years after the plaintiff had attested. The answer of the executor of the father, filed in August, 1838, he died seized of some real and personal estate, but denied knowledge of its value, and the real estate was encumbered with mortgages. The bill was amended in January. The cause was in a state to be set on before the long vacation of the year 1839, an application was made to the Master for leave to withdraw replication and file fresh amendments. The application was heard on an affidavit by the plaintiff and the defendant stating that they had in July, 1838, and been informed for the first time of the death of the defendant Crook had, before his death, made a voluntary assignment of all his real and personal estate to his brother. But the affidavit of the plaintiff was to the belief of the plaintiff whether the fact. On this the Master refused to grant the amendments; and the present application in the nature of an appeal from the Master's decision was now produced, and a new affidavit was produced in the Master's office, which swore to the belief of the plaintiff that the new facts on which his bill was founded.

Mr. Pemberton and Mr. Piggott for the plaintiff supported an order for the amendment that if Crook the father had made a voluntary conveyance of his estate at his death, there would be assets to satisfy the demands of the plaintiff, and that the defendant was not any explicit averment that he produced in the Master's office, of the plaintiff, yet there was enough to show the truth of the fact, and the plaintiff was entitled to make amend-

ments, the very object of which was to interrogate the defendant Crook as to that fact. At any rate the plaintiff in the affidavit now produced swore distinctly to his belief.

Mr. Roupell for the defendants said, that there was not any evidence at all before the Master that the plaintiff believed the truth of the new facts which he sought to introduce by way of amendment. That the cause had been ripe for hearing before the long vacation, and the plaintiff ought not now to be allowed to retard the hearing, when possibly he was perfectly aware that the facts alleged were wholly untrue. For he merely swore that he had *heard and been informed*, and that allegation was perfectly consistent with the supposition that he had no belief whatever. As to the affidavit now produced, he contended that his client ought to be allowed to file an affidavit in reply.

Mr. Pemberton in reply as to the point of now delaying the cause, said, the cause had been delayed so long by the tardiness of the defendants in answering, that the plaintiff could do nothing till October, 1839, and referred to the various dates to shew that the plaintiff had amended and taken all other steps as rapidly as he could.

Lord LANGDALE, M. R. said he thought he must make the order. The demand was made against the defendant alleging fraud, and it was important to make out assets when compensation to the plaintiff depended on that. Assets were denied by the answer, but it was alleged by the bill that there were real assets, which would be available if it could be proved that there had been a voluntary conveyance by Crook the father to the defendant shortly before his death. Now that fact it was proposed to introduce by amendment. The plaintiff ought not, undoubtedly, to be permitted to do that unless he pledged his belief; and if the case had been before the Court in the state in which it was before the Master, the Court must have refused the application. But the plaintiff had, at a late period it was true, sworn to his belief, although he did not do so before the Master. The defendant could not be allowed to file an affidavit in opposition to the plaintiff's last affidavit, because although the defendant might disprove by affidavit the truth of the fact sworn to, he could not by any affidavit displace the truth of the plaintiff's averment that he believed the fact.

Order made, the plaintiff paying the costs.

Dec. 23.

ATTWOOD v. BANKS AND OTHERS.

*Act for abolishing Arrest for Debt, sec. 8.—Affidavits in Bankruptcy—Jurisdiction of the Court.*

Mr. Pemberton moved for an injunction to

restrain the defendants from taking any proceedings to obtain a fiat of bankruptcy against the plaintiff, and also upon a demurrer to the bill for want of equity, and to the jurisdiction of the court. The plaintiff, in 1836, carried on the business of a manufacturer of glass, soap, and alkali, and in the same year he took in Mr. E. Banks as his partner in the glass and alkali works, and Mr. C. Augustus Tulk as a partner in the soap works alone; and in August, 1836, the plaintiff took into partnership with him, in the glass works only, Mr. Anthony Hart Hart, another defendant, who is the brother-in-law of Mr. Tulk. Accordingly, draft articles of partnership were prepared, under which the plaintiff and Messrs. Banks, Tulk, and Hart, were to bring in £12,000. each as capital, and the new firm was to discharge the whole of the debts and liabilities of the business which had been previously carried on, and were to become jointly entitled to the whole of the profits of the business as well as to the stock in trade, including the manufactories. During the progress of the business, the partners kept accounts with the firm of Sir Matthew White Ridley and Co., to whom they became indebted for accommodations and advances in money to the amount of £33,640., for securing the payment of which the plaintiff deposited policies of assurance and various title deeds and other assurances and securities of great value. In consequence of some differences, the firm of Sir M. W. Ridley and Co., on the 26th of April, 1839, made an affidavit of debt, and gave a notice under the provisions of the late Act for the Abolition of Arrest, requiring payment of what was due to them. Under this it was arranged that the plaintiff should retire from the business concerns, and leave them to Messrs. Banks, Tulk, and Hart; and, accordingly, an agreement was made, dated the 27th of April last, which declared that the partnership was dissolved from that day, and it was agreed that the partnership property should be transferred by the plaintiff, and that the accounts as against him should be considered as settled, and that the plaintiff should be indemnified from all the partnership debts, and that mutual releases should be given. In making this arrangement the partners had no power to bind the firm of Sir M. W. Ridley and Co.; but, upon being applied to, they signed a memorandum, whereby they agreed to confirm the within written agreement, so far as the Northumberland and Durham District Bank was concerned, which was, in effect, accepting the security of the continuing partners, and discharging the plaintiff. For carrying this into effect proper deeds were to be made. The bankers, consequently, took no proceedings under the notice they had given for payment of what was due to them. But, while attempting

to carry the agreement into execution, question arose between the plaintiff and his late partner who refused to acknowledge, as a partnership debt, a sum of £2000., which was due to M. Hadley, and which was secured by a note of the plaintiff and his brother, and had been adopted by the partnership; interest had also been paid on this debt. There was also another sum of £800. due to Mr. Ware; this, the plaintiff insisted, was a debt due from the soap business and was also adopted by the firm, and entered such in the books. The continuing partner, however, denied these statements, and denied that they formed any portions of the debts of the partnership, and refused to pay them. Disputes also arose as to what was and what was not partnership property. The plaintiff had taken in his own name the lease of some property near Gatehead. This the continuing partners claimed. In this state of things the plaintiff filed his bill on the 22nd of September last for a specific performance of the agreement, but the defendants ordered to determine the question thought better to make the plaintiff a bankrupt, and the defendants, Sir M. W. Ridley and Co., at the instigation of Messrs. Banks, Tulk, and Hart, took steps to make him a bankrupt; and Mr. Boyd, one of the firm, made an affidavit, and gave a notice for payment of their demand under the Act for the Abolition of Arrest, which if not complied with in 21 days, became an act of bankruptcy. The plaintiff immediately filed a supplemental bill stating these facts, and asked that any further proceedings might be stayed. This, it was insisted, must be granted, as the firm of Sir M. W. Ridley and Co. had agreed to release the plaintiff, and also on the ground that the commissioner must grant the fiat on the mere legal force of the statute being complied with, and without being able to inquire into the merits.

Lord LANGDALE said, that this was an application of the first impression which arose out of the statute which had been passed for the abolition of imprisonment for debt in certain cases. It appeared that in April, 1839, the plaintiff was engaged in business at Newcastle as a glass and alkali manufacturer with Messrs. Tulk and Banks. The partners became largely indebted to Sir Matthew White Ridley and Co. to the amount of £33,640., and in this state of things the partners did not agree, and Messrs. Tulk and Banks became desirous of getting rid of the plaintiff and to effect this proceedings under the new law were suggested, by which all the parties might be made bankrupts. This was a rapid mode of proceeding, and accordingly affidavits were made and notice was given. In consequence of this the plaintiff was obliged to retire, and on the 27th of April he gave up the whole of the joint property to the other partners, in consideration

upon themselves the whole of the debt which had been incurred by the parties was not considered a sufficient security and could not be available against the defendants, and upon being applied to, Sir John Lubbock, Ridley, Biggs, Boyd, and Co., agreed, stating that "We do not confirm the within written agreement of the Durham Branch Bank of this case is concerned." The plaintiff acquiesced in the whole of the partnership of the continuing partners and no disputes had arisen, there would be no end of the question; but difficult to protect the property, and also liabilities, and in consequence of these, I did not proceed to carry the agreement among themselves. In this case the plaintiff, in September last, praying for a specific performance of the agreement, and by his bill offering on his part that was necessary for that purpose, that the defendants might exonerate themselves from their liabilities. During these discussions W. Ridley and Co. thought that it was as if they had not confirmed the agreement, and had not agreed to accept the liabilities of the continuing partners, and they re-proceeded which they had commenced in April; and in November last one of the partners of the firm of Sir M. W. Lubbock made a fresh affidavit, and gave the act for the abolition of arrest in force with a view to make the plaintiff a creditor of the footing of the debt which was the subject of the agreement. It appeared, however, there was some error in the proceeding, which renewed proceedings were taken in November. The plaintiff filed a bill stating these facts, and asked that he might be restrained from taking any further proceedings. His Lordship did not think that a writ of injunction could be sustained on any ground, unless it were on that of jurisdiction. The statements showed an unjust attack on the debt in violation of the agreement. When a new law passed, it could hardly be that attempts would not be made to circumvent it in a manner which must give satisfaction of the first impression. There is, no doubt that this Court had the power to prevent an unconscionable mode of proceeding. Where the plaintiff had been given up the joint property, and to himself of the means of payment, was it not for the defendants to proceed, when in such an unprotected state? *It does not concur in the argument that this*

*Court had not any jurisdiction, because the Bankruptcy Court had jurisdiction.* That the Court had no power to interfere in the present case; it could only give such security as might be recovered for damages in an action at law. It was said, if the parties were allowed to go on, and proceed so far as to obtain a fiat, then the Bankruptcy Court would be capable of considering whether there was a good petitioner's debt. But was that a reason why the defendants were to be allowed to proceed so far as to sue out the fiat? He concurred in the statement that there never was such a state of things before; but the only question was, whether the Court, having regard to the agreement and the debt, would prevent the defendants from suing out the fiat? Of this he had no doubt; but the only difficulty was the framing of the order. He thought, however, it must be to restrain the defendants from taking any steps whereby, or in consequence, the plaintiff might be deemed, under the provisions of the Act for the abolition of arrest, &c. to have committed an act of bankruptcy, by not paying, compounding for, or securing the debt, which was due to the defendants in April last. If, however, they were kept out of their debt by collusion, they would be entitled to relief.

#### NEW POSTAGE ORDERS.

*London Gazette Supplement, Friday, Dec. 27, published Saturday, Dec. 28, 1839.*

This Supplement presents to the public a Treasury warrant, signed by Lord Melbourne, the Chancellor of the Exchequer, and Mr. Wyse, for regulating the rates of postage to be charged on and after the 10th of January inst. With the exception of being wholly silent on the subject of the rewards awarded to the projectors or inventors of improvements or alterations in our Post-office system, and also with regard to the use (formerly suggested) of stamps, the warrant follows in perfect strictness the terms of the original Treasury minute, known some time since (a). It appears also that the Lords of the Treasury adhere to the impost of an additional charge for postage upon all letters directed to, or coming from, parts beyond the seas, in their transmission between any part or parts of the United Kingdom. So much for the "uniformity" of the system.

(a) See ante, vol. 2, p. 319.

**GENTLEMEN APPLYING TO BE ADMITTED SOLICITORS OF THE COURT OF  
CHANCERY, AT THE ROLLS' HOUSE, CHANCERY LANE.  
AFTER HILARY TERM, 1840.**

*Names and Residence.*

Henry Cook, Kingston-upon-Hull.  
Augustus Manning, the younger, 8, Hertford  
Street, May Fair; and Chalk Hill House,  
Kingsbury, Middlesex.

*To whom Articled.*

Thomas Thompson, Kingston-upon-Hull.  
Jonathan Norman Dalston, Hertford Street,  
May Fair.

*The following Extracts from the ORDERS of  
the MASTER of the ROLLS, relating to the  
Admission of Solicitors to practise in the  
Court of Chancery may at this time be of  
some service.*

*Order, 27 July, 1836.*

That every person who has not previously been admitted an attorney of the Common Law Courts shall, before he be admitted to take the oath required to be taken by persons applying to be admitted as solicitors as aforesaid, undergo an examination touching his fitness and capacity to act as a solicitor of the said Court of Chancery; and that *four of the sworn clerks* of the Court of Chancery, and *twelve solicitors* of the same Court, to be appointed by the Master of the Rolls, on the twenty-eighth day of July in this present year, and on the first day of Easter Term in every succeeding year, shall be examiners for the purpose of examining and inquiring touching the fitness and capacity of every such applicant for admission as a solicitor; and that any five of the said examiners (one whereof to be one of such sworn clerks) shall be competent to conduct the examination of such applicant; and that *one of the Masters* in ordinary of the said Court of Chancery shall be present and preside at the said examination, and shall, or shall not, take part in the said examination, as he shall in his discretion think fit; and that if the said examiners, or the major part of them, shall be satisfied of the fitness and capacity of the applicant to act as a solicitor, then the said examiners, or the major part of the said examiners, shall give him a certificate, under their hands, testifying such fitness and capacity; and the said Master shall sign the said certificate, in testimony of his having been present and presided at the said examination; and such certificate shall be in force until the end of the term next following the date thereof, and no longer, unless the time shall be specially extended by order of the Master of the Rolls.

That the examiners so to be appointed shall conduct the said examination under regulations

to be first submitted to, and approved by, the Master of the Rolls.

*Order, 28th July, 1836.*

That every person applying to be admitted solicitor of the High Court of Chancery, pursuant to the said orders, shall, within the first seven days of the term in or as of which he is desirous of being admitted, leave, or cause to be left, with the secretary of the *Incorporated Law Society* at the hall of the said society in Chancery Lane for the inspection and consideration of the examiners, his articles of clerkship duly stamped and also any assignment which may have been made thereof, together with answers in writing to the several questions hereunto annexed, signed by the applicant.

That every person applying for admission shall also, if required, sign and leave, or cause to be left, with the secretary of the said society, for the inspection and consideration of the examiners, answers in writing to such other written or printed questions as shall be proposed by the said examiners touching his *said services and conduct*. And moreover, that every person applying for admission shall, if required, procure the attorney or attorneys, solicitor or solicitors, with whom he shall have served his clerkship, as aforesaid, to answer, either personally or in writing, to the questions touching the *services or conduct* of the applicant, unless it shall appear to the satisfaction of the said examiners, or the major part of them, that he is unable to procure the said attorney or attorneys, solicitor or solicitors, to attend or answer any such questions as aforesaid.

That every person so applying shall also attend the said Master and examiners at the *Rolls House*, at such time or times as shall be duly appointed for that purpose, and shall answer such questions as the said examiners shall then ask there, in the presence of one of the Masters of the High Court of Chancery, put to him, *by written or printed papers*, touching as well the matters hereinbefore mentioned, as also touching his fitness and capacity to act as a solicitor.

COURT OF QUEEN'S BENCH.

to be held in Middlesex and London, before the Right Honourable THOMAS MAN, Lord Chief Justice of the Court of Queen's Bench, in and after Hilary Term,

IN TERM.			
Middlesex.		London.	
. . . . .	Jan. 13	Thursday . . . . .	Jan. 30
. . . . .	Jan. 16		
. . . . .	Jan. 29		

**AFTER TERM.**

Middlesex.		London.	
. . . . .	Feb. 1	Monday . . . . .	Feb. 3

will sit at eleven o'clock in Term, in Middlesex; at twelve in London; and in both after Term.

g causes will probably be postponed from the 13th and 16th of January to the days; and all other causes on the lists for the 13th and 16th of January will be taken until they are tried.

causes only will be taken on January 29th.

ded as well as undefended causes entered for the Sitting on Jan. 30th will be tried on: Plaintiffs wish it, unless there be a satisfactory affidavit of merits.

ding over with Judgment of the Term in Middlesex will be taken on the 1st of

COURT OF COMMON PLEAS.

nted in Middlesex and London, before the Right Honorable Sir NICOLAS CONYNG-IL, Knight, Lord Chief Justice of her Majesty's Court of Common Pleas at West- and after Hilary Term, 1840.

IN TERM.			
Middlesex.		London.	
. . . . .	Jan. 17	Wednesday . . . . .	Jan. 22
. . . . .	Jan. 24	Wednesday . . . . .	Jan. 29

**AFTER TERM.**

Middlesex.		London.	
. . . . .	Feb. 1	Monday . . . . .	Feb. 3

e Court will sit at ten o'clock in the forenoon on each of the days in Term, and at precisely on each of the days after Term.

in the list for each of the above Sitting Days in term, if not disposed of on those days, y adjournment on the days following each of such Sitting Days.

y the 3rd of February, in London, no causes will be tried, but the Court will adjourn y.

EXCHEQUER OF PLEAS.

isi Prius in Middlesex and London before the Right Honourable JAMES Lord Chief Baron of Her Majesty's Court of Exchequer, in and after Hilary Term,

IN TERM.			
Middlesex.		London.	
. . . Thursday . . .	Jan. 16	1st Sittings . . . Monday . . .	Jan. 20
ent (if necessary)		2nd Sittings . . . Tuesday . . .	Jan. 28
. . . Friday . . .	Jan. 17	By adjournment (if necessary)	
. . . Wednesday . . .	Jan. 22	Wednesday . . .	Jan. 29
ent (if necessary)			
. . . Thursday . . .	Jan. 23		
. . . Friday . . .	Jan. 24		

**AFTER TERM.**

Middlesex.		London.	
. . . . .	Feb. 1	Monday . . . . .	Feb. 3

(to adjourn only)

The Court will sit during Term at ten o'clock.



## REVIEW OF NEW BOOKS.

AN INTRODUCTION TO CONVEYANCING, and the History, Nature, Incidents, and Titles of LEGAL ESTATES, by OWEN FLINTOFF, Esq. A.M., Barrister-at-Law. London: John Richards and Co. Law Booksellers, 194, Fleet Street. 1840.

We have already noticed the first volume of this elementary work,<sup>(a)</sup> and we spoke of the Author's plan in approving terms; but we were quite unprepared for the present volume, which the Author has published separately, although forming part of the Second Volume of his LAW OF REAL PROPERTY.

The author says in his Preface it was necessary, according to the plan laid down, to treat in the first place of Legal Estates historically, so that the reader might understand their nature and origin, before proceeding to consider such points as more immediately concern the legal student and practitioner.

The work before us is founded on the second volume of Blackstone's Commentaries, in which the author has judiciously made such alterations as the modern state of the Law has occasioned. The most valuable appendage to this work is the notes which have been collected with much industry and care, and to a student who is reading up, will be found of essential service. We take from p. 112, the following description of an estate of inheritance in fee simple, as an example, and refer our readers for the sake of comparison to 2 Blacks. Comm. p. 107.

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other, though divers inferior estates may be carried out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs, and, after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Moreover the mere possession of land, if unexplained, is *primâ facie* evidence of the estate of the pos-

essor being in fee-simple; (b) so that it will constitute sufficient ground for maintaining an action of trespass against an unlawful intruder. (c) Yet sometimes the fee may be in *abeyance*, that is (as the word signifies) in expectation, remembrance, and contemplation in law, there being no person *in esse* in whom it can vest and abide; though the law does not allow of such *abeyances*, except where the original creation of estates requires them, or where the consequences of estates do in congruity require them (d), and considers the fee as always potentially existing and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, for *nemo est hæres viventis*; it remains, therefore, in waiting or *abeyance* during the life of Richard. (e) This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in *abeyance*. (f)

The word "heirs" is necessary in the grant of a donation, in order to make a fee or inheritance. For, if land be given to a man for ever, or to him and his assigns for ever, this vests in him but a *estate for life*. (g) This very great nicety about the insertion of the word "heirs" in all feoffments and grants in order to vest a fee, is plainly a relic of the feudal strictness: to which, we may remember (h), it was required that the form of the donation should be punctually pursued; or that, as Cragg (i) expresses it, in the words of Baldus, "*donationes sunt stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit*." And therefore as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life, unless the donor, by an express provision in the grant, gave it a long continuance and extended it also to his heirs. But this rule is now softened by many exceptions. (k)

In the first place, it does not extend to devises by will, in which, as they were introduced at a time when the feudal rigour was apace wearing out, a more liberal construction is allowed; and therefore, the devisee will take a fee-simple where

(b) 4 Taunt. 17. 547. 5 Taunt. 326.

(c) Harper v. Charlesworth, 4 B. & C. 574.

(d) Sheffield v. Rutcliffe, Hob. 338. See also Withers v. Iseham, Dyer, 70 b; Machell v. Clark 2 Ld. Raym. 781.

(e) Co. Litt. 342.

(f) Litt. s. 646. See vol. i. p. 34\*.

(g) Ibid. s. 1. Perk. 243.

(h) See p. 48. See also 1 Plowd. Com. 25 b.

(i) L. 1. t. 9, s. 17.

(k) Co. Litt. 9, 10.

(a) Vol. 1, pp. 371, 303.

55. *Denn v. Slater*, 5 T. R. 397.  
 129, 1 Bro. C. C. 147.  
 86.  
 557. *GHb. Dev.* 18.  
 194, *Moore*, 853, 1 Rol. Abr. 306.  
 Or. 834.  
 2 pl. 9.  
 36.  
 Or. 250, 251, *Webb v. Herring*, 1 Rol.  
*Jewell v. Perkins*, 2 Atk. 103, *Goodtitle*  
 115, 7 1 Inst. 96, 2 Cro. 416, 3 Cro.  
 Pl. 659, 1 R. A. 835. But whether a  
 this posterity gives a fee or estate tail,  
*General v. Bamfield*, 2 Freem. 268.  
 283.  
 Or. Nenny, 3 Ves. 470.  
 33 b, 17 Ves. 261.  
 Bla. 461, 2 Eq. Ca. Abr. 220, pl. 7  
*General v. Bamfield*, 2 Freem. 268.  
 261.  
 5 Ves. 167, 17 Ves. 261, 3 East, 172.  
 M. & S. 126.  
 Or. 832, *Skin*. 563, 1 Vent. 215.  
 13, 4 T. R. 89.  
 45, *Plowd.* 286, 289.  
 515.  
 Or. C. Towers, 1 Eden, 142.  
 181—185, 5 Ves. 403, *Fearn P. W.* 144.  
 141, 5 Ves. 403. But see 15 Ves. 532  
 141, 3 Bro. C. C. 324, 1 Cox, 250.  
 7, *Bendl.* 11. pl. 9. (1) 2 Wils.

Besides the instances already given, a fee simple will also pass to the party intended to be benefited by devise of the testator's "estate," where that word is not narrowed by the context of the will, (b) when it not only carries the real estate (c) but also the fee, although no words of perpetuity are added. (d) Thus the devise of "all the testator's estate, interest, or property in any land" carries the fee as do also the expressions, "All the rest of his estate or of his effects both real and personal," (e) or "all the residue of his real estate," (f) or "all the rest and residue of his estate," (g) or "all that his estate," (h) or "his estate and effects," where the intention is apparent, (i) or "all that his estate he bought of M.," (j) or "all his estate, to such uses as shall appoint," (k) or "all his temporal estates," (l) or "all his testamentary estate," so the devise of the testator's estate, at or

(m) 6 Mod. 111, 1 Leon. 283.  
(n) 1 Leon. 156, 2 Wils. 6. (o) 1 Ch. Ca.  
(p) 1 Leon. 156. (q) 6 Mod. 111.  
(r) W. Kely, 6. (s) 1 Jac. & W. 180.  
(t) 2 Vent. 285, Carth. 50. (u) 1 Roll. Abr.  
(x) Co. Litt. 9 b, 1 Eden, 143, Amb. 363, 9 E.  
(y) Co. Litt. 9, 9. (z) 2 R. & C. 2.  
(a) 2 Brod. & B. 623.  
(b) Doe v. Hurrell, 5 B. and Ald. 21.  
(c) Barnes v. Patch, 8 Ves. 604, Warr.  
worthy, 9 Ves. 142.  
(d) 7 East, 268, 3 Ves. and Bea. 183.  
18 Ves. 105, 2 Dougl. 763.  
(e) Holdfast v. Martin, 1 T. R. 411, E.  
son, Comp. 209, 4 Taunt. 174, 2 Ves. 4.  
(f) 1 Ves. 10, Pr. Ch. 264, 3 P. W.  
659, 1 Wils. 383, 2 Ld. Raym. 122.  
(g) 4 Mod. 90, 3 Ibd. 22, 2 Ves. 4.  
(h) 2 Lev. 91, 6 Mod. 184, 1 W.  
9 Ves. 137, 7 East, 250, 1 T. R. 411.  
Show, 328.  
(i) 9 Ves. 143, 2 Ves. 4.  
(l) 3 P. Wms. 294, Ca. 11.  
(m) 2 H. Bl. 444, 3 Brod. & B. 623.  
264. See as to - al a my -  
Gwan, 201.



# The Legal Guide.

SATURDAY, JANUARY 11, 1840.

[No. 11.]

## OF REAL PROPERTY.

### Essay II.

#### — IV cap 74.

#### Provisions of Feoff and Recov- er Substitution of more Assurance.

From p. 16.

It is his observations upon  
these that rules are much  
more important, as 20. 11, which  
relates to the non-concurrence  
of a bargain and sale  
in the stranger, or by the  
owner of the legal  
estate, provided the  
tenant is in possession.  
The intent for making the  
conveyance to the tenant. The  
law applies to the single  
case, and being within the  
will, and purporting to  
convey the same com-  
plete estate requiring in-  
formation, nor extend to any  
other as make the tenant is  
owner of the non-involvement  
of the same. Suppose  
then for life, remainder to  
the tenant: B. purchased  
the estate of A. in life estate  
and then conveyed to a  
tenant, and suffered a recovery,

but the bargain and sale (a) of the commission-  
ers which could operate only from the time of  
involvement) was not inrolled till after the con-  
veyance from the assignees; the recovery  
would be bad, for, as the case would be that  
of a deed, not being a bargain and sale with-  
in the Statute of Inrolments, nor purporting  
to make the tenant, no assistance could be  
derived from the provision in question. Nor  
does this provision appear to do more than  
enlarge indefinitely the time for inrolment.  
The provision relative to the non-concurrence  
of the legal owner will be readily and justly  
appreciated by all who have had any experi-  
ence in titles derived under recovery.  
One example will suffice:—Lands are limited  
to the use of A. for the life of B., upon trust  
for B., with remainder to C. in tail, with re-  
mainder over; B. conveys to a tenant to the  
purposes, and C. suffers a recovery, which of  
course is void for the want of the legal free-  
hold; but as B., who conveyed to the tenant,  
was beneficially entitled to an estate of free-  
hold in possession, the recovery is made  
valid by the act. It may possibly be doubted  
whether the act has contemplated the case  
where A., the legal freeholder, is a conveying  
party to the deed for making the tenant, but  
owing to some informality (as the want of a  
lease for a year, or livery as a feoffment) he  
does not effectually convey: it is conceived,  
however, that this case would fall within the

words, "in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant." But, it is clear, that a recovery, void for want of an effectual legal conveyance, by a person seised at law for his *own* benefit, is not aided by the statute. Thus if lands were limited to the use of A. for life, with remainder to B. in tail, with remainder over, and A. conveyed by release, without a lease for a year, or by a feoffment, without livery, in order to make a tenant to the *præcipe*, and B. suffered a recovery, which of course was void, the act would not make the recovery good; and it would avail nothing that the conveyance by A. was sufficient to pass his interest in equity. The instances were very numerous in which, from ignorance or inadvertence, the concurrence of persons seised of the immediate legal freehold as trustees or mortgagees, was omitted to be procured; and cases have occurred in which it was a point of great nicety whether the legal freehold was outstanding in trustees or not, and in which recoveries were suffered either in the confidence that the legal freehold was not outstanding, or on the speculation that such might be the result of a judicial decision. Thus, in a late case, estates of great value were devised to trustees in terms which rendered it questionable whether they took the legal fee, or only the legal freehold for the life of A., who was made beneficial tenant for life, with remainder to B. in tail, with remainders over; A. alone (the trustees being adverse) conveyed to a tenant to the *præcipe*, upon which a recovery was suffered by B.;—if the trustees took the legal fee, then the entail and remainders, as well as the estate for life, were equitable, and were well barred by the recovery; if they took only the legal freehold the recovery was bad, and the person in possession would probably have been evicted from these large possessions, but for the intervention of the legislature, which, by the provision in ques-

tion, remedied the defect, or rather supplied the total want of title. (a)

Sec. 36 enacts, That any device, shift, or contrivance, by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and that the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a Court of Equity shall not control or interfere to restrain the exercise of his power of consent nor treat his giving consent as a breach of trust.

Sec. 37 provides, That the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act.

Sec. 38 provides, That when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards, under this act, by any assurance other than a lease requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such

(a) Hayes' Introduction to Conveyancing, 134.

ite in the lands thereby disposed  
ll extent as against all persons  
whose rights are saved by this  
t the time of making the dispo-  
shall be a protector of the settle-  
uch protector shall not consent  
ition, and the tenant in tail shall  
such consent be capable under  
nfirming the voidable estate to  
t, then and in such case such  
all have the effect of confirming  
e estate so far as such tenant in  
en be capable under this act of  
e same without such consent :  
ays, that if such disposition  
e to a purchaser for valuable  
, who shall not have express  
voidable estate, then and in  
e voidable estate shall not be  
against such purchaser and the  
ing under him.

(To be continued.)

## PROBLEM XI.

VOL. 3.

### LAW OF EVIDENCE.

struments of a private nature.—  
D or WILL is given in evidence  
that is the general rule of

### EDITOR OF THE LEGAL GUIDE.

## TO PROBLEM IV. VOL. II.

ses may an action be brought by  
has entered into a Special Con-  
the person with whom he has  
while the plaintiff's own side of  
remains unperformed ?

es of independent mutual con-  
mises, each party may maintain  
against the person with whom he  
ed, without performing his own  
contract.

All contracts are either—

1st. Dependent upon a condition pre-  
cedent.

2nd. Concurrent.

3rd. Independent.

As to their performance :—

1st. *Conditions precedent.*

A condition precedent is an act to be per-  
formed by one of the parties to a contract,  
before the liability on the part of the other  
is to accrue. As if A. promise to do, or to  
abstain from doing, a certain act, in consi-  
deration of the antecedent performance of  
some act on the part of B., the promise of  
A. depends upon a condition precedent.  
See *Thorpe v. Thorpe*, Lord Raym. 662 ;  
Salk. 171, which is a leading case on this  
subject.

2ndly. *Concurrent Acts.*

Where concurrent acts are to be per-  
formed by both parties at the same time,  
neither can maintain an action against the  
other, without performance of his part of  
the contract, or offering to do so. *Rawson*  
*v. Johnson*, 1 East, 203.

“As, if two men agree, one that the other  
should have his horse, the other that he will  
pay £10. for it, an action does not lie for  
the money, until the horse be delivered.”  
Per Holt, C. J. in *Thorpe v. Thorpe*, ante.

3rdly. *Mutual independent Promises.*

From the observations already offered on  
the subject of Independent Mutual Co-  
venants, Conditions Precedent, and Con-  
current Acts, it will be seen that in the two  
latter cases neither party can bring an action  
against the other without performing or  
offering to perform his part of the contract.

But this is not the case in mutual inde-  
pendent contracts, or promises, for in such  
case either party can maintain an action  
independently of the contract being per-  
formed on his own side, and the reason for  
this rule appears to be, That in all cases of  
mutual contracts, the mere promise and not  
the performance thereof, is the consideration,

—and to decide “Whether one promise be the consideration of another, or whether the performance, and not the mere promise, be the consideration, must be gathered from and depends entirely upon, the words and nature of the agreement.”—Per Lawrance, J., in *Glazebrook v. Woodrow*, 8 T. R. 373, and see Hob. 106.

In *Martindale v. Fisher*, 1 Wils. 88, the declaration stated, it was agreed that a race should be run between a horse of the plaintiff, and one of A.B.’s, and in consideration that the plaintiff had agreed to deliver to the defendant a quantity of cloth, the defendant agreed to pay a sum of money in case A.B.’s horse should beat, and then averred that A.B.’s horse won the race. After verdict for the plaintiff, an exception was taken in arrest of judgment, because it was not averred in the declaration that the cloth was delivered to the defendant; but the Court over-ruled the exception, and observed, that this was an action founded on mutual promises, and therefore it was not necessary for the plaintiff to make an averment of the delivery of the cloth; and DEXTER, J. took this distinction, “Where a plaintiff declares, that in consideration that he would deliver to the defendant a piece of cloth, he, the defendant, should pay a sum of money for it, an averment of the delivery of the cloth is necessary; but if the plaintiff state an agreement, and then state, that in consideration of such agreement, &c. in that case an averment is not necessary.”

A covenant by one party to assign his interest in a house, and the other to pay a sum of money, is a mutual and independent covenant, *Trench v. Trench*, 1 Lord Raym. 125.

Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant.

But where the mutual covenants go to the

whole consideration on both sides, they are mutual conditions, and the performance must be averred, 1 Ventr. 147.; *Duke of St. Albans v. Shore*, 1 H. Bl. 270.

In the case of positive agreements, an action may be brought by either party before performance. And the following rule was laid down by Holt, C. J. in *Thorpe v. Thorpe*, ante:—

“If a day be appointed for payment of the money, and the act for which the money is to be paid cannot be done, before the day appointed, then, though the agreement be to pay the money for the doing the thing, yet the action may be brought for the money before the thing done, because the agreement is positive, that the money shall be paid at the day appointed,” and agreeably to this is 48 Ed. 2, 3, cited in 7 Co. 10 b. *Ughtred’s* case, though the case is put there more generally. To the same purpose are 1 Ventr. 147, *Large v. Cheshire*; 1 Sams. 320, *Pordage v. Cole*; and see the note (C) by Serjeant Williams.

Lastly. The rules which are contained in these cases are clear and indisputable, but the difficulty lies in their application to each particular case.

Where there are several covenants, promises, or agreements which are independent of each other, one party may maintain an action against the other for a breach of the covenants, &c. without averring or proving a performance of the covenants, &c. on the plaintiff’s part.

But where the covenants, &c. are dependent, it is necessary to aver and prove performance on his part, to entitle him to an action for breach of the covenants on the part of the defendant’s.

The contracts or promises are construed to be—dependent or independent of each other according to the intention and meaning of the parties, and the good sense of the case, and technical words should give way to the intention, 1 Term. Rep. 645.; *Hotham*

*pany*, 6 Term. Rep. 668.; and  
 ment of Lord Mansfield in *King-*  
*ston*, Dougl. 690.; and *Durn-*  
*Willes* Rep. 157.

J. A. M.

## Law Reports.

OF CHANCERY.—Dec. 24.

EX PARTE PARKER.

FROM THE COURT OF REVIEW.

—*Act for Abolishing Arrest*  
*sec. 8.*—PRACTICE.—*Validity of*

an appeal from an order of the  
 iew. It appeared that on the 22d  
 affidavit of debt was made, on the  
 ember a fiat issued, and on the  
 er a second issued, the first having  
 led for want of prosecution. All  
 ngs were by different persons, and  
 Review held the second fiat good;  
 kruptcy having been completed by  
 the first.

It contended that the second fiat  
 having been issued within two  
 moreover it was not sued out by  
 had made the affidavit.  
 ton supported the order of the  
 ew.

CHANCELLOR said, it was per-  
 it the fiat need not be issued by  
 the affidavit. The act of bank-  
 om the inability of a party to pay  
 matter to whom. In September  
 kruptcy was complete, and the  
 as properly issued within two  
 t were held invalid, any creditor  
 e power of destroying the effect of  
 kruptcy by filing an affidavit of  
 mitting the time to expire. The  
 e Court of Review was right, and  
 might be prosecuted.

CELLOR'S COURT.—Dec. 21.

BARTON v. SMITH.

ANSWER after AMENDMENT of  
 ight of Defendant to set forth an-  
 nule to that set out in his An-  
 e original Bill.

In application made by the plaintiff  
 he defendant, Samuel Smith, to

pay into the Bank of England the sum of  
 £335. 18s. 4d. in the name of the Accountant-  
 General of the Court of Chancery. The plain-  
 tiff filed her bill on June 17, 1839, alleging  
 therein that one Thomas Harrild, by his will,  
 bearing date the 28th of February, 1828, gave  
 and bequeathed unto his son, Robert Harrild, a  
 defendant thereto, and his son-in-law, Samuel  
 Smith, another defendant, all his property upon  
 trust, that they would pay all his just debts, tes-  
 tamentary and general expenses, and after the  
 same were duly paid and satisfied, should divide  
 the residue into three parts, one-third to go to  
 the defendant, Samuel Smith, in right of his  
 wife, who was a daughter of testator; one-third  
 to the defendant, Robert Harrild, and the re-  
 maining one-third was to be divided between the  
 three children of a deceased daughter. The tes-  
 tator died in August, 1829, without having al-  
 tered or revoked his will. After the proving of  
 the will, the defendant Samuel Smith acted alone  
 in the execution thereof, and the bill prayed an  
 account. The defendant, Samuel Smith, alone  
 put in an answer, from which it appeared that  
 the complainant, Jane Barton, upon the death  
 of her parents, went to live with the testator, and  
 upon his death (she being only 12 years of age,  
 and having no place to go to except the work-  
 house) the defendant, Samuel Smith, took her  
 into his house, and boarded her, clothed her,  
 and educated her, when she was well enough to  
 go to school (for during the greater part of the  
 time it appeared she was under the care of a  
 physician), from the month of February, 1829,  
 to the month of August, 1836, at which time  
 the complainant left him in a very abrupt man-  
 ner, giving no reason for her so doing, and only  
 a notice of five minutes; and he submitted that  
 such boarding, &c. with fees to the physician,  
 and expenses of medicine, and also expenses of  
 a journey to Margate, whether she went by order  
 of her physician, was an ample set off against  
 the small demand of complainant (£37. 6s. 6d.),  
 and he also in his answer set forth a schedule as  
 prayed, giving an account of all moneys received  
 by him and paid by him on account of all monies  
 owed by the said testator, but omitted to give an  
 account of all the legacies he had paid. On the  
 25th of November last, complainant obtained an  
 order to amend her bill, which she did on Dec.  
 5, and made her brothers defendants, and also  
 added a further interrogatory, whether the debts,  
 funeral and testamentary expenses and legacies  
 of the testator, had been fully paid. On Dec.  
 14th, the defendant Smith put in an answer to  
 the amended bill, and stated, that he had paid  
 all the legacies, except that of the complainant,  
 against which he had a lien, and that the legatee  
 had discharged him.

Mr. Wakefield now applied to have the sum



of £335. 18s. 4d. (admitted by the first answer to be in the hands of the defendant Smith after the debts and funeral expences of the testator had been paid) paid into Court, contending that the second answer could not alter the purport of the first.

Mr. Jacob, for defendant Smith, contended, that as the complainant had altered her original bill, she had released the defendant from his first answer, and that he was entitled to set forth another schedule to his second answer.

The VICE-CHANCELLOR said, he could not order the defendant to pay into Court the sum mentioned in the original bill, as the complainant had amended her bill the defendant was entitled to set forth another schedule, and also considering the small sum that she would be entitled to (provided the defendant could not prove his lien), would be consumed in paying the money in and taking it out of Court, and therefore the motion must be dismissed, but the costs to abide the event of the hearing.

#### COURT OF EXCHEQUER.—Nov. 14.

*Sittings in Equity, before Lord ABINGER.*

SLOMAN v. KELLY.

GAMBLING—PRACTICE—*As to sufficiency of ANSWER, where the Defendant would be liable to pains and penalties on making an admission that the money was lost at play.*

Mr. Simpkinson, for the plaintiff, stated that Mr. Kelly, the defendant, had brought an action against the plaintiff in the Court of Exchequer to recover the amount of certain checks and I O U's which he had received from Mr. Sloman, but which that gentleman had refused to pay, or permit his banker to pay. Soon after the action had been brought, a bill was filed in this court, setting forth that the documents above referred to were obtained without sufficient consideration, and praying the court to grant an injunction to restrain Kelly from proceeding with the action-at-law which he had brought. The bill further stated, that in the month of October, 1838, the plaintiff in the present cause had occasion to visit Herne Bay, where he met the defendant Kelly, who resided and carried on business in Clifford Street, Bond Street, where he kept a coffee-house called the Lounge, at which billiards were played; that he kept cards, dice, &c., and that his house was frequented by gamblers; that on the 5th of October, 1838, the plaintiff, the defendant, Captain Polhill, Mr. Holt, Mr. Decane, Mr. Farris, and several others, dined at the Pier Hotel, Herne Bay; that a great deal of wine was drunk upon the occasion; that Mr. Sloman was much affected by the wine he had taken, and that Mr. Kelly re-

mained perfectly sober; that at the suggestion of the latter, cards and dice were introduced; that they played at hazard, at which game plaintiff lost money to a large amount, when defendant supplied him with the means of continuing his play, and further losses ensued to the amount of £700. for which he gave checks and I O U's; that Sloman had reason to believe he had been duped; that he therefore called at his bankers and requested the checks given to Kelly might not be paid. The defendant in the present cause, in bringing his action in the Court of Exchequer set forth in the declaration that the documents above referred to were in part for money lent and in part upon accounts stated and settled. In his answer the defendant admitted that he kept the coffee-house called the Lounge, in which there were only two billiard-tables; he admitted that on the occasion of the dinner above-mentioned he was present at the Pier Hotel, Herne Bay; that much wine was drunk; but contended that it took considerable effect upon himself, and none whatever upon the plaintiff; that the money for which he brought an action against Mr. Sloman was not money lost at play, but money borrowed of him at different times by that gentleman. To this answer exceptions had been taken and the matter now came before the Court to determine whether or not the answer was sufficient. It was contended that the defendant was bound to give a full and explicit answer, seeing that it would not subject him to any pains and penalties.

Mr. Therry, on the other side, said that it would subject him to pains and penalties. He could not be called on to give an answer to points, which answer, if given in the affirmative would subject him to the charge of being guilty of two acts contrary to law—the one, illegal gaming—the other, renewing *post* dated checks for some of the checks were dated on the 9th of October; there was not one of the I O U's before date subsequent to the time set forth in the bill. A defendant in equity stood in a situation similar to that of a witness; he could not be called upon to state anything that might have the effect of criminating himself.

Lord ABINGER observed, that the defendant had said enough in his answer to prevent its being read against him. A defendant might decline to answer upon certain points; but if he answered at all, why not answer fully?

Mr. Therry contended that the present was an exception to the general rule.

Lord ABINGER.—The defendant is not bound to say that the money was lost at play; but having stated that it was money lent, he should have stated the time when, the place where, and the persons in whose presence the transaction took place. As a year had elapsed, he would not

ver in the affirmative, subject himself to penalties.  
is allowed.

#### NEGATIVE COURT.—Dec. 4.

ON AND ANOTHER v. CLARKE.

ACT, 1 Vict. c. 26. s. 9.—*Whether attestation is sufficient when made in the room in which the Testator was at the curtains of which were closed.*

Used, Mr. Patrick Perce, of Brompton, died in June last, having executed his will whilst confined to his bed of the illness which he died, he gave directions to his Rev. Mr. Fitzpatrick (his residuary legatee) to prepare a codicil increasing the legacy of his son. The codicil was prepared by Mr. Fitzpatrick, who brought it to the testator in the room: the bed stood with the foot to the fire-place; the curtains were drawn up, but closed at the foot; two small windows in the room, one at the foot of the bed and the other at the bed-side. Mr. Fitzpatrick, in the presence of the legatee, the nurse, and the testator's footman, read over the copy to the testator, who approved of it, and the presence and hearing of all those present, he signed it in their presence, though he did not actually see the testator sign his name. He was standing by the fire, and the bed and curtains were closed at that part. Mr. Fitzpatrick attested it in the presence of the legatee, being intimated that White should read the codicil, Mr. Fitzpatrick again read it in the presence and hearing of the legatee, who attested it in the room upon the foot of the bed, the curtains were closed, though the testator might not see him do so. The question was, whether this was a valid attestation within the meaning of the Act, which requires that the witness should attest the execution in the "presence" of the testator.

Mr. Perce's Advocate contended that the testator was not in the presence of the witness, and that the allegation ought to be rejected. *Prima facie* the witness was not (as was thoroughly expressed in *Wright v. Mau.* & *Nelw.* 194) "within the organs of sight," (a) that the judges in construing the Statute of Frauds (29 Car. 2. s. 1) allowed a constructive presence where the witness might see the witnesses sign their names in an adjoining room. *Casson v. Dade*, 10 Ca. 98; *Shires v. Glasscock*, 2 Salk 411; *Winchelsea*, 3 Russ. 441.

Mr. Perce's Advocate contended that the attesting wit-

ness being in the room, and signing the will which had been previously read over and executed by the testator, was a proper act; that fraud was not charged, and that in the cases which had been decided in other courts, it was held that a constructive presence would be sufficient to establish a due attestation, even under the Statute of Frauds.

Sir H. JENNER held that the allegation must be admitted, and that if a fraud was not alleged, the proofs were complete, and the will and codicil would be entitled to the probate of the court. The last paper was signed in the room where the deceased was, he being perfectly cognizant of what was going forward. *Prima facie* such an execution was good, if there was not fraud, and in this case such was not alleged. The whole question turned on the meaning of the word "presence." It is said that the requisites of the act have not been complied with, inasmuch as White did not actually see the testator sign his name; but I should be of opinion, under the words of the act, without referring to the cases which have been cited, that the witness being in the same room was present, the object of the act being to prevent fraud being practised upon the deceased by the substitution of another paper. It is pleaded, in some degree, that the testator might have seen White sign the paper; and I am of opinion that the paper being attested at the foot of the bed, after its being twice read over, the testator knowing what was going on, this is a sufficient attestation in the presence of the testator. The cases decided under the Act of Charles II. (the Statute of Frauds) did not immediately bear on the point now before the court. In the case of the Duke of Roxburgh, (*Todd v. Winchelsea*, ante,) and others noticed, the testator was in an adjoining room, where the testator might see the act, was held good. Here the act took place in the same room where the testator was. In *Casson v. Dade* (b) this doctrine was carried to a great extent; for there the testatrix, having gone to the office of her solicitor to execute her will, retired to her carriage to execute it, the witnesses attending her. After having seen the execution, they returned to the office to attest it, and the carriage being accidentally put back, it was sworn by a person in the carriage, that the testatrix was thereby placed in a situation, whence, looking through the window, she might have seen the witnesses attest the will in the office; and it was afterwards delivered to her in the carriage by the witnesses, who told her that they had attested it. In this case it was held that, constructively, the testatrix attested in her presence, which was sufficient in length. In the other cases, which were cited, upon their own peculiar circumstances, the doctrine of constructive presence was not applied.

requisites of the Statute of Frauds. The object of the act is to prevent fraud, and fraud might be committed in the very room of the deceased, by the attestation being done in a corner of it. But here there can be no suspicion of fraud, for the drawer of the will is the residuary legatee, who will be a sufferer to the extent of the addition the codicil makes to the legacy, and the legatee himself was present. I am of opinion, as far as my impression goes of the true construction of the act, that where a paper is executed by the deceased in the same room where the witnesses were, who attest in the same room where the testator was at the time, they do attest it in the presence of the testator, though he may actually see, or could not see them sign; so that if the facts pleaded can be established, I must pronounce for the validity of the paper.

The *Queen's Advocate* said, after the expression of the opinion of the Court, the executors would take probate.

(a) In that case, it was proved that the testator lay in bed when he executed the will; that the head of his bed was placed against a partition, which separated the bed-room from another room. The door of each of these rooms opened into the same passage; and the night-chair was placed between the testator's bed and the door of his bed-room, very near to the door. After the testator had signed the will, there being no table in his bed-room, the witnesses retired to the other room, and wrote their attestation at a table, which stood before the fire-place of that other room, and the doors of both rooms were open. While the witnesses were retiring for that purpose, with the will, into the other room, the testator called to his attendant, who was in the room, using an expression which he commonly used when he required his assistance, to help him to the night-chair; but there was no further proof of his going to the night-chair.

LORD ELLENBOROUGH, C. J., said—It is not necessary that a deviser should actually see; but the question is, whether he must not be in such a situation that he might see the witnesses attest. I am old enough to remember the decision of *Casson v. Dade* (see n. (b) upon that point; and afterwards went

to view the office, through the window of which it was proved that the testatrix, who sat in her carriage when the will was attested in the office, might have seen what was passing there. In favour of attestation it is presumed that, if the testator might see, he did see. But I am afraid, that if we get beyond the rule, which requires that the witnesses should be actually *within the reach of the organs of sight*, we shall be giving effect to an attestation out of the deviser's presence; as to which the rule is, that where the deviser cannot by possibility see the act doing, that is out of his presence.—ED.

(b) In this case the testatrix ordered her will to be prepared, and went to her attorney's office to execute it. Being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution they returned into the office to attest it, and the carriage was accidentally put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might see what passed; immediately after the attestation, the witnesses took the will to her, and one of them delivered it to her, telling her they had attested it; upon which she folded it up and put it into her pocket. The Lord Chancellor inclined very strongly to think the will well executed, and the case of *Shires v. Glascock*, 2 Salk. 688.; 1 Eq. Abr. 403, was relied upon to that purpose. Mr. Arden pressed much for an issue; but, finding the Lord Chancellor's opinion very decisive against him, declined it. See *Eccleston v. Petty* *al. Speke*, Carth. 80; Comb. 156; 1 Show. 89; Holt 222. *Broderick v. Broderick*, 1 P. Wms. 239. *Machell v. Temple*, 2 Show. 288. *Davy v. Smith*, 3 Salk. 395. In *Shires v. Glascock*, the testator had desired the witnesses to go into another room, several yards distant, to attest it, in which there was a window broken, through which the testator might see them. *Et per Cur.* The

ired attesting in his presence, to ruding another will in place of . It is enough if the testator t is not necessary that he should them signing; for at that rate ould but turn his back or look d vitiate the will. Here the in the view of the testator; he seen it, and that is enough. tator being sick should be in bed, ain drawn.—Ed.

#### DEBTORS' COURT.—Jan. 4.

ABRAHAM HENRY CHAMBERS.

*Asking Imprisonment for Debt, JURISDICTION of the COURT as to a person to Newgate for con- not filing his Schedule after a had obtained a VESTING ORDER.*

had obtained a *vesting order* in the insolvent had neglected to file as required by the 1 & 2 Vict.

roffe said he was instructed by Mr. n, solicitor, of Bank-buildings, apply for a rule calling on Mr. show cause why he should not be the common gaol of the county in dwelling, for a contempt of Court bedience to the order to file his

COMMISSIONER asked where Mr. s confined.

roffe.—In the Fleet Prison, where or some time.

MISSIONER.—What power have we an order, as to commit him to the

I thought the question had been another case.

roffe said he was not aware the been decided. It had been argued a man named Jeremiah Board, (a) many years in the Fleet Prison. ould, perhaps, allow him to read the Mr. Wilton, in which the urgent he application was stated.

remarked that, in the case men- armed friend denied, on the part of

the prisoner, the power of the Court to take the man out of the custody of the warden.

Mr. Woodroffe.—I appeared for Mr. Brown, the warden, and not for the prisoner. The Court will grant a rule on the affidavit I have in this case.

The CHIEF COMMISSIONER ordered the affidavit of Mr. Wilton to be read.

Mr. Woodroffe proceeded to read the affidavit. It set forth that a vesting order was made on the 19th December last, and Mr. Chambers had been called upon on the same day, by a rule, to file his schedule within fourteen days.

CHIEF COMMISSIONER.—When was he required?

Mr. Woodroffe.—On the 19th December.

CHIEF COMMISSIONER.—We are very quick here; hardly a fortnight has elapsed. We should give a man "breathing time."

Mr. Woodroffe.—We show that Mr. Chambers has, since he has been in prison, received £2000, and has control over £23,000 more.

CHIEF COMMISSIONER.—He has only had fifteen days' notice. It is rather sharp.

Mr. Woodroffe.—It is sixteen days, sir. Will the Court permit me to state the case?

The CHIEF COMMISSIONER, after consulting Mr. Commissioner Bowen on the subject, asked to what prison it was sought to commit Mr. Chambers?

Mr. Woodroffe.—To the common gaol of the place—*Newgate*, according to the words of the act. We come to this Court, which we say is more potent than that of Bankruptcy. The matter has now been in agitation since 1825.

CHIEF COMMISSIONER.—Don't you think this may stand over until next week, giving the party further time?

Mr. Woodroffe.—We say he has control over £23,000, and we come to a more efficient Court than the one in which it has been since 1825.

The CHIEF COMMISSIONER thought the Court had no power to grant the application; at all events, it had better be made some days hence.

Mr. Woodroffe said the Court could, under the act, make an order for the commitment of Mr. Chambers to *Newgate*, or any other prison, for contempt, and it might be lodged at the gate, in case he should settle with his creditors and go out of custody; then he could be taken on the warrant.

CHIEF COMMISSIONER.—That is another question. You had better move next week.

Mr. Woodroffe.—Perhaps the Court will allow me to move the latter end of next week.

CHIEF COMMISSIONER.—When you like.

## SITTINGS IN THE COURT OF CHANCERY, HILARY TERM, 1840.

Before the LORD CHANCELLOR, at Westminster.

Saturday	Jan. 11	-	-	Appeal Motions and Causes from the last Paper.
Monday	" 13	-	-	Petitions.
Tuesday	" 14	-	-	} Causes from the last Paper, and Appeals.
Wednesday	" 15	-	-	
Thursday	" 16	-	-	Appeal Motions and Appeals.
Friday	" 17	-	-	} Appeals and Causes.
Saturday	" 18	-	-	
Monday	" 20	-	-	
Tuesday	" 21	-	-	
Wednesday	" 22	-	-	} Appeal Motions and Causes.
Thursday	" 23	-	-	
Friday	" 24	-	-	} Appeals and Causes.
Saturday	" 25	-	-	
Monday	" 27	-	-	
Tuesday	" 28	-	-	
Wednesday	" 29	-	-	
Thursday	" 30	-	-	} Appeal Motions and Causes.
Friday	" 31	-	-	

Such days as his Lordship is occupied in the House of Lords excepted.

Before the VICE-CHANCELLOR, at Westminster.

Saturday	Jan. 11	-	-	Motions.
Monday	" 13	-	-	Petition Day.
Tuesday	" 14	-	-	} Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Wednesday	" 15	-	-	
Thursday	" 16	-	-	Motions.
Friday	" 17	-	-	} Short Causes, Unopposed Petitions and General Cause Paper.
Saturday	" 18	-	-	
Monday	" 20	-	-	} Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday	" 21	-	-	
Wednesday	" 22	-	-	Motions.
Thursday	" 23	-	-	} Short Causes, Unopposed Petitions and General Cause Paper.
Friday	" 24	-	-	
Saturday	" 25	-	-	} Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Monday	" 27	-	-	
Tuesday	" 28	-	-	
Wednesday	" 29	-	-	} Short Causes, Unopposed Petitions and Directions.
Thursday	" 30	-	-	
Friday	" 31	-	-	Motions.

Before the MASTER OF THE ROLLS, In and After Hilary Term, 1840, at Westminster.

Saturday	Jan. 11	-	-	Motions.
Monday	" 13	-	-	Petitions in General Papers.
Tuesday	" 14	-	-	} Pleas, Demurrers, Causes, Further Directions and Exceptions.
Wednesday	" 15	-	-	
Thursday	" 16	-	-	Motions.
Friday	" 17	-	-	} Pleas, Demurrers, Causes, Further Directions and Exceptions.
Saturday	" 18	-	-	
Monday	" 20	-	-	
Tuesday	" 21	-	-	
Wednesday	" 22	-	-	} Motions.
Thursday	" 23	-	-	

" 24	-	-	}	Pleas, Demurrers, Causes, Further Directions, and Exceptions.
" 25	-	-		
" 27	-	-		
" 28	-	-		
" 29	-	-		
" 30	-	-		Petitions in General Paper.
" 31	-	-		Motions.

AT THE ROLLS.

Feb. 1 - - Short Causes, after swearing in the Solicitors.  
s, Consent Causes, and Consent Petitions every Tuesday at the Sitting of the Court.

OF JOHN FROST FOR  
HIGH TREASON.

it sufficient for the purposes of to record the summing up of the F JUSTICE TINDAL to the jury, embrace the facts and the law. will not allow of our doing so in , and its importance quite pre- iving an abridgment; we shall, nclude it as occasion shall serve.

compelled to adopt the same iving the judgment of the Court Bench in *Stockdale v. Hansard*. first blamed for doing so, as space in so many numbers, but usion (the correctness of the re- o universally acknowledged, and t NO OTHER JOURNAL or paper had ) we were highly commended for . It is an excellent essay for our n not only the Law of Libel, but ivileges claimed by the House of

ief Justice TINDAL thus addressed Gentlemen of the jury,—The charge prisoner is, that, having broken his ue allegiance which he bore to his reign, he had levied war against the r realm. The indictment itself con- s specific counts, stating in a different ground of accusation against the pri- ut appears to my mind that it would arass than enlighten you if I read the to you, for first or last it must come sion which you have heard so much r not, under the circumstances : offence of levying war against the

Queen in her realm has been established. Gen- tlemen, as to the first part of the indictment, it is formed upon the ancient statute of Edw. III. which contains the very clause of levying war. The two other counts are upon a more modern statute, which has, to a certain extent, explained the former, and made certain overt acts specific grounds of treason. Taking it, therefore, as a substantive charge against the prisoner, it is that of levying war against the Queen in her realm. I shall propose shortly to state to you that which appears to me to be the law upon this subject, to which your minds must be applied when the facts are passing in review before you. The ancient statute of 25 Edward III. declares the offences which constitute high treason, and declares that when a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be properly attainted of open deed by the people of their condition, he shall be guilty of treason. That is one ground upon which, if a party be accused, and the case proved against him, he shall be deemed guilty of treason. The same statute goes on to mention, that it is to be under- stood that in the case above rehearsed, that ought to be judged treason which extends to our Lord the King and his royal majesty, meaning the levying of war. It may not be for the pur- pose of immediately assaulting the Sovereign, but against the royal authority as by law estab- lished. This being the state of the law, if we look merely at the words contained in the Act of Parliament, that of "levying war against the King," it would seem at first to confine itself to those ancient instances in which war was carried on where there have been rivals contending for possession of the throne. All those long wars that took place between the houses of York and Lancaster were treated by the party who hap- pened to be seated on the throne as acts of trea- son. Those were literally and properly levying war in the widest sense of the word. In more recent times, not within our recollection, but within reach of report and tradition, thus wars

took place by the friends of the Pretender coming into the realm—an offence which would literally and completely fall within the description contained in the statute of levying war against the King; and if the statute were confined to levying within that sense, that unless there were armies advancing with generals at their head, and conflicting for the possession of the throne, a case of this sort would be clearly not within the statute. The statutes have been explained by learned judges in all ages, so as to meet the exigencies that have occurred during many reigns of monarchs that would have been subversive of the public weal, if not redressed, although they did not amount to an actual levying of war in the more specific sense of the term. I cannot do better than read the exposition of a most learned person, whose authority is regarded with great veneration—I mean the exposition of these terms, which is in the treatise by Sir Michael Foster. That learned judge states—“Every insurrection, which in judgments of law is intended against the person of the King, whether to dethrone, or to imprison him, or to oblige him to alter his measures, or government, or to remove evil counsellors from about him; all such risings amount to a levying of war within the statute.” And he goes on a little lower to distinguish between insurrections of persons armed and arrayed in a warlike manner, merely for some local or private purpose, from some general public purpose affecting the State: he says,—“So insurrections to throw down all inclosures, to alter the established law, and change religion, to enhance the price of all labour, or to open all prisons; all risings in order to effect these innovations of a public and general concern by an armed force, are, in construction of law, high treason, within the clause of levying war; for though not levelled at the person of the King, they are against his royal majesty; and, besides, they have a direct tendency to dissolve the bonds of society, and to destroy all property and all government, too, by numbers and an armed force. Insurrections, likewise, for redressing national grievances, or for the reformation of real or imaginary evils of a public nature, and in which the insurgents have no special interest; risings to effect these ends, by force and numbers, are, by construction of law, within the clause of levying war, for they are levelled at the King's crown and royal dignity. And, accordingly, it was held in the time of Queen Anne, that a large body of men, tumultuously rising and assembled together, with the avowed purpose of putting down all the meeting-houses of Protestant Dissenters, and proceeding to pull down several, until prevented by force, brought the parties who were guilty of that act within the branch of the statute of levying war against the Queen. And in a

more recent case, where a riotous multitude, headed by Lord George Gordon, and acting in concert, with the declared design of pulling down or destroying all chapels belonging to those of the Roman Catholic persuasion, proceeded to put that design in force, there was no doubt but that the facts, if proved against the party accused, amounted to the offence of high treason, by levying war against the King.” Gentlemen, I will trouble you with no further authority, except from Sir Matthew Hale, which I do for the purpose of pointing out the same distinction, because one part of this case may have some bearing upon it, and perhaps, so far as it goes, in favour of the prisoner at the bar. He says—“If men levy war to break prisons, to deliver one or more particular persons out of prison wherein they are lawfully imprisoned, unless such as are imprisoned for treason, this, upon advice of the judges, upon a special verdict found at the Old Bailey, was ruled not to be high treason, but only a great riot (1668); but if it were to break prisons, or deliver persons generally out of prison, this is treason.” So that, gentlemen, the rule of law may be laid down in a few words, by stating that there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature. But if all these be found to concur in any individual instance, it is quite sufficient to constitute a levying of war. The question, therefore, for your determination will be whether, when the facts are brought fresh to your recollection which, in the course of this long investigation, have been proved, you can say that the acts imputed to have been done by the prisoner at the bar amount to the levying of war in the sense I have explained to you, or whether they fall short of that, and amount to no more than a grievous insurrection or riot, accompanied with great danger to the community. Unless the case reaches the point to which I have first called your attention, it does not amount to high treason, but merely to a grievous riot and insurrection. The Attorney-General, in stating the case on the part of the Crown, said he should be able, by evidence he should bring before you, to show that the prisoner had brought down to the town of Newport a very large number of persons armed and arrayed in a warlike manner, the object being to take possession of Newport, to break down the bridge, stop the mail, the non-arrival of which at the usual hour was to operate as a signal for revolt to the people of Birmingham and Manchester, and that the charter would then be proclaimed the law of the land. And the learned counsel who summed up the case on the same side proceeded nearly to the same extent, omitting, with great propriety, one point in the outline—namely, that which related to the ge-

It is not an unreasonable thing, in all investigations both civil and at if there is a certain appearance which involves a party in a state of suspicion, it is by no means unjust that he should, for his own sake and what the circumstances were, if possible, reconcile the suspicious appearances to innocence. And therefore the learned judge entering his protest against a jury required to make any such case, state that the case of the prisoner was innocent, that is, so far as the crime of which he was concerned. He said, what was necessary to take the town nor attack the magistrates who were there through an accident, but to make a demonstration in the streets of Newport, and of the county of Monmouth, for the purpose of inducing the magistrates to procure the liberation of three persons convicted of some political offence, and in Monmouth gaol, or, at all events, of their treatment. If the objection of the officers of the Crown is filled with evidence, there can be no doubt but that if the person accused amounts to high treason, on the other hand, the evidence is not more than the description given by the prisoner for the prisoner, although it would not be sufficient to prove a very grievous offence, as involving the

*(To be continued.)*

*General Post Office, Dec. 1839.*

On and after the 10th of January next, the single rate of inland postage on all letters except those between the United Kingdom and the colonies and foreign countries, will be the uniform single rate of one penny.

The scale of weight at present in force for General Post letters will be applicable in future to local penny post letters, and those passing through the local posts of Dublin; the regulation, therefore, which restricts the weight of these letters to four ounces is abolished, and they will be subject in future to the same rules and the same charges as General Post letters. The postage, however, on all letters (whether local or General Post letters) between places in the United Kingdom, must be paid in advance: should the postage not be paid in advance, they will be charged with double the rate to which they would otherwise be subject. Parliamentary proceedings are an exception to this regulation.

The uniform single rate on all routes conveyed by packet between the United Kingdom



and the British colonies and possessions, will be one shilling, with the exception of letters between the United Kingdom and Malta, the Ionian Islands and India, when passing through France, the rates on which remain unchanged. Letters, therefore, intended to pass at the reduced single rate of a shilling, between these three last mentioned places and the United Kingdom, should be addressed *via* Falmouth.

Foreign letters, when transmitted by packet, will be liable to the single rates of packet postage from Falmouth, Dover, and London, as given in the table below, if posted or delivered at the port. If posted or delivered at any other place in the United Kingdom, they will be subject to the additional single rate of two-pence as inland postage.

Letters, however, between France and the United Kingdom, and also those in transit through France, will be an exception to this rule; the British charge on such letters will be the uniform single rate now taken from London, except in those cases where the letters are at present subject to a less charge than the sum specified. This last provision also applies to letters between the United Kingdom and Belgium, the rates on which, where lower than the sum specified, will not be increased.

Letters, also, between the United Kingdom and the United States of America, and between the United Kingdom and Spain, *via* Falmouth, form a further exception to this rule. No inland postage, therefore, will be taken on letters between the United Kingdom and France, and those in transit through France, or upon those between the United Kingdom and the United States of America, or upon those between the United Kingdom and Spain, *via* Falmouth.

The single rate on all foreign and colonial letters, except in those cases where a lower rate is now taken, when conveyed by packet, will accordingly be as follows:—

#### By Falmouth Packets.

	Packet Rate from Fal- mouth	Inland Postage, if not posted or delivered at the Port	Total Single Rate
Between the United Kingdom and	<i>s. d.</i>	<i>d.</i>	<i>s. d.</i>
Lisbon - - - -	1 7	2	1 9
Spain (by Falmouth Packet) - - - -	2 2	Nil	2 2
Greece and Egypt - - - -	2 3	2	2 5
Madeira - - - -	1 8	2	1 10
Brazil - - - -	2 7	2	2 9
Buenos Ayres, Chili, and Peru - - - -	2 5	2	2 7
Hayti - - - -	1 3	2	1 5
La Guayra, Mexico, & Cuba Carthagena	2 1	2	2 3

	<i>s. d.</i>	<i>s. d.</i>
United States - - -	1 0	Nil
Gibraltar - - -	-	-
Malta - - - -	-	-
Ionian Islands - - -	-	-
British North America - - - -	1 0	Nil
Bermuda - - - -	-	-
Honduras - - - -	-	-
British West Indies	-	-
India, <i>via</i> Falmouth	-	-

#### By Dover Packets.

	Packet Rate from Dover	Inland Postage, if not posted or delivered at the Port	Total Single Rate
Between the United Kingdom and	<i>s. d.</i>	<i>d.</i>	<i>s. d.</i>
Belgium - - - -	1 4	2	1 6
France - - - -	Uniform British Rate to Calais of - 0 10		
*Switzerland, <i>via</i> France - - - -	Uniform British Rate of - - - * 1 3		
*Germany, <i>via</i> France - - - -	Ditto	ditto	* 1 4
*Spain, Portugal, Italy, Turkey, &c. <i>via</i> France - - - -	Ditto	ditto	* 1 7
(Except in those cases where the present charge is less.)			

Turkey, Greece, and Mediterranean, <i>via</i> Marseilles, if addressed by French Packet - - -	Uniform British & French Rate of 2 3		
India, <i>via</i> Marseilles, if addressed by French Packet - - -	Ditto	ditto	3 5
India, by Monthly closed Mail, <i>via</i> Marseilles - - -	Ditto	ditto	2 8
Malta, Ionian Islands, and Alexandria, by monthly closed Mail, <i>via</i> Marseilles - - -	Ditto	ditto	1 8

\* N. B. These rates do not apply to letters intended to be paid to particular places of destination, which must be charged with the uniform British rate of 10d. in addition to the postage from Calais, stated in the printed lists with which the Postmaster is furnished.

#### By Packets from London.

	Packet Rate from London	Inland Postage, if not posted or delivered at the Port	Total Single Rate
Between the United Kingdom and	<i>s. d.</i>	<i>d.</i>	<i>s. d.</i>
Holland - - - -	1 4	2	1 6
Germany, Denmark, Sweden, & Russia	1 8	2	1 10
Heligoland - - -	Uniform Rate of 1 10		

a uniform rate on letters between the Kingdom and places beyond sea, when private ship, will be *td.* in what the United Kingdom they may be delivered. This rate must be taken between the United Kingdom and the &c. when conveyed by private ship, on between these and other classes having been abolished.

to be understood that the single postage given in the above instructions is only to letters not exceeding half weight. The charge for postage exceeding half an ounce will advance to their weight, in accordance with weight and number of rates at pre-tion, as laid down in the instruction 1st November last. It must, however, be in mind that this scale does not touch rates on letters to and from through France, as the present system of French rates on such letters is in force, viz. a single French rate of an ounce exclusive.

will be permitted hereafter to send letters free of postage; Members, however, House of Parliament will be entitled, free of charge, petitions addressed to the House of Parliament, provided they are in covers, or in covers open at the not exceed the weight of six ounces. Her Majesty will likewise go free of

notes and proceedings in Parliament to be sent at the following rate between the United Kingdom, and between the Kingdom and the colonies when connected, but not through France nor to the Colonies:—

weight not exceeding two	-	1d.
weight exceeding two ounces	-	2d.
weight exceeding four ounces	-	3d.
weight exceeding six ounces	-	4d.

on in proportion. No additional charge made upon them if the postage is advanced.

on newspapers and letters of soldiers will remain unaltered, with the exception, that the privilege now given to sailors' letters will be restricted to which they shall not exceed half an ounce.

and packets exceeding sixteen ounces, with the exception of those mentioned below, cannot be forwarded to the Colonies, but must be sent to the Dead Letter Office according to the present regula-

The following are the exceptions to this rule: Parliamentary Petitions, and Addresses to Her Majesty.

Parliamentary Proceedings.

Letters and Packets addressed to, or received from, places beyond sea.

Letters and Packets to and from Public Departments, and to and from Public Officers now franking by virtue of their office.

Deeds, if transmitted under such regulations as the Postmaster-General may consider necessary.

By Command,  
W. L. MABERLY, Secretary.

*General Post Office, Dec. 17, 1839.*

Morning mails are now despatched from London to Southampton, Portsmouth, and Cheltenham, at nine a. m., conveying letters and newspapers for the following towns:—

Basingstoke, Benson, Burford, Cheltenham, Farnham, Godalmin, Gosport, Guildford, Henley, Horndean, Maidenhead, Nettlebed, Northleach, Oxford, Petersfield, Portsmouth, Reading, Southampton, Winchester, Windsor, Witney.

The boxes at the branch offices, Charing Cross, Old Cavendish Street, and the Borough, will be open for the reception of newspapers until half-past seven, a. m., and for letters until eight, a. m. At the General Post Office and the Branch Office in Lombard Street the boxes will close for newspapers at a quarter before eight, a. m., and for letters at half-past eight, a. m.

By Command,  
W. L. MABERLY, Secretary.

INSTRUCTION TO ALL POSTMASTERS.

*General Post Office, December 20, 1839.*

In consequence of the great increase of letters containing coin, it has become necessary, in order to prevent the total interruption of the service, to discontinue the system which has hitherto prevailed of entering the addresses of such letters, and taking receipts for them on delivery to the owners.

The practice, therefore, of entering such letters as money letters will cease on and after the 1st of January, 1840; after which time, parties having occasion to transmit small sums in cash are recommended to make use of the Money Order Office, where they will incur no risk; while those who may desire to remit bank notes, or drafts payable to bearer, are requested to cut them in half, sending each half, if possible, by two different posts. In the case of bank notes, or bank post bills being sent, the numbers, dates, and amounts should be carefully taken.

Money orders for sums under £5. are granted by every post town upon every other post town.

in the United Kingdom on application at the various offices.

By Command,  
W. L. MABERLY, Secretary.

*General Post Office, Jan. 1, 1840.*

Parties having occasion to transmit through the post, packets which do not contain letters, are requested not to enclose articles which have hard or sharp edges, or which may be of a brittle nature, as in the first case the seals of the letters in the mail bags may be broken and the letters mutilated, while in the second, the articles themselves will probably be injured in the operation of stamping.

Bottles containing liquid should not be transmitted through the post office, as they must be broken by the friction of the mail coaches, even if they should escape injury from the stamp, when the most serious consequences to the mails may be experienced, from the addresses, and, in many instances, the writing of the letters being thereby entirely effaced.

By Command,  
W. L. MABERLY, Secretary.

*General Post Office, Jan. 6, 1840.*

On and after the 10th instant, the boxes at the receiving houses in London will be closed for the receipt of General Post letters at 5 p. m.

The boxes at the branch offices at Charing Cross, Old Cavendish Street, and the Borough, will be closed at 5 45 p. m.

The boxes at the branch office in Lombard Street, and at the Post Office in St. Martin's-le-Grand, will be closed for the receipt of such letters at 6 p. m. Letters will, however, be received at the last-mentioned office till 7 p. m. on payment of a penny for each letter, and till 7 30 p. m. on payment of a fee of 6d. There is no alteration with respect to newspapers.

By command, W. L. MABERLY, Secretary.

*Post Office Regulations, Jan. 10, 1840.*

A letter not exceeding half an ounce in weight may now be sent from any part of the United Kingdom to any other part, for one penny, if paid when posted, or for two-pence if paid when delivered.

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S. A. W.—We have attended to your communication, as we had a minute of the case:—in your next, insert the name of one solicitor in the cause. Our other correspondents on such subjects send us their names, which guarantees the communication being correct.

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# The Legal Guide.

SATURDAY, JANUARY 18, 1840.

[No. 12.]

## WS OF REAL PROPERTY.

### Essay II.

§ 4 Wm. IV. cap. 74.

*The Abolition of Fines and Recoveries for the Substitution of more Modes of Assurance.*

*Continued from p. 163.)*

#### PROTECTOR OF A SETTLEMENT.

##### TO SUPPORT CONTINGENT REMAINDERS.

THE first tenant in fee, having the first immediate freehold, will be protector of a settlement made before the 28th August, 1833. The settlement containing a limitation for years, if he should so long live, or for the life of the first tenant in tail, the trustees would be protected to preserve contingent remainders to the first and other tenants in tail, the trustees would be protected during the life of A., and in case of his death, the trustees would be necessary to make the first tenant in tail to make the settlement. And, by the 36th section, the protector shall not be deemed to have lost the effect of his power of consent, and the Court of Equity shall not control or restrain the exercise of his power, or treat his giving consent as a breach of trust. He has made great alterations in the duties of trustees to

preserve contingent remainders; see sections 15, 22, 40, 27, 31, and 36. The latter section, nevertheless, has reference to the old law, which establishes the doctrine we have asserted at the head of this article. To expound this law in a clear and satisfactory manner, we think the judgment of the Judges on a writ of error in the House of Lords, from a Judgment in the King's Bench, delivered by WILLES, C. J., in *Smith v. Dormer v. Packhurst*, will best assist us. In that case, Mr. John Dormer, in the year 1662, upon the marriage of his eldest son, John Dormer, made a settlement of an estate; and, after limiting an estate to his son, John Dormer, and the heirs of his body, he limited as follows:—"And, in default of such issue, to the use and behoof of Robert Dormer, one of the brothers of the said John Dormer, for the term of 99 years, or so long as he shall happen so long to live: and after the death of the said Robert Dormer, or other sooner determination, the estate limited to him for 99 years, to the use and behoof of T. S. and J. R. and their heirs, during the life of the said Robert Dormer, upon trust to preserve the contingent uses and estates hereinafter mentioned from being defeated and destroyed, and for that purpose to make entries and take actions, as the case shall require: and to permit the said Robert Dormer to receive the rents and profits of the said estate during the term of his life."

after the end or other sooner determination of the said term, to the use and behoof of the first and every other son of the said *Robert Dormer* in tail male;" with remainder, in the same words, to *Fleetwood*, another brother of the said *John Dormer*; remainder to *Peter*, another brother; and the last remainder to *Eusebe*, the father of the lessor of the plaintiff, for 99 years, if he should so long live; remainder to the trustees, in the like manner as in the limitation to *Robert Dormer*, and to the first and every other son of *Eusebe Dormer* in tail male. *Robert Dormer* had one son, *Fleetwood*, and when he came of age, *Robert* and his son *Fleetwood* levied a fine to make a tenant to the *præcipe* and suffered a recovery, in which *Fleetwood* was vouched; the son died without issue, then *Robert Dormer* died, leaving no other son, but four daughters. *Fleetwood* and *Peter* both died without issue, and *Eusebe* being dead, his son, the lessor of the plaintiff, and the nearest surviving remainder man, made his actual entry within five years, and being so seised demised to the plaintiff, &c.

The two questions proposed by the House of Lords to the Judges were, *first*, whether the remainders limited to the first and every other son of *Eusebe* were good remainders in their first creation; and *secondly*, whether the fine and recovery suffered by *Robert Dormer* and his son barred these remainders.

Before proceeding to the questions, his Lordship laid down some general rules and maxims of the law, with respect to the construction of deeds; first, it is a maxim that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.

Another maxim is, that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor, the words are not the principal things in a deed, but the intent and design

of the grantor; we have no power, indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insertible: these maxims are founded upon the greatest authority, *Coke*, *Plowden*, and Lord Chief Justice *Hale*, and the law commend the *astutia*, the cunning of Judges in construing words in such a manner as shall be answer the intent; the art of construing words in such a manner as shall destroy the intent may shew the ingenuity of counsel but is very ill becoming a Judge.

Having laid down these maxims, his Lordship said: In this case the intention of the party cannot be doubted, the grantor manifestly intended to continue the estate in his name and blood as far as he could by the rules of law; the law will not admit a perpetuity, but the intention of the party, so far as is consistent with the rules of law, ought to be observed.

It was said that the intention of the party by appointing trustees to preserve the contingent remainders, was only to preserve the estate till there was issue of *Robert Dormer* and that they were not meant to preserve the distant remainders; but if this had been the case, how came *Robert Dormer* not to be made tenant for life; for even though he had been tenant for life, the trustees could have preserved the remainders till his son came of age: but the plain intention was making him tenant for 99 years only, was to prevent him and his son from barring the estates in remainder without the joining the trustees, the effect of which is, that they could not be barred without the consent of the trustees during the life of *Robert Dormer*, which is going as far as the law will permit.

The objections to the limitations to the first and other sons of *Eusebe*, &c. were the first, that the commencement of the estate

and to the first son was at the end consequently the latter limited; *secondly*, that the limitations are disjunctive, and therefore void; and where there is an estate limited by disjunctives which cannot stand together, because if one happens the other in such case it shall take effect, but the settlement shall rather be void.

*First*, we are clearly of opinion, that the limitation of the estate to the trustee first son, &c., commenced at his death: in support of the first objection, that an estate limited during the life of another, to commence at his death, is certain; but when the deed says, or other sooner determination for years, this manifestly is a determination of the estate to the trustee, and the determination of the term, may happen not only by effluxion of time, but may take effect by surrender, or in several ways, in the lifetime of the trustee or *Eusebe*.—And we are of opinion, that the estate to the trustees might commence at his death; but the estate to the first son, is not to commence till the death of the first son or his fathers.

by my Lord *Coke*, that the limitation, though it is more properly appointed for years, yet may mean an estate for life, and it is plainly, in this deed, so. The trustees are to perform for the life of *Robert Dormer*, &c. to receive the profits of his life; and the estate is not to commence till the death of *Robert Dormer*, or sooner determination of the term, by referring the relative to the death of *Robert Dormer*, must mean the term of his life. The words *sooner determination*, if the estate for life, these are inapplicable; if they were proper, they would be rejected, they were proper in *currente calamo*, or by precedent; and if the precedent be the Reformation, when there was

a civil death as well as a natural, by entering into religion, it might then have a meaning.

As to the *second* point, since we are of opinion that there was a different commencement of the estates limited to the trustees and the issue in tail, there is no inconsistency.

As to the *third*, it is highly absurd, and, against reason, and I think, against law too; but in support of this, the case of *Camberford v. Birch*, 2 Lev. 157, was cited by the defendant's counsel; there the settlement was with a proviso, that in case none of the brothers or sisters of A., or any of the children, be living, then immediately, or after a term of 21 years ended, to the use of B. C. and D., his brothers successively in tail male, remainder to the plaintiff. A. died without issue, B. and C. died without issue male, but B. had issue a daughter, and A. himself had sisters living; this the Court held to be one sentence, and a condition precedent, that none of the brothers or sisters of A. or any of their children be then living, and which as it had not happened, all the remainders were void, and judgment for the defendants; and it was not at all determined on the necessity there was that the remainders should take effect on both disjunctives; but that case does not come up to the present, for it was never intended that the remainder should vest on the death of *Robert Dormer*, but as appears by the express words, on a determination of the estate for 99 years before his death, and such a construction as the defendant's counsel contended for, would destroy not only the remainder to *Eusebe*, but every one of the remainders limited by the deed, except the remainder to *John Dormer* and his heirs; and the words of a deed must be extremely strong, which would induce us to construe all the limitations in the deed to be void. We therefore are of opinion, that the limitations to the first and every other son of *Eusebe*, were good remainders.

(To be continued.)

## PROBLEM XII.—VOL. 3.

## SCINTILLA.

What is the doctrine of Scintilla?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM VIII.  
VOL. III.

## LIVERY OF SEISIN.(1)

When is it necessary?—To whom may it be made?—and how?

Livery is the essential and operative part of the Conveyance by Feoffment, and until livery (when necessary), no estate passes.

Livery of seisin must be had and made in all cases where any estate of fee simple, fee tail, or for a man's own life is made or granted in writing, or word, in the country of any lands or tenements corporeal, where the person granting them has the lands or tenements in possession, (2) Littl. sec. 59.; Shepp. Touchst. 210.; Prest. Abst. 1, 291.

To lease for years, with or without deed, no livery is necessary, but where an estate of freehold or inheritance, as for life in tail or in fee expectant on the term is limited, livery must be made, and that to the lessee, otherwise no estate passes to those in remainder, Littl. sec. 60. For the livery could not be made to the remainderman, the lessee being in possession. And if the lease be made to two without deed remainder to another in fee, and livery is made to one only in the absence of the other, the livery is good to vest the remainder; but if a *feoffment* be made to two and their heirs, without deed, and the livery be made to one only in the name of both the livery is void as to the absentee; but good if the feoffment be made by deed, Co. Litt. 49, b.

If lands be granted to a man for a term of two years, and upon condition performed that he shall have the inheritance, if the

grantee enter before livery and perform the condition, yet he shall only have the term Littl. sec. 349. But see Preston's interpretation in Shepp. Touchst. 210, where it says—if there be a deed, the fee will arise.

As to the situation of the fee in feoffment on condition, whether it be in abeyance, the feoffor, or in the feoffee, and whether breach of condition the feoffor may re-enter there have been contrary decisions and opinions. The better opinion seems to be, that a reversion is left in the feoffor, and that he may re-enter, Littl. sec. 350.; Co. Litt. 2 b. et seqq. Butler's note, 216 a. Doe and Student, b. 2, cap. 20 and 23, where the opinion of an *implied* condition of re-entry is entertained, see also cap. 21.

When an estate is conveyed under power, no livery is necessary, nor in an exchange; and if a house or land belonging to an office, by a grant of the office by deed the house or land will pass. As if a house and chamber belong to a Corody, by grant of the Corody the house or chamber passeth. And if a freehold may by custom be surrendered without livery, Co. Litt. 49 a.—see Vin Abr. Feoffment.

Livery must be made to the feoffee, the feoffor, or to the attorney appointed by deed (3) of the feoffee, by the attorney for the feoffor, also by deed appointed; and livery must be made and taken in the time of the feoffor and feoffee, for the power expires with the life of the donor of the power. And the power must be strictly pursued, as if a letter of attorney be given to make livery to J. S. Capellano, the attorney cannot make livery to J. S. unless he be a Chaplain, 4 H. 6. 1. b. But such non-compliance would not vitiate the feoffment.

—Before the Statute of Frauds, if the feoffment was not by deed, livery could not be available for the benefit of the person to whom it was made. All persons capable of receiving livery of seisin, except those disabled by law; but those so disabled, as men

ants, &c. may make and receive attorney. And livery to one in of many, if the feoffment be by od. Tenant in common may re- of his companion, but joint ten- not. And livery must in all cases the immediate grantee. must be made either on the land view of the land, and the feoffor possession; for that purpose, in se,—

T. Doe, the feoffor, sets about  
take the people in, go out;  
er pretence of some ballroom,  
being wonders in the moon."

*Conveyancer's Guide*, 169.

akes the key of the house, or a land, and holding the key or turf same to the feoffee, saying, "I key or turf to you in the name this house, &c. to hold to, &c. to the form and effect of this )which is then produced, and after- memorandum of the livery is in- attested by the witnesses present. re delivery of the charter of feoff- the name of seisin of the land, is Inst. 48, a.; but such delivery r declaration is insufficient. *Ibid.* ion of a tenant is considered the of the lessor, and the possession at sufferance will be no obstacle. ry is made in view, the feoffor give you yonder house, enter and sion." But livery in view cannot y attorney. 1 Inst. 49, a. And ill pass till the feoffee has entered bed as near as possible, and claims the claim must be made in the the feoffor. (5)  
ere are several pieces of land in r, livery of seisin of one in the l, or of one according to the deed, efficient for all, if all be in the ossession and out of lease. But in divers counties, or in the same

county, and they be not in the grantor's possession or in lease, *contra* Shep. Touchst. 212.

Feoffments merge all powers except powers collateral; since the Statute of Uses this mode of conveyance is rarely used.

Formerly feoffment and livery of seisin passed the fee by right or wrong, but now they will only operate to pass what the feoffor can lawfully convey. 5 Dowl. & Ryl. 161. A. J. H.

(1) LIVERY OF SEISIN (so technically called) is the ceremony of delivering upon the land, in the presence of witnesses, a detached portion of the soil, or some other symbol, a solemn investiture, which, while the art of writing was rare, supplied the only evidence of the transaction, and which, although written evidence was afterwards required by the Stat. 29. Car. 2. c. 3. (Frauds), still continued to be the essence of the conveyance, which was a *FEOFFMENT*, and by which *land still passes*. Practitioners, however, should use great caution in adopting this mode of conveyance, and should not rely too much upon the power and character given to this species of conveyance in the old authorities for *experimental operations* or *delusive speculations*; as for instance, by the skin of parchment transforming a term into a fee, &c. See *Doe v. Lynes*, 3 Barn. & Cress. 388; *Doe v. Hall*, 2 Dowl. & Ry. 38.—Ed.

(2) One reason why freehold interests cannot be made to commence *in futuro* is, because they cannot at Common Law be made without *livery of seisin*, which being an actual transition of the land must take effect *in presenti*, or not at all. See 2 Black. Com. 314.—Ed.

(3) If made under a power of attorney contained in the deed itself, it is not necessary that it should be made on the day of the date of the deed; for the power may be well executed afterwards. *Doe d. Heale v. Rashleigh*, 3 Barn. & Ald. 156.—Ed.



(4) In making livery of seisin no particular form of words need be observed. *Doe d. Barnett v. Stock*, Gow. 178.—Ed.

(5) Livery of seisin is not rendered void by the fact of a child having remained on the premises at the time, even though such child were the descendant of a party having title, unless the child was placed there for the purpose of representing that party. *Doe d. Reed v. Taylor*, 2 Nev. & Man. 508; 5 Barn. & Adol. 575.—Ed.

### Imperial Parliament.

#### HOUSE OF COMMONS—ENGLAND.

##### STOCKDALE V. HANSARD.

LORD JOHN RUSSELL called the attention of the House to a subject, which, he regretted to say, must take precedence even of the consideration of her Majesty's speech—the state of the proceedings in the last action of *Stockdale v. Hansard*.

Mr. Hansard's petition was then read at the table, after which LORD JOHN RUSSELL observed, that the matter could not be suffered to remain where it stood, a levy having been made of between £600. and £700. There were different courses open to the House. That which he thought most consistent with their dignity was, that they should resort to the ancient mode of commitment; or they might direct the printer to defend all actions; or they might abandon their privilege of publishing to the world, and confine their publication to the use of members; or they might settle the whole matter by introducing a bill. But no one would say that they, the grand inquest of the nation, ought to continue their present practice of publication, and leave their publisher liable to suits. He would move, therefore, that Stockdale, the sheriffs, and some other parties connected with the action, should attend to-morrow at the bar.

SIR EDWARD SUGDEN warned the House to consider the consequences to which they were about to commit themselves. He took a short but comprehensive review of the law, and showed that the cases in which the courts of Westminster Hall had held themselves excluded from discussing the privileges of the House were cases in which there had been a commitment in *execution*. He adverted to the absurdities which their present assertion of exclusive judicature would involve. If the Queen's Bench had decided in favour of the privilege, the privilege would not thereby have been necessarily established; for even then the plaintiff could have appealed to the House of Lords, who might have overruled

the privilege, and would at all events have taken cognizance of it. And how could the House commit the sheriffs? Having authorized a plea in these actions, it had admitted that the judges were bound to decide that plea; and if the judges were bound to pronounce a decision, the sheriffs were bound to follow it.

The ATTORNEY-GENERAL supported the motion. If the House allowed the Queen's Bench to try such an action, they must allow every petty court in England to try it, every county court, every court of requests, every manor court. (?) In this third action, however, the judges had not interfered: the judgment had gone by default; so that the sheriff was the only party to be fixed with responsibility. A plaintiff, who had brought an action against a messenger for taking away his umbrella in the House of Lords, was summoned to the bar of the House, together with the judge of the court of conscience where the action had been tried; and the House of Lords had compelled him to forego the points of his judgment. (The plaintiff's attempt to retain his umbrella was an obstruction to the business of the House; and it is clear that the privilege of either House extends to prevent all such obstructions, and, of course, to prevent all proceedings against the officers whose duty it is to get those obstructions removed.)

LORD MAHON thought it safer to rely on the uniform decisions of the judges than on shifting majorities in the House of Commons. It did not follow, even if the House possessed the privilege now claimed, that there was a necessity for thus asserting it. The reporting of the debates was an undoubted breach of privilege; but the House were not accustomed to commit the reporters.

MR. CRESSWELL said that it was a mistake to treat the sheriff as the only officer in question upon this third action; the judges were concerned in it, for the sheriff had applied to them, and they had declined to give him the protection he had asked. The House had originally admitted the jurisdiction of the Queen's Bench, but now, because the decision was against them, they denied that jurisdiction. If this publication was protected, it was not by privilege of Parliament, but by the general rule of law which sanctions *bond fide* communications to any party of a subject in which he has an interest. The only precedent for the interference of either House of Parliament with an action was the case of the umbrella; but that was an action for a thing done in the House. Commitments, indeed, have been upheld by the courts; but that was because commitments are judgments; and it is of the nature of a judgment to be irreversible except by a tribunal of appeal.

SIR ROBERT PEEL took a short retrospect of the facts, and then enlarged upon the unreason-

leaving the officer of the House exactions for obeying its orders. He privilege an essential one, of public only for the use of the members, but of their constituents. There might, for instance, to address the Crown removal of a judge on the ground of

Surely the people ought to be made with that ground. It was true that ion of the House was imperfect—that th the session. Is not its cessation sion a tolerably strong proof that it d only to obviate obstructions? But, nt advised, he was ready to take the osed by Lord John Russell.

LY opposed the assertion of privilege, to secure indemnity to the printer. ficers were sincere in their allegations een's Bench had decided erroneously, try the question by a writ of error.

IN RUSSELL cited from Lord Denment, in *Stockdale v. Hansard*, some n former decisions, which tended to be opinions even of the judges have ways uniform, and sometimes have under the excitement of the time. n were tolerated, questions might be e admission of strangers during any which involved imputations on indi- in the Duke of York's case. The rds had asserted the privilege, and he House of Commons.

use divided—

. . . 286 | Noes . . . 167  
Majority . . . 119

RUSSELL then moved that, on Friday, oy whom the writ had been executed t the bar of the House, and bring with rrant under which he acted.

LY hoped that the noble Lord would t of his motion that the sheriff do e bar, bringing with him all the writs, lers under which he acted in the case.

TORNEY-GENERAL thought it quite y to make any order requiring the of writs or other documents in the e Sheriff. That officer, as a matter ould bring with him all that might ry for his own justification. It was House to make any order upon the sense of his own interest, and of what himself, would lead the Sheriff, as a ource, to bring with him to the bar ouse all that might be wanting to ex- dicate the course which he himself had

aw said, that the observations which had just heard from the learned Attor- al formed an equally good argument e production of the warrant as against ction of the writs. Why call upon

the inferior officer to produce his authorities if they were not prepared to call upon the superior functionary to produce his authority likewise? He hoped that they were prepared to face the real grounds upon which the proceeding rested. He hoped that they would not flinch from dealing with the Sheriff in the matter, and examine into the grounds upon which he went. They were afraid of the judges awhile ago, now they were afraid of the writs. The House, he trusted, would not sanction a demand for the warrant; that they would, in fact, reject the motion for producing the warrant, or else let the Sheriff produce the writs, and then say whether they were prepared to call upon the Sheriff to answer to the House of Commons for doing that which he could not fail to do—namely, to yield obedience to the injunctions of the Court of Queen's Bench. Surely, when the Sheriff, or any one acting under him, was brought to the bar of that House, and asked why he had taken a certain course, and done certain acts, he ought to receive previous notice to bring with him the documents necessary for the purpose of explaining and vindicating his conduct.

Mr. KELLY said, he should move an amendment to the effect that the Sheriff do attend at the bar of the House, and bring with him all writs, orders, rules, and other authorities under which he acted in this case.

Lord J. RUSSELL concurred with his Hon. and Learned Friend the Attorney-General, that there was no necessity for calling upon the Sheriff to bring with him those authorities, at the same time he did not feel it to be absolutely necessary to refuse agreeing to the proposition for their production. He wished, however, to extend the motion to the Under-Sheriff, and include all notices amongst the documents which the Sheriff was to bring.

A motion was then agreed to, directing that the Sheriff and Under-Sheriff do attend at the bar of the House to-morrow, bringing all writs, rules, orders, and notices, received by them in the case.\*

\* The question lies in a narrow compass. Is the House of Commons or the law to govern England? There ought to be no confusion—it is a question between the House of Commons and the law as adverse parties. It is nothing to tell us that the House of Commons has privileges, and that as far as these privileges have been exercised and acquiesced in, either by the tribunals of the country, or by the other branches of the legislature, these privileges are a part of the general law. We admit all this; but we deny that it applies to the case now under consideration. In that case the House claims to create a new privilege, that is, to make an addition to the laws of its own mere authority. Let this power be conceded to the House, and it becomes exclusively the legislature, and its orders must be recognised by the courts of justice as laws of plenary authority. Indeed, this is the very thing at present demanded.—*Standard*.

## Law Reports.

## VICE-CHANCELLOR'S COURT.—Dec. 2.

## NEWLANDS v. HOLMES.

## SEPARATE USE of MARRIED WOMEN. (a)

Mr. JACOB (with Mr. Bethell) moved to dissolve an injunction awarded on the 28th of November against Mr. Samuel Paynter, the Sheriff of Surrey, to restrain him from executing any process issued out of the Court of Queen's Bench in an action brought against the plaintiff by the defendant Holmes, either against the leasehold premises, No. 19, West-square, Southwark, or the goods and chattels therein, in respect of any claim against the husband of the plaintiff. The defendant, Holmes, having recovered £200 damages at the summer assizes, in an action of trespass against William Newlands, the plaintiff's husband, entered up judgment on the 25th of November, and issued a writ of execution to the Sheriff of Surrey, whereupon Mrs. Newlands filed the present bill, which stated that her father, John Peter Reina, by his will, bearing date the 3d of October, 1833, bequeathed to her by the name of Mary Sarah Reina, all his property whatsoever, and appointed her sole executrix, and thereby specifically directed that any property he might have given or should give to her should not be liable to the interference or controul, in any way, of any person or husband she might be married to, or liable to his then present or future debts, but that her receipt alone should be a discharge for all the money or effects he might give or leave to the plaintiff; and that she should dispose of the same by her will and testament as she pleased, notwithstanding her coverture; that she proved the will on the 23d of October, 1833, and intermarried with William Newlands on the 20th of November following, and that she had continued ever since to reside with him in the house No. 19, West-square, which, with the furniture, plate, &c. therein, formed part of the property bequeathed to her by her father. The bill then stated that she had not, at the time of her marriage with Newlands, or at any time since the death of her father, any property except that which she took under his will, and that all the goods and chattels in the house (which were separately set forth), were either a portion of the testator's property, and subject to the trusts of his will, or had been purchased out of the income of her separate estate, and therefore she submitted that her husband was a trustee for her of all such legal estate and interest as she had in the lease-

hold premises, and the goods and chattels therein to her separate use. The affidavits in support of the present motion to dissolve the injunction stated, among other things, the witness's belief that a settlement of £6,000 bank stock was made upon Mrs. Newlands at the date of her marriage. If this were true, the fact ought to have been stated to the Court when the injunction was applied for. (The settlement was handed to his Honour.) The learned counsel then contended this being the case of a gift to a woman absolutely, and she being also executrix, there was no ground for drawing any distinction between legal and equitable ownership. Had the legal ownership been in trustees, had the marriage been before the death of the father, or had the bequest been to a married woman, the case would be different. The marriage amounted to an unqualified gift to the husband, and there was no contract or stipulation to limit the effect of the gift; on the contrary, there was a stipulation as to a portion of the property, that it should be settled, and the necessary presumption was, that as to the rest, the husband's marital right should prevail. The present case was precisely the same as "Massey v. Parker," (b) and must be governed by that case until the question was decided otherwise.

The VICE-CHANCELLOR did not call upon the counsel who supported the injunction to address the Court, but said he thought the point very simple. If a man married a woman who had personal chattels *prima facie* at law, the act of marriage constituted a gift to the husband of those chattels. If the wife had a term of years, either legal or equitable, the law said during coverture the husband might assign the term if he pleased, and if he survived the wife, he took it as a gift by marriage, and was not obliged to administer to her for the sake of constituting the term in him in virtue of the wife. If he died in her lifetime, the term survived to her. With respect to choses in action, they remained in the wife during coverture, unless the husband during coverture reduced them into possession. But his Honour always understood that a father might make a gift to the separate use of his child, being a daughter; and in this case it appeared very plain to him that the testator expressed an intention that there should be a trust for the separate use of his daughter, although he had not so fully worked out that intention as he might have done. For, having given the property to his daughter and appointed her sole executrix, he specifically directed that any property he might have given or should give to her, should not be liable to the interference or controul in any way of any person or husband she might be married to (which

(a) See Editor's letter to the Lord Chancellor ante, vol. I. p. 225; see also id. pp. 22, 38, 69, 143, 167.

(b) 2 Myl. & Ke. 174.

an inaccurate expression this gentleman, because he imagined she might be a person who might not be her husband to his then present or future at her receipt alone should be a disbursement of the money or effects he might give the plaintiff, and that she should disburse by her will and testament as notwithstanding her coverture. His intention, that when the testator died, his daughter proved the will, she certainly was the absolute owner of all the property of a personal nature the father gave her, and when she married she did not give to her husband the complete disposal of all the personal property. The question was whether, when she married a woman who took the property under such a bequest as this, it was necessary subject the marital rights and powers which he acquired by the executrix to that trust, that was (Honour should say) by the will on the testator gave to his daughter. He could not but think, until he was told by a higher authority, that the husband, by marrying the executrix, did, though he himself with legal rights and legal powers, subject to that trust which was affixed to the property. The marriage settlement had not been called to the notice of the Honourable Judge, who had read it through, and was solely confined to a sum of £8,000, which was admitted to have been part of the father's estate. It was not a settlement of stock to the separate use of the wife in the same manner in which she took it; but, on the contrary, it appeared to be a reduction and limitation of the property, as the *cestui que* trust of her property she had over it; for the stock was put into the names of three persons as trustees for her separate use for life, and if she happened to survive her husband, it was hers absolutely; but if her husband died then she had no power of disposition otherwise than by a testamentary will, and so much as she did not dispose of would belong to her husband. It was by the constitution of the settlement that the husband was let in to participate for his share in the Bank Stock, to the prejudice and abridgement of those rights the wife had under the father's will. If there were express provisions in consideration of the settlement that the husband should become absolute owner of all the wife's other property, then it would be a relinquishment of her rights over her property; but the settlement was not as to that, and he thought it would

be a new thing to say that where the husband derived a benefit from the wife's property and gave her no benefit, and nothing elsewhere was said or treated of except what related to the wife's property, it should *ipso facto* give the husband all the property not contained in the settlement. He could not but think, the true construction of the father's will and the settlement taken together, the wife did stand in this position, viz that the husband, so far as he had any right under the marital power, had that right as trustee for his wife, and therefore he thought the chattels were not seizable in equity, though they might be at law, and that the motion to dissolve the injunction must be refused, without costs.

## APPEAL.

## COURT OF CHANCERY.—Dec. 5.

The above decision of the VICE CHANCELLOR was appealed from on the ground that the decision was wrong, as it left the defendant without any security for his debt until the decision of the cause.

Mr. Jacob appeared for the defendant in support of the appeal, and submitted that at all events the Vice-Chancellor's order must be varied, as there ought to be some restraint on the plaintiff from disposing of the property pending the suit.

Mr. Wigram supported the Vice-Chancellor's view of the case, and contended that the will of the father gave the property to the separate use of the plaintiff, his daughter, and on her marrying Mr. Newland afterwards, there was an implied, though not an express contract, to respect the disposition of the property as made by the lady's father.

The LORD CHANCELLOR said the question in this and in two other cases, which were waiting for his judgment, were questions of the greatest difficulty and importance, and whichever way they should be decided, several other decided cases must be overruled. The two cases referred to, *Tullett v. Armstrong*, and *Scarborough v. Borman*, were for some time under his consideration, and he would dispose of them *before Christmas*. Until that decision he would avoid giving any opinion on the question of "separate use." In any view, however, of the subject, the Vice-Chancellor's order in this case ought not to be allowed, as it gave no security for the protection of the property, but, on the contrary, the order continuing the injunction left the defendant (who was the claimant) without any security for his debt, which could not be right. The plaintiff must either go before the Master and give security for the property to be forthcoming when the cause shall be decided, or pay the amount of the judgment, debt, and costs into court. In either

case the sheriff, if in possession, will retire, or if he is not in possession he will be restrained from taking it.—Injunction dissolved.

#### COURT OF EXCHEQUER.—Nov. 14.

##### *Sittings in Banco.*

SALMOND v. ROLLIN.

#### WRIT of SUMMONS—Irregularity—PRACTICE

Mr. Thomas moved to set aside service of a writ of summons, on the ground of irregularity. The objections were two. First, the writ of summons did not say whether the defendant was to appear in the Court of Exchequer or the Exchequer of Pleas, the former being the equity side, the latter the common law side of the court, so that the defendant would not know where to make his appearance.

Mr. Baron GURNEY.—Does your client swear that in his affidavit?

Mr. Thomas.—No, he does not; but it is so stated in my instructions.

Mr. Baron PARKE.—It all depends upon the form given by the act of Parliament, and that is, “in our court of —,” without stating any court. As, therefore, no precise form is given by which to designate this Court in particular, I think it is sufficient. You will take no rule therefore.

Mr. Thomas.—There is another objection to this writ which my client wishes me to bring under the notice of the Court, and that consists of the omission of the letter “d” in the word “and,” in the form given by the statute.

Mr. Baron PARKE.—I don’t think you can make anything of that either.

Rule refused.

#### INSOLVENT DEBTORS’ COURT.

##### JOHN JOSEPH STOCKDALE’S CASE.

*Act for Abolishing Arrest for Debt, sec. 89.*

Mr. Cooke applied to the Court under the 89th section of the act, for a rule calling on the Sheriff of Middlesex to hold and retain the sum of £600. paid as the damages against Messrs. Hansard into the hands of the sheriff, and for a rule on Stockdale to show cause why that sum, or such portions as the court should think fit, should not be paid into the hands of an assignee, to be appointed, for the benefit of the creditors. The schedule was in court for the inspection of the learned Commissioners, and it would appear that Mr. Stockdale was discharged under the act, in January, 1831, and that his debts remained unpaid. He made the application on the part of Mr. Samuel Chamberlain, coach-builder, in Great Newport-street,

who, he believed, opposed on the hearing. The court was aware that it was not necessary for an assignee to make the motion, none had been appointed, and a creditor was authorised to make the application.

CHIEF COMMISSIONER.—Who is the creditor? Mr. Cooke.—Mr. Samuel Chamberlain.

CHIEF COMMISSIONER.—I see in the schedule he is a creditor for 13 guineas.

Mr. Cooke read the affidavit of Mr. Chamberlain, which set forth that Mr. Stockdale was discharged in 1831, and no assignee appointed. That deponent had been informed, and believed that the said Stockdale had obtained a verdict with £600. damages, in an action for libel against Messrs. Hansard, of Lincoln’s Inn fields, and that £600. with costs, under a writ of *fiery facias*, had been paid into the hands of the Sheriff of Middlesex, where it now remained. Deponent, therefore, applied that a rule should issue on the said sheriff to hold and retain the money until further order; and also on the said sheriff and the said Stockdale to show cause why it could not, or a portion, be paid for the benefit of the creditors inserted in the schedule.

Rule nisi to be granted.

#### COURT OF THE SHERIFF OF MIDDLESEX

STOCKDALE v. HANSARD.

##### *Libel.*

(Concluded from p. 140.)

Mr. STOCKDALE then proceeded to observe.—He had a right also to impress upon the jury what influence wealth might effect in such a case as this. It had been insinuated that it was only briefless barristers and scamping attorneys who would lend him support; but supposing him to be so supported, it would not matter. It might be that there were briefless barristers who deserved briefs; and it was now the interest of the bar to vindicate its high character, and merely to advocate that cause which paid the best, but to maintain that character which Lord Mansfield had so well described as “ornamented most by the brilliant gem of truth.” But suppose bribery had been employed to buy up the case from under him, and to make him stay away where would have been the dignity of the bar where the rights of this country? Up to the present time, precisely the same case as his own had not occurred; but there was one case of disturbed times which, though mentioned in judgment, had been studiously kept from light. That was the case of a man than whom one more profligate, more wicked, more obscure or more villainous had never existed in the country—he alluded to John Wilkes, who, when it suited his convenience, fled the country;

ise—the great question of general  
uld not come on for years. The  
neral warrants had been exercised  
by Lord Halifax and the Treasury;  
ie same Treasury, he would repeat,  
able iteration," as Falstaff had it,  
ry of Whigs too, for it was a strong  
the attacks on the liberties of the  
been made by the Whigs. On the  
1763, Wilkes was committed to the  
general warrant, and remained there  
and it was to be remarked that the  
ed against him had been up to that  
ly exercised in similar cases. On  
June he commenced his action for  
false imprisonment; but as soon as  
fled the country, and was outlawed.  
ever, from his (Mr. Stockdale's)  
y, he had remained at home pur-  
if he would be sent for, though he  
at a prison was, and its privations.  
hooze to bring his action till the  
ommons' committee had made its  
had said "that it had been so  
it had not time to report," when,  
ad nothing to report, and wished  
ne chapter of accidents. He read  
the *Morning Chronicle*, and before  
c on the same day the action was  
re Parliament was prorogued; and  
essrs. Hansard were informed, in  
eir own letter, that the action was  
use, in contempt of the former ven-  
tinued to sell the libel against him.  
empt he was determined to push his  
try the question before Parliament  
lf the House had sent immediately,  
e been taken: he remained at home,  
have been committed to the Tower,  
or to the custody of the sergent-at-  
the House knew well that there their  
end. The House, however, would  
must come to the bar of the House,  
d come if he were asked; but they  
ommit him without learning from his  
were stepping beyond their power,  
oever their officer might be, as soon  
eleased, he would bring his action  
or the assault and false imprisonment  
ough them. Still the real offender  
t. The monkey used the paws of  
ke the chestnuts out of the fire, and,  
d, he would but catch

"The tool  
naves do work with, called a fool."  
s themselves would not get into the  
ose who even now bought their seats  
noyed at what he had said that day;  
been done before, members would get  
use, make again those false assertions

for which they had already begged the pardon  
of the judges, and say, "Here you cannot hurt  
me." Unless the jury should give emphatic  
damages that day, they would not show what  
might be done in a court of justice by an un-  
flinching course, and by a reliance on the consti-  
tution of the country; nor would the poor man  
see that, without disturbance, if injustice had  
been rendered by the highest, the poorest might  
obtain his right. In the case of Wilkes, in 1771,  
it was pleaded that verdicts had already been  
obtained; but he laid his damages at £20,000,  
and got £7000, although avowedly there was not  
a more profligate man in morals and religion, for  
he was a recorded atheist; and that verdict was  
given seventy years ago. In the present case,  
the defendants had not attempted to impeach his  
character; and if they could, would they not have  
done so? In the Queen's Bench, though nothing  
had been dropped by the judges in favour of his  
character, nothing had passed against it, and  
when the chief officer of the law alluded to it, he  
was reproved by the Chief-Justice, who said that  
it was indeed a novel practice to hear so high a  
functionary introduce into the argument on such  
a legal case the "*Memoirs of Harriett Wilson*,"  
or any other memoirs; all of which, if published  
by him, would, however, bear the closest exami-  
nation, and, to a mind not previously polluted,  
would present a better argument on morality than  
many sermons. The House might discover that  
before it committed, it must permit him to expose  
at the bar of the House that which would suffuse  
cheeks that were never suffused before, and they  
would learn that instead of the plaintiff starting  
for America, he was ready and willing to fight  
his own battle and the battle of his country.  
He trusted that the jury would give due weight  
to the facts before them. In his ignorance of  
the practice of pleading, he might have stated  
that which he would not be allowed to prove, but  
he possessed the means of proving it; he wished  
that the verdict should be given deliberately, but  
that it should be given without doubt; that they  
would arrive at it from the facts, and the facts  
alone; but he trusted that it would be that the  
plaintiff in this cause had damages to £50,000.

No further evidence was tendered.

The UNDER-SHERIFF, in summing up, said  
that the plaintiff sought at the hands of the jury  
damages for a publication made by the defendants,  
and which he read from the record. That libel  
the defendants confessed that they had illegally  
published, and there was no doubt that the  
plaintiff was entitled to their verdict. He would  
only call their attention to the oath which they  
had taken, diligently to inquire, to assess the  
damages, and a true verdict give according to the  
evidence. Great observation had been made, and  
indeed they could not shut their eyes to the fact,

to proceedings that had taken place in other places touching a suit similar to this; and it was stated that they were all in jeopardy by proceeding with their duty in this cause. All his life had been spent in courts of justice; he had there learned the law of the land, and he hoped that for a long time there would in England exist judges to whom they should look for the construction of the law. All were bound to obey the law, and, if any difficulty arose, to whom were the Queen's subjects to go? To the Courts of Westminster Hall; and so long as men of learning were selected by the Queen, and paid by the public, it was to them, and to them alone, that her Majesty's subjects, high or low, must resort for an exposition of the law under difficulty. It had been intimated that there was some fear in the public office of the Sheriff of Middlesex; but he assured the jury that there was no doubt, no apprehension; the sheriff did not fear the execution of the process of the Court; but he informed the Court that he had received intimation that the execution might be and was impeached by another power. The sheriff thought it right to intimate this to the Queen's Bench; but he hoped that so long as the laws were to be obeyed, nobody would fear to execute the laws of the land. If they were to be hereafter punished by a power stronger than what he conceived to be the law of the land, they must take the consequences; but if physical force were employed against those who expounded the law, it would be a state of unhappiness in this country which he hoped never would be seen. It was clear that the defendants had published this work after a verdict had been already obtained against them for the same matter. In ordinary cases, a party persisting in doing that which was a subject of wrong, particularly with a knowledge that it was wrong and after the verdict of a court, aggravated the damages; it was for the jury to say whether, in this peculiar case, the circumstances had been aggravated on the part of the defendants. Mr. Stockdale did not impute to the defendants any *malus animus*; he described them as the agents of other persons, and he said that they were indemnified; but of that there was not a tittle of evidence: there was no evidence that they would be reimbursed by any legal mode the damages that should be awarded. It was for the jury to say what damages the plaintiff had sustained. They were not sitting there to punish the defendants as an expression of an opinion on any matter not before them; they ought not to travel out of the record; and they ought not to give one farthing more or less, except the damages the plaintiff had actually sustained, with the view of any expression of an opinion on any question not before them. It was not their place to give any opinion on any question other than that of the plaintiff; they ought not

to travel out of the record, but they were to say what damages the plaintiff had sustained. That question was peculiarly in their breast. He would carefully abstain from any intimation as to the amount; it was no part of his duty: it was for them to do as they thought right: but this he would advise them—that whatever damages they thought the plaintiff had fairly sustained—with out reference to, or the fear of any consequences—to give fairly. He had spent many years in courts of justice; he had had many opportunities of watching the judges of the land, and he had always found that those who had watched them respected them.

A jurymen inquired whether the book complained of by the inspectors was before them?

The UNDER-SHERIFF replied, that the book was not put before them. It would have been better if the plaintiff had put the book before them, and if they thought that Mr. Stockdale had not put it in because it would influence the verdict, undoubtedly that would affect the damage which they would be likely to give. It was one of the matters for the jury to consider, that he did not produce it. There was one point on which an observation had been made and a paper put. The plaintiff said that he had been paid 11s. 4d. and that that was all he had in the former cases; but, looking at the paper, he found the item "Sheriff, for damages and costs, £290. 14s. The costs were included with the damages, and it ought not to be said that the plaintiff received only 11s. 4d.

Verdict—Damages £600.

Michaelmas Term, 1839.

Mr. Platt applied and obtained a rule against the Sheriff to return the writ, and on the 23d of November a *feri facias* was issued against the defendant's goods, and lodged at the Sheriff's office, Red Lion-square. On the 25th of the same month the Sheriff was served with a Judge's order to return the *feri facias*; and, in obedience thereto, he returned on the 29th "that he had caused to be seized divers goods and chattels of the defendant's, which remained in his hands unsold, for want of buyers." On the 2d of December the plaintiff issued a writ of *venditioni exponas*, requiring the Sheriff to sell the defendant's goods, whereupon he directed his warrant to Hemp, the officer, and Mr. Crook, an auctioneer, of Snow-hill, was engaged to dispose of them by public auction. Messrs. Parkes and Preston, in the mean time, served the Sheriff with a written notice, reminding him that if he proceeded to a sale, he would be amenable for the consequences of a breach of parliamentary privilege, to which document was formally annexed a copy of the resolution passed by the

ommons, declaring that they possessed of publishing parliamentary reports. Of December the Sheriff was served with a Judge's summons for him to writ of *venditioni exponas*, and on parties attended before Mr. Justice in his chambers, in Sergeant's Inn, Lordship was pleased to grant the Sheriff's petition of time, and stayed the return.

By the Sheriff determined to sell the defendant, and Mr. Crook accorded the auction to take place at one of the defendant's premises, in Lincoln's Inn. On the evening previously, however, taken in execution were disposed of by the Sheriff for £695. to *Nicholas Winsland*.

The writ of *venditioni exponas* was served on the Sheriff, pursuant to *Judge Little*, with the following indorse-

DALE v. HANSARD AND OTHERS.

Indorsement.—I hereby certify and return that, by this writ, I have caused to be sold the goods and chattels of the within-mentioned defendant, and every part thereof, for the best price I could obtain, and I leave the said money arising from the sale before the Queen, at Westminster, to the within-named John Joseph Stockdale, within commanded."

William Evans and John Wheelton,

On the 10th of this month Stockdale took out a writ, directing the Sheriff to show cause why he should not pay over the debt and costs on the 21st it was part heard, and on further hearing until Monday last, the writ was adjourned. At the time appointed the Sheriff and Mr. Watson attended to show cause against the summons; when, in consequence of the plaintiff being unable to produce a Judge's interference under similar circumstances, Mr. Justice Little refused to order on the subject.

THE BENCH.—Jan. 11.

It was moved for a rule to show cause why the Sheriff should not pay over to the plaintiff the money which he had received as the proceeds of the levy. Mr. Stockdale, as well as his counsel, made application for the payment of the money, but, in each instance, the Sheriff refused to hand it over. The present motion, therefore, was, that the Sheriff having received the money, and so having refused to comply with the intent of the rule of the Court, should be ordered to pay the money over by a rule

of that Court, in order that the plaintiff might be able to take such proceedings in the event of a further refusal against him for a breach of duty as he might be advised.

Lord DENMAN.—Take a rule to show cause. (a)

(a) See Report of the proceedings in the House of Commons in this case, *ante*.

## TRIAL OF JOHN FROST FOR HIGH TREASON.\* CHIEF JUSTICE TINDAL'S ADDRESS.

(Continued from p. 173.)

Upon the evidence of the first witness, Simmons, when the first allusion to Frost occurred, as having directed the tumultuous assemblage, and in various ways, to "go towards the town, and show yourselves to the town," the learned Judge observed, that it would be found from other testimony that what was passing at this moment gave rise to that direction of the prisoner. But taking the words by themselves, "Let us go towards the town, and show ourselves to the town," there was nothing in the mere purpose of going towards the town and showing themselves to the town savouring of or at all amounting to an attack on the town itself. Strictly considered by themselves, they amounted only to a display of themselves to the town—nothing more. The jury must, however, take their construction as well from the words themselves as from the circumstances by which they were accompanied, and of those by whom the prisoner was then surrounded. Unless it was shown by clear and conclusive evidence that something deeper than their natural interpretation was intended, the jury must give to them their natural and fair meaning only. If they were used in their real sense, the words would undoubtedly not import a criminal meaning. In the evidence of the same witness, the words "turn round to the front" occurred, as spoken by Frost to the mob; upon which the learned Judge observed that the meaning of those words fell far short of any direct attack on the Westgate Inn, or those who were found there. It was only by reference to the surrounding circumstances, which happened there at that time, that the jury could form any conclusion as to what the intention was. Unless it clearly appeared by evidence, of which there could be no reasonable doubt that they had another meaning distinct from their natural signification, undoubtedly it would be their duty to give to them the natural sense only which the words themselves

(a) Sentence of DEATH was passed in the usual form in cases of high treason, on Thursday last, upon John Frost.



imported. From the evidence of Waters it appeared that Frost was seen in front of the inn immediately before the firing commenced. The same witness stated that he afterwards heard some hundred volleys, an expression which was no doubt exaggerated, perhaps from the excitement and confusion of the moment, if indeed the witness did not mean shots instead of volleys. But the difference in that respect between this and other witnesses was not so material. In his cross-examination he stated that there were prisoners at the Westgate Inn. Upon this the learned Judge observed, that on the part of the prisoner it was alleged that the object of this attack on the Westgate Inn was entirely unconnected with any design on the soldiers. They never saw the military there, it was said, till after the firing commenced, and they knew not they were there: but simply for the purpose of rescuing certain prisoners committed by the magistrates during the night preceding the tumult. If there had been no other evidence against the prisoner at the bar except the fact of the conflict that took place between the soldiers and the mob led on by the prisoner, it would certainly be very important to see that they had no knowledge the soldiers were there at all, and that they had an object perfectly distinct from the general one of attacking the soldiers and taking the town. They wanted nothing but to rescue certain prisoners. But that is not the whole of the case that will be laid before you. The learned judge then read the evidence of Rees, the boy who was called with Coles to speak to what took place as to the mob being ordered to march when within a short distance of Newport. The account of this witness varied slightly from that which was given by Coles, but the variance was very immaterial where boys were the one telling what he had heard, and the other what Frost had said. So far as it was material for the jury to know whether Mr. Frost was aware that there were soldiers at the Westgate, it was not material whether this boy gave a true account or not. The boy went on to say, that one of the party said, "We will have the Westgate." Now, this was important, in order to consider what was the state in which the Westgate then was, and whether he spoke in reference to that place as being then in the possession of the soldiers, or whether it was consistent with the object they had of releasing the Chartist prisoners who had been taken there during the night. That fact might have been communicated to them, and some one or other might then have said, "We will have the Westgate," but without there being any other treasonable design than that of rescuing the prisoners who were taken in the course of the night. They must weigh the evidence on both sides, and see how far it was consistent

with an intention on the part of Frost and Jack the Fifer, they being aware of the soldiers then being at the Westgate, to go there in order to take possession of it whilst so guarded, or simply for the purpose of rescuing the prisoners, whom they thought were there placed in custody.

(To be continued.)

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TO THE EDITOR OF THE LEGAL GUIDE.

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SIR,—I beg to draw your attention to a very material error contained in S. A. W.'s answer to Problem 26, Vol. II. of the "Legal Guide."

The error I allude to will be found in p. 148, Vol. III. of the "Legal Guide," and consists in an erroneous extract from the 12 Car. II. c. 24.; S. A. W. stating that "*All tenures are adjudged and taken to be for ever free, turned into free and common socage; Stat. 12 Car. II. ch. 24.*" Now, if you or S. A. W. will have the goodness to refer to that statute, you will see that the alterations effected by it were not, nor ever have been, so extensive as stated by S. A. W.; for the statute enacts, "*That all sorts of tenures held of the King or others be turned into free and common socage, save only tenures in frankalmoigne, copyhold, and the honorary services (without the slavish part) of grand serjeanty.*"

I would also draw your attention to the way in which this problem is answered. The problem itself runs thus: "Socage Tenure.—Describe what it is." The answer is, for the most part, occupied in giving a description of what that tenure originally was. Surely S. A. W. was not warranted in thus answering the question; and probably more than one other person's answer to that problem—and which consisted in describing *what that tenure is at the present day*—has been rejected to make room for the insertion of S. A. W.'s description of what that tenure was originally.

In conclusion I beg to say, that the above

have not been made by reason of  
 answered that identical pro-  
 id that answer, as I presume from  
 earance in the columns of your  
 ving been rejected; nor do I  
 least partiality to the learned  
 he above work; but I imagine  
 answer was inserted without con-  
 at the Problem only required a  
 of socage tenure at the present  
 order to prevent a recurrence  
 kind, and in justice to myself  
 er correspondents, I have been  
 write the foregoing letter, and am  
 time,

Your's most obediently,

C. B.

need only repeat our entire satis-  
 seeing this sort of discussion.  
 onds cannot, in justice, charge  
 ith partiality towards any parti-  
 n, or with want of courage in  
 up any particular correspondent  
 ws have pronounced his errors.  
 quite correct.—The Problem is  
 ed, and it now remains open for

NOT RECEIVED the ANSWER C. B.  
 at us.—ED.

#### VIEW OF NEW BOOKS.

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ful, convenient, and cheap Diary  
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 of the Judges—Central Criminal Court—Police  
 Magistrates—Courts of Request—Record Of-  
 fices—Registries of Deeds—Patent Office—  
 Commissions—Perpetual Commissioners under  
 Abolition of Fines and Recoveries' Act—Town  
 Clerks—Clerks of the Peace—Clerks to Magis-  
 trates—Solicitors to Public Departments—Se-  
 cretaries, Clerks, and Solicitors to Public Com-  
 panies, Institutions, &c.—County Coroners for  
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 rections of Writs, &c.—Cinque Ports and De-  
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Part II.—*Commercial.*—Directors, &c. of  
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 and Life Insurance Companies—Gas Light and  
 Water Companies—London Fire Engine Estab-  
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 —Rates of Parcels from Inns—General and  
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 and Queens of England from the Conquest—  
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Part IV.—*Revenue.*—Commissioners of Cus-  
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Part V.—*Tables.*—Assessed Taxes—Annuity  
 Table—Table of Interest at Four and Five per  
 Cent.—Table to cast up Expenses—Table to  
 Calculate Wages—Weights and Measures—  
 Hackney Coach Fares.

Part VI.—*Colonial.*—Governors of British  
 Colonies.

Part VII.—*Parliamentary.*—General Index  
 to the Acts of the last Session, alphabetically  
 arranged—Analysis of the 97 Acts passed in the  
 2nd and 3rd Victoria—Table of Local and Per-  
 sonal Acts, and concludes with

THE DIARY.

## COURT OF EXCHEQUER.

Sittings in Equity before LORD ABINGER in Hilary Term, 1840.

Monday	Jan. 13	-	-	Petitions and Motions.
Wednesday	" 15	-	-	Causes.
Saturday	" 18	-	-	{ Pleas, Demurrers, Exceptions, and Further Directions.
Tuesday	" 21	-	-	
Saturday	" 25	-	-	{ Pleas, Demurrers, Exceptions, and Further Directions.
Wednesday	" 29	-	-	
Thursday	" 30	-	-	Causes.
				Petitions and Motions.

## NEW POSTAGE ORDERS.

*Continued from p. 176.**General Post Office, Jan. 7, 1840.*

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At the Post-office in St. Martin's-le-Grand, they will be received after 10, and up to 11 p.m. on payment of a fee of one penny, and after 11 up to 11 30 p.m. on payment of a fee of 6d. The box and the window will be closed at Lombard-street immediately after the striking of the clock.

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By Command,

W. L. MABERLY, Secretary.

*General Post Office, Jan. 6, 1840.*

On and after the 10th instant, Deeds above the weight of sixteen ounces will be permitted to be forwarded by post, if sent open or in covers open at the sides, so that it may be clearly ascertained by postmasters that the packets transmitted are deeds. There will be no objection to their being tied up with string and sealed, in order to prevent inspection of the contents, though they must be open at the sides, that it may be seen they are entitled to the privilege.

By command, W. L. MABERLY, Secretary.

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# The Legal Guide.

[ SATURDAY, JANUARY 25, 1840.

[No. 18.

## PRIVILEGES OF THE HOUSE OF COMMONS.

Extensions, at different times, set the Houses of Parliament to certain privileges, placing them above the law, and are the more familiarly known by the name of their having of late been a subject of discussion by a new and extraordinary claim, asserted on behalf of the House of Commons, to publish libels through their agents. The natural course of this power is, that it increases gradually until it becomes a tyranny, and creates resistance which it overcomes. The tendency of Parliamentary privilege to overthrow all law, and establish an unbearable tyranny on its ruins, is in our history to have become a lesson, that a check was soon provided to its further progress; and we accordingly find that in former times pretensions were advanced, and generally allowed, by the two Houses, which they afterwards obliged to abandon. Notwithstanding the power of issuing what orders they pleased, and taking whatever steps they thought fit in their collective capacity, they were at one period held, and were by the Judges to hold, that their members were clothed with extraordinary powers as private individuals; they were exempted from all arrests for debts, but

their servants were set equally above the law, and every Member's house enjoyed the privilege of sanctuary, which is now confined to the Royal Palaces. So there are repeated instances of the Commons deciding questions of property between their Members and strangers, and punishing the latter, without any hearing, for disputing the title of Members; a proceeding so despotic, absurd, and barbarous, as cannot probably be matched in the history of any other assembly in the civilized world. But these and other extravagant claims, although acted upon within the last 70 or 80 years, have since been silently abandoned, and, excepting the freedom from arrest for debt enjoyed by individual Members, no privilege is claimed beyond the walls of Parliament, except for the acts of the two Houses themselves in their collective capacity. Even the extravagant claims of the Houses have begun to be restrained within narrower bounds than they acknowledged in more ancient times; but of late years, especially since the controversy arising out of Sir Francis Burdett's publication in 1810, a disposition has seemed to be once more spreading in favour of high-privilege doctrines; and some men have professed themselves their champions, as if they thus furthered the cause of popular rights. The accession of power gained by the democratic part of the constitution, by the late Reform, has increased this inclination to stickle for

extreme rights, and in 1831 a new and unheard of claim was asserted by some Members of the Lower House to be free from the jurisdiction of Courts of Justice in offences of a very grave nature, namely, those contempts which obstruct the whole course of justice. Mr. Long Wellesley, in 1831, raised a Privilege question with the Court of Chancery: he had been ordered by a decree of that Court, affirmed afterwards on appeal in the House of Lords, to give up the custody of his infant children, wards of the Court; he violated the order, took away the infants from those appointed to take charge of them, and removed them, beyond the jurisdiction of the Court, to France. He came into Court, when asked to attend, and declared that he refused to bring them back, or give them up. The Lord Chancellor immediately committed him for this contempt to the custody of the Serjeant-at-Arms. Mr. Long Wellesley moved for his discharge; the question was rested upon his Privilege as a Member of Parliament; some Members of the House took it up, a Committee was appointed, precedents were searched for, and a Report was made that there was no such Privilege. This attempt of Mr. Wellesley, and of those who supported him in the House of Commons, thus signally failed. But the circumstance of its meeting with any support was sufficiently striking, and seemed to show that there existed a disposition to revive antiquated claims of Privilege, and even to carry the pretensions of immunity from the laws of the country, on the part of Members of Parliament, farther than they had ever, in the worst times, been pushed. Accordingly, the defeat of 1831 did not prevent a renewal of the conflict; for, in 1836, Mr. Lechmere Charlton, being a suitor in the Court of Chancery, as well as a Member of the House of Commons, grossly insulted, first a Master in Chancery, and then the Lord Chancellor, both acting in their judicial capacity; and when com-

mitted to the Fleet for his offence, as a matter of course threw himself upon the protection of the House, whose Privileges he counted to be violated in his person. The usual notification of his imprisonment had been made to the Speaker; a form always observed by way of testifying respect for the House, and accounting for the imprisoned Member's absence. It is, indeed, a form which would be observed were a Member committed by a magistrate for a robbery; nor, it may be observed, is there a single argument ever urged in favour of Privilege which would not serve as a pretence for allowing all the Members of both Houses to rob and murder with impunity on the highway.—A Resolution having been taken in 1836 to *publish for sale the papers of the Commons*, and in the genuine spirit of retail dealing to give 'the trade,' as it was with technical felicity of phrase termed, the benefit of a discount, the Parliamentary shopkeeper was found selling libels against the character of individuals. An action was brought for the published slander, and the defendant set up the authority of the House as his protection against answering for the wrong committed. The eminent Judge before whom this question was raised performed his duty as faithfully and as firmly as might have been expected from him who had at the bar and in the senate made the name of DENMAN illustrious for uncompromising integrity and unflinching defiance to the favours of power. He who had so often scorned the assaults of authority, which was lawful in its constitution although perverted to purposes of oppression, might well be supposed incapable of abating one jot of his resistance, when the threats proceeded from the perpetrators of a lawless usurpation. He bravely told the Commons that the law which he was sworn to administer knew of no Privilege to commit crimes, and he drew the party to another defence. On that defence he prevailed; but new actions being

the House of Commons again appointed a committee to inquire, and an elaborate report was produced and adopted by the House. The report which has ever since been the stock of all rational men for the support of its conclusions, the illogicality of its reasonings, the self-destructive character of its successive positions, and the gross inconsistencies of its sin-happy and scarcely grammatical language. It, however, asserted plainly its pretension, and that was the right to make whatever law it chose on all subjects, and to assume, without the vote of its own, any right whatever. It further declared all who disputed its pretensions, or acted, judicially or otherwise, in opposition to its claims, to be guilty of Contempt of Privilege. Nothing, certainly, more high, or more mighty, or more imposing than the tone of these Resolutions. But it was soon found to be a mere puff and pitch, that it could not be maintained above eight-and-forty hours; for a short interval of triumph of bluster had elapsed, the gentle and unobtrusive note of submission was again heard. The Lord Chief Justice had previously declared in the House of Commons that he should utterly disregard the Resolutions, and when the question arose in the next day, what course should be taken in the actions brought against their opponents, it was deemed expedient to forgo, and entirely, the famous Resolution of the day before yesterday, and at the Attorney-general should defend the actions in the Court of Common Bench; thus submitting the question of Privileges to the decision of the Court, with which they were in open opposition. But which but two days before they had claimed guilty of a contempt if it entertained the question. — Lord

## PRIVILEGES OF THE HOUSE OF COMMONS.

JUDGMENT pronounced by the CHIEF JUSTICE of NEWFOUNDLAND in the Chambers, Aug. 13, 1838, upon the application of EDWARD KEILLY, to be discharged from custody under the Writ of Habeas Corpus, he having been committed by the Speaker's Warrant for an alleged Breach of Privilege.

This was an application by the prisoner to be discharged, under a *habeas corpus*, from the gaol of this town, to which he had been committed by virtue of a warrant to the sheriff from the Speaker of the House of Assembly of the island, for an alleged breach of the privileges of the House. The questions, therefore, which present themselves to my mind are—1st, what are the privileges of the House of Assembly? 2dly, Have they the power of punishing summarily for a breach of their privileges by imprisonment? And 3dly, if it cannot be clearly shown that they have such power, whether the warrant in the present case is a legal and valid document for the detention of the prisoner?

As to the first question, I am given to understand that the House of Assembly here assume to themselves the privileges of the Imperial House of Commons, and claim to exercise the like powers of punishment for a breach of those privileges, and that upon this plea they have exercised the power of punishing the prisoner on the present occasion. This, therefore, leads me in the first instance to examine briefly into the nature and origin of the privileges and powers of the Imperial Parliament, and more especially those of the House of Commons, before inquiring for the authority upon which those privileges and powers are claimed for the House of Assembly.

Every one who has sufficiently read the history of our mother country, well knows that anciently the two Houses of Parliament sat together, and formed what then and after their separation was, and still is, called the High Court of Parliament—a court of the remotest antiquity, of the highest dignity, and of the most unlimited power and authority within the realm. Its laws, customs, and usages, which Sir Edward Coke and all the old writers style the *lex et consuetudo Parliamenti*, were from the earliest times held and considered to be part of the law of the land, and in that respect a part of the common law; and at the time of the separation of the two Houses, which was as early as the 49th of Henry III., the privileges enjoyed and the functions uniformly exercised by each branch of the Legislature, were, in the opinion of Lord Ellenborough, by a for-

mal act at the time of their separation, statutely assigned to each.

If not the whole, the greater part, therefore, of these laws, customs, and usages are coeval with the common law. They have from time to time been expressly altered and varied by acts of the Legislature for that purpose, and are to be found in the "rolls of Parliament," in "precedents and records," and "continual experience of the customs of Parliament." It therefore appears, that the law of Parliament was not originally one uniform code, but has been added to, and altered from time to time; that many of the powers and privileges of the two branches of the Legislature have at various times been doubted, resisted, and debated, and have been exercised only upon their being clearly ascertained to be a part of the ancient and undoubted usage and custom of Parliament. But the House of Commons have never claimed, nor has any one been hardy enough on their behalf to claim, the power by their own resolution of making that a privilege which before was no privilege. Neither are their privileges arbitrary and undefined, vague and uncertain, but where doubts arise are discoverable by "examining the records of Parliament," and inquiring "what was claimed and allowed in similar instances in former times," precisely in the same manner as the common law is constructed by the judges of the several courts of law. It does not precisely appear at what time the House of Commons first convicted for contempt, as in the nature of a breach of privilege; and Mr. Hatsell mentions that up to the time of Henry the Seventh, the Commons had never proceeded as for a breach of privilege upon their own authority.† It is now, however, and indeed always has been, clear law, that the House of Commons does lawfully possess the power of commitment for contempt, as in the nature of a breach of privilege—a power recognized by statute as having been anciently exercised by them—equally applicable to the House of Lords, for they are one and the same in this respect—the grand council of the realm divided into two different parts, and carrying with them those powers which they collectively exercised before their separation. Upon a *habeas corpus*, therefore, to discharge one committed by the House of Commons for contempt, it has been adjudged and decided in satisfaction of that part of *Magna Charta* which directs that no man shall be imprisoned but by the lawful judgment of his peers, or by the law of the land, and of the 28th Edward III., that no man shall be taken or imprisoned without being brought in to answer by due process of the law, that the *lex et consuetudo Parliamenti*—the

law of Parliament—is part of the law of the land equally with the common and statute law.

I come now to the most important consideration—namely, does the House of Assembly of this island possess the powers and privilege acknowledged as belonging to the House of Commons, and more particularly the power of punishing summarily by imprisonment for a breach of privileges, as in the present instance? Upon this point let us look at the origin of our local Legislature. It is, as is well known to all of us, but some five or six years since it first commenced to exist, by virtue of a commission from his Majesty to the governor of the colony, empowering him to convoke general assemblies from among the inhabitants of the island, who, in conjunction with the governor and council, were to make laws and ordinances for the good government of the colony, not repugnant to the acts of the Imperial Parliament. But is there in this charter contained any thing which erects the House of Assembly of the island into a body with the same power and authority, and possessing the same rights and privileges as the Imperial House of Commons? There is not. Is there a statute or act of the Imperial Parliament which defines their rights, powers, and privileges, and declares them to be, within their jurisdiction, equal in power with the House of Commons? There is none. Whence, then—by what authority, and from what source, do they derive the power which they have exercised on the present occasion? I am given to understand that it is by analogy to the House of Commons and the Assemblies of other British colonies—that because the House of Assembly is the representative branch of the local Legislature, it is therefore necessarily invested with all the privileges and powers acknowledged as belong to the House of Commons, as well as the customs and usages of the Houses of Assembly of other colonies. I myself have heard not only this doctrine, but that even of the power of inflicting corporal punishment, broadly asserted by members of the House of Assembly. Let us examine into this colony is one of those provincial establishments, the constitution of which, according to Blackstone, "depends on the respective commissions issued by the Crown to the governors and the instructions which usually accompany these commissions, under the authority of which provincial assemblies are constituted, with power of making local ordinances not repugnant to the laws of England." So far, then, the assembly is not equal in power, even within the colony, to the Imperial Parliament, to which as well as all other legislatures in the Queen's dominions, is subordinate, whose constitution is yet liable to alteration by the sovereign power which granted it, and whose existence may,

\* Lord Coke, 4th Inst. 50.      † 1 Hat. 51.

Parliament, at any time be terminated. The House of Assembly does neither by conjunction with the Council form a report; neither do the Council and together, nor does either separately part of Judicature; nor does it possess of impeachment—one of the highest of the House of Commons, which may commit even for a crime in order to prevent. The House of Lords, as is the highest court of record, and supreme appellate jurisdiction within but does the Council of this island—branch of the Legislature—in the whatever exercise analogous powers? powers and privileges claimed to be the House of Assembly on the present should, for the like reason, apply the Council, from its analogy to the Lords. It is true there are here three the Legislature, in imitation of the parent, and somewhat similar forms in the passing of bills are observed; this it is absurd to talk of analogy is no resemblance of origin, constitutions. Indeed, it is not long since the Government, upon view of the Parliament which the Legislature had itself, disallowed the title as wholly and if under the name of Parliament might have claimed to exercise of the Imperial Parliament, this Government has prevented them doing

I will refer as conclusive upon this the opinion of Lord Camden—a lawyer of learning and ability, who was Solicitor-General, Chief Justice of the Court of Common Pleas, and Lord Chancellor of England—it is well known favoured popular during the war of the revolted Americans sided with colonial pretensions. the exercise of rights by the colonial is supported by arguments drawn from the rise of the like rights in the House of Commons, he says—"The constitution of the House of Commons (that is, the House of Assembly of the Colonies) differ fundamentally from the House of Commons; our House of Commons has its own laws, the *lex Parliamenti*; the Colonies in the colonies are regulated by their respective charters, usages, and the common law of England, and will never be allowed those privileges which the House of Commons is entitled to justly here, upon principles which can nor must be applied to the Colonies." And again he says—"the disposition of the Lower House of Commons themselves any privilege which the House of Commons enjoy here, his

lordship (Lord Baltimore) should resist all such attempts, where they are unreasonable, with firmness, and should never allow any encroachments to be established on the weight of that argument singly; for I am satisfied that neither the Crown nor the Parliament will suffer those assemblies to erect themselves into the power and authority of the British House of Commons."

Let us now inquire into the legality of exercising the power of punishing summarily by imprisonment for contempt, as in the nature of breach of privilege, upon the ground that a similar power is exercised by the legislatures of other colonies. The constitutions of these colonies, as has been shown, are not alike, but depend upon the terms of the respective commissions under which they were granted, and indeed those of the old American colonies were greatly dissimilar to each other. In some of them the councils at least were courts of record, possessing various powers of judicature; but if in any of them (Nova Scotia for instance) the power of punishing by imprisonment for breach of privilege is exercised by the House of Council, it is not necessarily because the House of Assembly exercises the same power, nor of any inherent right in the Assembly to exercise such power. It may then be that in such colony they originally enacted and declared by a law what the rights and privileges of the several branches of the Legislature were, and conferred upon them the power of punishing summarily for a breach of those privileges. The most probable foundation for the exercise of such a power is long practice not questioned in the first instance, and after lapse of time and repeated exercise grown into usage, and recognized perhaps by the courts of law. If so, such power became to be, as regards such colony, in some respects part of the law of the land. But will any one say that such an usage can be pleaded as having any force in this colony, and that if it have ever grown into law in the colony where it obtains, it can be said to be the law of the island a whit more than their statute of distribution, or for the release of dower, or any other act of the local Legislature of such colony can be held to be in force as the law of this island?

(To be continued.)

### PROBLEM XIII.—Vol. 3.

#### WRIT OF SUMMONS.

Describe this Writ? What are the requisites of this process and the proceedings to compel an appearance where the defendant can be served?

• Chalmers's Opinions.



TO THE EDITOR OF THE LEGAL GUIDE.

### ANSWER TO PROBLEM V. VOL. III.

#### FIERI FACIAS.

What is this writ? When, where, and how, is it executed? What sort of property may be taken and how disposed of?

The answer to this Problem may for the sake of perspicuity be more conveniently divided into four parts.

Firstly, The writ of *fiery facias* is a judicial writ of execution which lies where the judgment is for debt or damages recovered in the Queen's Courts, by which writ the Sheriff is commanded to levy the debt and damages of the goods and chattels of the defendant; see F. N. B. 152. This writ, though mentioned in the Stat. of H. 2 and 13 Edw. 1. c. 18, is a writ of execution at common law, and is called a *fiery facias*, because the words of the writ directed to the Sheriff are *quod fiery facias de bonis et catallis*, and from these words the writ takes its denomination, Co. Litt. 290 b.

Secondly, This writ may be sued out as soon as final judgment is actually signed, but not before; (*Stamp v. Kinsey*, 2 Shaw, 494.) And it may be sued out at any time within a year and a day after the judgment is signed, (*Simpson v. Gray*, Barnes. 197.) It may be directed to any sheriff or returning officer, in England, (*Price v. Jackson*, M. & Selw. 442.) It may also issue into Wales, and directed to the sheriff of the county, see 11 G. 4. & 1 W. 4. c. 70, s. 13. It may also be issued into the county Palatine of Lancaster. 2 Saund. 193; but it must not be directed to the Sheriff of the county, but to the Chancellor or his deputy, (*Bracebridge v. Johnson*, 3 Moore, 237.) As regards the County Palatine of Chester since the 11 G. 4. & 1 W. 4. c. 70, s. 13, it is directed to the sheriff of that county; and this writ cannot be executed in any other county than that to the sheriff of which it is directed, and if it is re-

quired to have execution of the goods of the defendant which are in a different county from that in which the venue of the action was laid, it must be a testatum.—(See *Archb. Pr. 6 Ed. by Chitty*, 577.)

Thirdly, It may be executed at any time before it is returnable, and even at any time on the day on which it is returnable, if made returnable on any particular day (*Maud v. Barnard*, 2 Burr. 812.) Although it was formerly holden that it must have been done before the rising of the Court on the return day, and not afterwards (*Dyke v. Blackstone*, 2 Ld. Raym. 1449), it may be executed either by day or night (2 Ord. 436.); and on any day except Sunday; and the same sheriff who begins the execution of the writ must end it, although he go out of office before the sale, (*Clerk v. Withers*, 1 Salk. 323.) The sheriff may enter the house of the defendant, when the outer-door is open, to seize the goods of the defendant, and this though his goods may not be there if there is reasonable ground for suspecting that there were goods of the defendant there (*Semayne's case*, 5 Rep. 92.); and he may also enter the house of a third person to execute this writ, if the defendant's goods be actually there; otherwise he cannot, (*Johnson v. Legh*, 1 Marsh. 565.) But the sheriff cannot break open any outer-door (*Buckingham v. Francis*, 11 Moore, 40) of the particular dwelling-house in order to execute the writ of execution. (*Semayne v. Gresham*, Moore 668.) But even if the sheriff exceed his duty by breaking open the outer-door, this would not vitiate the execution, but render the sheriff liable to an action of trespass. 5 Co. 93 a.

Fourthly, By the writ of *fiery facias* the sheriff has authority to seize and sell all the personal chattels belonging to the defendant he can find, (3 Co. 12.) And if the defendant die after execution is sued out, the writ may, it seems, notwithstanding be executed on the goods in the hands of the

3 Wils. 399. And corn growing, as to the executor, may be seized, see, M. T. 702. Before the passing of 2 Vic. cap. 110, the sheriff could not take money found in the defendant's (9 East, 48.), or bank-notes *v. Criddle*, M. T. 1807, K. B.) could have been taken in execution which could not have been sold, as *Francis v. Nash*, T. T. 3.) But since the passing of this act, the sheriff is empowered, under the 12th of the act, by virtue of the writ of *sequestratio*, to seize and take any monies or (whether of the Governor and of the Bank of England, or of any or bankers,) and any cheques, change, promissory notes, bonds, or other securities for money, to the person against whose effects of *fiari facias* shall be sued out. in execution of the writ enters remises in which the defendant's and by seizing part in the name e, is a good seizure of the whole *ries*, 1 L. Raym. 724.) He then tioneer to make an inventory of and to remove and sell them. The not keep the goods himself and laintiff his debt (Noy, 107), nor m to the plaintiff in satisfaction t, as may be done on an *elegit* *Sampson*, 2 Vent. 95). But they d if the defendant do not imme- sify the plaintiff for the debt, costs, es.

J. M.

## Imperial Parliament.

OF LORDS.—January 22.

### FRANCHISEMENT OF COPYHOLDS.

UGHAM said, in pursuance of a ge- he had given, he had to lay on the portant measure which had been ast year, viz. a measure for the en-

franchisement of copyhold tenements. It was his intention to refer it to a committee upstairs, and on making that motion to-morrow he would state the points upon which this bill differed from that of last year.

The Bishop of EXETER said, that as this was a measure which would affect in some degree ecclesiastical property, he hoped the House would have an opportunity of considering it.

Lord BRO GHAM.—Certainly; the bill will be printed to-morrow.

The bill was then read a first time, and ordered to be printed.

## HOUSE OF COMMONS.—Jan. 17.

### PETITION OF MESSRS. HANSARD.

John Joseph Stockdale was examined, also William Hemp, the sheriff's officer, who produced the warrants directed to him by the sheriff.

Wm. Evans and John Wheelton, Esqrs., Sheriff of Middlesex, were also examined, and produced the following notices:—

Westminster, 21, Great George-street,  
14 Nov. 1839.

Stockdale v. Hansard and Others.

Gentlemen,—We beg to recall your attention to the notice and the copy of the resolutions of the House of Commons annexed, and with which you were served on the 4th inst. As since that service, and notwithstanding the same, you have thought fit to execute a writ of inquiry, we give you notice, on behalf of the defendants, not to return the said writ; nor deliver the same to the plaintiff, nor take any further proceedings under it; and we warn you that in the event of any such further proceedings being taken by you in this cause, your conduct in that respect will be represented in due manner to the House of Commons.

We are, Gentlemen,

Your obedient servants,

(signed) PARKES & PRESTON,  
Solicitors to Messrs. Hansard.

To the High Sheriff of the County of Middlesex, his Under-sheriff, the Deputy Under-sheriff, and to all other persons whom it may concern.

21, Great George-street, Westminster,  
4 Nov. 1839.

Stockdale v. Hansard and others.

Sir,—The defendants herein having received notice that a writ of inquiry of common in this cause will be executed on 12th November inst. we deem it

behalf of Messrs. Hansard, to give you notice, that this action is brought for the alleged publication of certain papers by order or under the authority of the House of Commons, of whose resolutions, in relation to publications by its authority, we send you copies on the other side, and we at the same time warn you, that in the event of your being a party to any proceedings relating to the execution of the above writ of inquiry, your conduct in that respect will be represented in due manner to the House of Commons, and that you will become amenable to its authority, as expressed in the said resolutions.

We are, sir,  
Your very obedient servants,  
PARKES & PRESTON,  
Solicitors to Messrs. Hansard.

The High Sheriff of the County of Middlesex.

*Resolutions of the House of Commons,  
30th May, 1837.*

" 1. That the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially of this House, as the representative portion of it."

" 2. That by the law and privilege of Parliament this House has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit, or other proceeding, for the purpose of bringing them into discussion or decision before any court or tribunal elsewhere than in Parliament, is a high breach of such privilege, and renders all parties concerned therein amenable to its just displeasure, and to the punishment consequent thereon."

1st August, 1839.

" 1. That Messrs. Hansard, in printing and publishing a Report and Minutes of Evidence on the present state of the Islands of New Zealand, communicated by the House of Lords to this House on the 7th of August, 1838, acted under the orders of this House, and that, to bring or assist in bringing any action against them for such publication, would be a breach of the privileges of this House."

" 2. That Messrs. Hansard be directed not to answer the letter of Charles Shaw, mentioned in their petition, and not to take any step towards defending the action with which they are threatened in the said letter."

*Great Turnstile, Lincoln's-Inn-Fields,  
28 Nov. 1839.*

Gentlemen,—A writ of *feri facias* in the suit of John Joseph Stockdale against us being executed by you on our premises, as printers of the House of Commons, notwithstanding the notice you have already received of the resolutions of the House of Commons to the contrary, and you being now in possession of our types and presses, and other property, and threatening to levy thereon to the amount of £618. 15s., with other costs, we hereby give you formal notice of the resolutions of the House of Commons, in relation to publications by its authority. We enclose you copies of those resolutions, and we warn you that, in the event of your further promoting or carrying on such proceedings, or persisting in the sale of our effects, your conduct in that respect will be represented in due manner to the said House, and that you will become amenable to its authority, as expressed in the said resolutions.

We are, Gentlemen,  
Your obedient servants,  
(signed) JAMES HANSARD,  
LUKE G. HANSARD,  
LUKE JAMES HANSARD.

To the High Sheriff of the County of Middlesex, his Under-sheriff, the Deputy Under-sheriff, to William Hemp, Bailiff, and to all other persons whom it may concern.

N.B.—Annexed to this letter were contained the resolutions of the House of Commons, dated 4th November, 1839.

*Stockdale v. Hansard.*

*London, Great Turnstile, 14th Dec. 1839.*

Gentlemen,—We have caused you to be served with several communications in this cause, giving you notice that this action is brought in violation and contempt of the privileges of the Commons of the United Kingdom in Parliament, and warning you against acting in aid and furtherance of such breach of privilege, as you would thereby render yourselves liable to censure and punishment by the House of Commons; and notwithstanding you have altogether disregarded such notice and warning, and acted in defiance thereof, we deem it right to repeat such notice and warning, and to require you to desist from making the sale which you have advertised of our property, and to give you further notice that if you persevere in making such sale, complaint will be made to the said House against you, and all others concerned in aiding you therein: and further, we require you not to part with the proceeds of any sale which

think fit to make; and we warn you that hereafter be required to restore to us the defendants; and we intimation to be made to you, that in parting with such proceeds (think fit to do so) at your peril, knowledge of the probable consequences. We beg again to hand you the resolutions of the House of Commons to this action, and the substance thereof, and to direct your serious attention thereto. By searching the Journals of the House, you may satisfy yourselves of the copies we hand to you. We are, Gentlemen,

Your obedient servants,  
(Signed) JAMES HANSARD,  
LUKE G. HANSARD,  
LUKE J. HANSARD.

The Sheriff of the county of Middlesex, Under-sheriff, the Deputy Under-sheriff, William Hemp, Bailiff, to Mr. Cook, Auctioneer, and to all other persons whom it may concern.

In pursuance of this letter were the resolutions of the House of Commons passed 4th Nov. 1839.

Evans and John Wheelton, Esqrs. in.

SPEAKER.—I am desired by the House of Commons, that if you have any thing to submit to the House, the House is ready to hear you.

Mr. Evans.—We certainly wish to have an opportunity to express that if, in the discharge of our painful duty, we have done anything which has incurred the displeasure of the honorable House, we certainly deeply

regret it. [The House was ordered to withdraw.]

20th January.

Motion made, and question proposed,—That it appears to this House that execution has been levied in the case of Stockdale v. Hansard, has been levied to the amount of £640. by the property of Messrs. Hansard, in contempt of the privileges of this House, and the money now remains in the hands of the Sheriff of Middlesex:—(Lord John Russell:—) Amendment proposed, to leave out the word “that,” to the end of the question, and to add the words “it appearing to this House that an action has been brought against Messrs. Hansard and others, for the contempt of this House, under an order of the House, that certain papers containing libellous statements of John Joseph Stockdale, and that the money has been obtained and execution

issued by due course of law against the said James Hansard and others in such action, it is expedient that the said James Hansard and others be indemnified against all costs and damages by them sustained in respect of such action; and that in case any action or actions being hereafter brought for the publication of any papers under the order of this House, the Attorney-General be instructed to defend such action, and to report thereupon to the House.” instead thereof:—(Mr. Kelly:—) Question put, “That the words proposed to be left out stand part of the question:”—The House divided—ayes 205, noes 90.

Motion made, and question proposed,—That the said Sheriff be ordered to refund the said amount forthwith to Messrs. Hansard:—(Lord John Russell:—) Amendment proposed, to leave out from the word “That” to the end of the question, in order to add the words “John Joseph Stockdale be called to the bar of this House,” instead thereof:—(Capt. Boldero:—) Question proposed, “That the words proposed to be left out stand part of the question:”—Amendment, by leave, withdrawn.—Main question put:—The House divided—ayes 197, noes 85.

Motion made, and question proposed, “That William Evans, esquire, and John Wheelton, esquire, Sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant-at-Arms attending this House, and that Mr. Speaker do issue his warrant accordingly:”—(Lord John Russell:—) Whereupon, motion made, and question put, “That this House do now adjourn:”—The House divided—ayes 86, noes 189.

Motion made, and question put,—“That William Evans, esquire, and John Wheelton, esquire, Sheriff of Middlesex, having been guilty of a contempt and breach of privileges of this House, be committed to the custody of the Serjeant-at-Arms attending this House, and that Mr. Speaker do issue his warrant accordingly:”—The house divided—ayes 195, noes 94.

Motion made, and question proposed,—“That Thomas Burton Howard do attend this House this day:”—Whereupon, motion made, and question put,—“That this House do now adjourn:”—The House divided—ayes 39, noes 113.

Motion made, and question proposed,—“That it appears to this House that execution in the cause of Stockdale v. Hansard, has been levied to the amount of £640. by the sale of the property of Messrs. Hansard, in contempt of the privileges of this House, and that such money now remains in the hands of the Sheriff of Middlesex:”—(Lord John Russell:—)

Amendment proposed, to leave out from the word "That" to the end of the question, in order to add the words, "it appearing to this House that an action has been brought against James Hansard and others, for the publication by them, under an order of this House, of certain papers containing libellous matter upon John Joseph Stockdale, and that judgment has been obtained and execution issued by due course of law against the said James Hansard and others be indemnified against all costs and damages by them sustained in respect of such action, and that in case of any action or actions being hereafter brought for the publication of any papers under the order of this House, the Attorney-General be instructed to defend such action, and to report thereupon to the House," instead thereof:—(Mr. Kelly:)—Question proposed,—“That the words proposed to be left out stand part of the question:”—

PETITION OF JOHN JOSEPH STOCKDALE.

The Petition of John Joseph Stockdale, humbly sheweth, That your petitioner is a prisoner in the custody of your Serjeant-at-Arms, by your order, made, as your petitioner believes, under an erroneous impression, induced by answers elicited from your petitioner to questions calculated to criminate your petitioner, without a subsequent opportunity (afforded to others) of remarks in vindication or explanation of said petitioner's conduct.

Your petitioner therefore humbly implores your honourable House to allow your petitioner further examination and statement, by which it must appear to the satisfaction of your honourable House, that your petitioner never contemplated, nor has been guilty of, any breach of the privileges of your House.

And your petitioner, as in duty bound, will ever pray, &c.

JOHN JOSEPH STOCKDALE.

*Prison Cell, House of Commons,  
18th January, 1840.*

21st January.

Question put:—The House divided; ayes 205, noes 90:—Main question put and agreed to.

Resolved—That it appears to this House that execution in the case of Stockdale v. Hansard, has been levied to the amount of £640. by the sale of the property of Messrs. Hansard, in contempt of the privileges of this House, and that such money now remains in the hands of the Sheriff of Middlesex.

Motion made, and question proposed,—“That the said Sheriff be ordered to refund the said amount forthwith to Messrs. Hansard:—(Lord John Russell:)—Amendment

proposed, to leave out from the word “That” to the end of the question, in order to add the words “John Joseph Stockdale be called to the bar of this House,” instead thereof:—(Capt. Boldero:)—Question proposed, “That the words proposed to be left out stand part of the question;”—Amendment, by leave, withdrawn.—Main question put:—The House divided—ayes 197, noes 85.

Resolved—That the said Sheriff be ordered to refund the said amount forthwith to Messrs. Hansard.

Ordered—That Will. Evans and John Wheelton, esquires, Sheriff of Middlesex, be not called to the bar, and that Mr. Speaker do communicate to them the said Resolutions of this House.

Sheriffs called in.

Motion made, and question proposed,—“That William Evans and John Wheelton, esquires, Sheriff of Middlesex, be forthwith brought to the bar, and discharged:” (Mr. Kelly:)—Amendment proposed, to leave out from the word “That” to the end of the question, in order to add the words “the order of the day for resuming the adjourned debate upon the question (20th January) ‘That William Evans, esquire, and John Wheelton, esquire, Sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant-at-Arms attending this House, and that Mr. Speaker do issue his warrant accordingly,’ be now read,” instead thereof:—(Lord John Russell:)—Question put, “That the words proposed to be left out stand part of the question;”—The House divided—ayes 99, noes 210.

Motion made, and question proposed,—“That William Evans, Esq. and John Wheelton, Esq. Sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the Serjeant-at-Arms attending this House, and that Mr. Speaker do issue his warrant accordingly:”—(Lord John Russell:)—Whereupon, motion made, and question put, “That this House do now adjourn:”—The House divided; ayes 86, noes, 189:—original question again proposed:—Amendment proposed, to leave out from the word “Middlesex” to the end of the question, in order to add the words “be allowed until the meeting of the House this day, to give their answer whether they will pay the money to Messrs. Hansard, pursuant to the order of this House, instead thereof:—(Sir Matthew Wood:)—Question proposed, “That the words proposed to be left out stand part of the question:”—Amendment, by leave, withdrawn:—original

again proposed:—debate arising:—  
turned till this day.

That William Evans and John Esqrs. Sheriff of Middlesex, do attend this day.

That Thomas Burton Howard do attend this day.

That Thomas France, Esq. do attend this day.

Made, and question proposed:—William Evans and John Wheelton, Sheriff of Middlesex, be forthwith the bar, and discharged:—(Mr.

Amendment proposed, to leave out the word "That" to the end of the question: to add the words "the order of resuming the adjourned debate

question [20th January], "That William Evans, Esq. and John Wheelton, Esq. Sheriff of Middlesex, having been guilty of a con-

breach of the privileges of this House, committed to the custody of the Arms attending this House, and

Speaker do issue his warrant accordingly read," instead thereof:—(Lord

Ill:—) Question put, "That the words proposed to be left out stand part of the question:—the House divided: ayes 99, noes 113:—original question put, and agreed to.

Ordered, That the petition of Messrs. Hansard be taken into further consideration this day.

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Motion made, and question proposed, "That Thomas Burton Howard be again called in, and that question be put to him:—question, by leave, withdrawn.

Motion made, and question proposed, "That Thomas Burton Howard do attend this House this day:—whereupon motion made, and question put, "That this House do now adjourn:—the House divided; ayes 39, noes 113:—original question put, and agreed to.

Ordered, That Thomas Burton Howard do attend this House this day.

Ordered, That the petition of Messrs. Hansard be taken into further consideration this day.

22nd and 23rd January.

Motion made, and question proposed,— "That the order of the day for the further consideration of the petition of Messrs. Hansard [presented 16th January], stating the progress and result of the action of Stockdale v. Hansard, be now read:—Amendment proposed, to leave out from the word "That," to the end of the question, in order to add the words,

"Copies of the warrants issued by Mr. Speaker for the commitment of John Joseph Stockdale, William Evans, esquire, and John Wheelton, esquire, Sheriff of Middlesex, be forthwith laid before this House," instead thereof:—(Mr. Thomas Duncombe:—) Question proposed,

"That the words proposed to be left out stand part of the question:—Amendment and motion, by leave, withdrawn.

Ordered,— "That copies of warrants issued by Mr. Speaker, for the commitment of John Joseph Stockdale, William Evans, esquire, and John Wheelton, esquire, Sheriff of Middlesex, be forthwith laid before this House."—(Mr. Thomas Duncombe.)

Mr. Speaker acquainted the House that copies of the said warrants were upon the table.

Order read, for further consideration of the petition of Messrs. Hansard [presented 16th January], stating the progress and result of the action of Stockdale v. Hansard.

Motion made, and Question proposed,— "That Thomas Burton Howard be now called to the bar:—Amendment proposed, at the end of the question to add the words "for the purpose of being forthwith discharged from further attendance on this house:—Question put, "That those words be there added."—The House divided—ayes 92, noes 210.—Main question put, and agreed to.

Thomas Burton Howard called in and examined, and then he withdrew; and being again called in, and further examined, stated, that, if he had incurred the displeasure of the House, he deeply and honestly regretted it —

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And being asked if he had any further statement which he wished to make to the House, stated, that if he could in stronger language apologize for any displeasure which he might have justly incurred, he would do it; and then he withdrew.

23rd January.

Motion made, and question proposed,—“That Thomas Burton Howard be discharged from further attendance upon this House:”—(Lord John Russell:)—Amendment proposed, to leave out from the word “Howard” to the end of the question, in order to add the words, “having been guilty of a contempt and breach of the privileges of this House, and having expressed his regret at having incurred the displeasure of this House, be now called to the bar of this House, and reprimanded by Mr. Speaker:”—(Mr. Attorney-General:)—Question put, “That the words proposed to be left out stand part of the question:”—The House divided—ayes 68, noes 178.—Words added:—Main Question, as amended, put, and agreed to.

Thomas Burton Howard accordingly called to the bar, and reprimanded by Mr. Speaker, as followeth:—

Thomas Burton Howard, I have to acquaint you, that the House has come to the following resolution:—

“That Thomas Burton Howard having been guilty of a contempt and breach of the privileges of this House, and having expressed his regret at having incurred the displeasure of the House, be now called to the bar, and reprimanded by Mr. Speaker.”

In pursuance of this resolution, I have further to acquaint you, that, whilst acting in the capacity of attorney to Mr. Stockdale, you caused a writ of inquiry to be executed, and a levy to be made upon the goods of Messrs. Hansard. You did that deliberately and advisedly, after having, according to your own admission, received notice of the resolutions of this House. I have to admonish you, that conduct of this description is a high contempt of the authority of this House, which ought justly to be visited with its severe displeasure.

The House, however, having taken into consideration the contrition which you have expressed, are disposed to deal leniently with you for this offence. I am directed by the House to reprimand you, and I reprimand you accordingly.

Ordered, *nemine contradicente*, that what has been now said by Mr. Speaker, in reprimanding Thomas Burton Howard, be entered in the journals of this House.

Motion made, and question proposed,—“That John Joseph Stockdale be forthwith

called to the bar, and reprimanded and discharged:”—Whereupon, motion made, and question proposed, “that the other orders of the day be read,” and withdrawn:—Original question withdrawn.

## Law Reports.

COURT OF QUEEN'S BENCH.—Dec. 21.

### Special Jury.

THE MERCERS' COMPANY v. HUDSON.

#### OBSTRUCTION TO LIGHTS. (a)

This action was brought to recover compensation for damage done to the plaintiffs' property in King's-arms-yard, Moorgate-street, by the erection of a new frontage towards the street so high as to obstruct the light and air from coming to the property in the rear. The defendant held from the City of London a lease of a slip of land running along Moorgate street, on which a clause in the lease had obliged him to raise the frontage complained of, which is but seven feet in depth at one end, and tapers away to two feet at the other. The issues to be tried were, first, that the new building obstructed the light, to the injury of the property behind; second, that it traversed the right to the ancient lights.

Mr. Nicholson, who occupies the premises of the Mercers' Company as a warehouse, was called, and deposed that the obstruction of the light had not been so material as to cause any inconvenience to him in carrying on his business.

Mr. Nicholson's shopman, on the other hand, deposed that the diminution of light had been very considerable.

Lord DENMAN, in summing up, said that to entitle the plaintiffs to a verdict, it was necessary that the obstruction should be proved to have been so material as to cause inconvenience. Nothing more had been proved than that at present there was somewhat less light than there had been at former time, but whether the light had been diminished by the new building was for the jury to determine.

The jury found for the defendant on the first issue, and for the plaintiffs on the second.

### Sittings in Banco.

STOCKDALE v. HANSARD.

JUDGMENT OF THE COURT upon the Rule obtained by the Plaintiff to show cause why the Sheriff of Middlesex should not pay over to him the amount of the Levy made upon the Defendant's goods, and sold under the Writ of Execution issued in this cause.

Lord DENMAN.—This is a rule, calling

(a) See *Smith v. Elger*, ante, Vol. II. p. 340.

to show cause why the money which was paid by them in a case of the plaintiff, against several defendants of the plaintiff, should not be paid over to the plaintiff. In that action, which was for libel, a judgment by default before last Michaelmas term, in which a writ of inquiry was granted, the jury assessed damages to a very great amount. On that the Sheriffs were returned on the writ. They said they could not pay. A writ of *venditioni exponas* was issued, to which the return was, that the defendant found buyers, had proceeded to pay, and had the money in their hands ready to pay in the manner as the Court might direct. In December. An application had been made to my brother Littledale, who had a view to nothing but the convenient discharge of his duty by the Sheriff, had given a return of the writ. An application was made to my brother Patteson for an order for payment of the money. We have conferred with him as to his reasons for making the order, and they turn entirely on the rules of the late rules, which do not give the Judge at chambers to make an order, which must, therefore, be made by the Court, consequently, referred the plaintiff to the Court. To that Court the plaintiff has come, and now to pronounce judgment, whether he should have this rule made absolute, and pay over damages and judgment, to have that judgment by due course of law. — prevent him having the fruits of that judgment. — Nothing that I can perceive. I do not know enough I may infer, that the House of Commons disapproves of the law as laid down by the House in the former case. If that be so, for reasons I most deeply lament it, but the House of Commons on a point of whatever manner the House may think fit, is not in coming to that opinion, is not at all averse for preventing the court of law from pronouncing judgment, or preventing the judges from enforcing those judgments of those of their fellow-subjects who are entitled to the benefit of them. Resolutions have been passed by the House on this subject. The first declared the Sheriff, by levying execution, had exposed himself to the displeasure of the House; but it had been cited to show that the mere incurring the displeasure of the House was any excuse to a Sheriff for not paying a writ directed to him in the ordinary course of the administration of justice. It was the resolution that the Sheriff had committed a contempt, but as nothing is stated in the allegation of contempt is founded, it possessed no means of ascertaining whether a contempt was committed or no. The second of the resolutions directed the money to be paid to the defendant, but he was at a loss to know how a resolution of the House of Commons could prevent any party from obtaining the rights to which he was entitled by law. The Court certainly must feel for the Sheriffs who were placed in so distressing a situation; but the Court could not prevent the legal consequences of the execution, except upon the production of a legal excuse. If the Sheriffs had returned to the writ, that they were prevented by the order of the House of Commons from paying the money, that return would be taken into consideration, and would probably be considered by the Court to be a bad and insufficient return. As the case stood at present, there seemed no reason at all why they had not paid over the money as soon as it had been received. With regard to the third resolution, by which the Sheriffs were committed to custody and deprived of their liberty, he made no comment upon it except in as far as it was connected with this rule; and in relation to that subject he should only say, that it was very possible that the Sheriffs may be in custody, and yet the plaintiff entitled to have the right which he claimed under the rule. If any discretion had existed in him upon the decision of this question, and if the liberation of the Sheriffs from their present distressing situation were to be at all dependent upon the result of the present application, he should long pause before he made the rule absolute, and thereby exposed them to further inconvenience. But he could not presume that injustice would be done to the Sheriffs by any other body, and even if unfortunately it should be otherwise, that would constitute no ground why the due course of law should be interrupted, and this writ not have its full and proper execution. The order upon them to refund the money had been made, and had been followed already by its consequences, and the making of the present rule absolute could therefore make no difference as to that point. It had been said by Mr. Kennedy that there was no precedent for such a rule as the present. But the reason why there was no precedent was, that unless in very special circumstances, the Sheriff never puts the plaintiff to the necessity of making such an application. In such a case the Court has no discretion. Its duty arises out of the relation between it and its own officer, who himself declares that he is ready to pay to the plaintiff the money which by the rule he is called upon to pay. Unless therefore some legal excuse for withholding it is produced, the Court cannot hold its hand and say that the plaintiff is not entitled to the benefits which he has acquired by his judgment. The noble and learned Lord stated that he should abstain from making any observa-



tions upon the variety of delicate and most interesting topics which had been mentioned in the course of the argument upon the subject of the jurisdiction of the House of Commons or the consequences of its allowance. He should confine himself strictly to the rules and practice of the Court as they affected the question under consideration, and in this view of the case he had no doubt whatever upon the question, and believed that the Court possessed no discretion, but were obliged, in conformity with the established course of their own practice, to make the present rule absolute.

Mr. Justice LITLEDALE was entirely of the same opinion. The sheriff having admitted he was in possession of the money, it was competent for the plaintiff to choose whichever mode he pleased to get at his money. The resolutions of the House of Commons did not appear to be sufficient to prevent the payment of the money.

Mr. Justice WILLIAMS said that he should, like the member of the Court who had delivered judgment before him, confine himself to the rules of practice as they affected the particular case. It was impossible not to perceive that the sheriff had brought the whole difficulty upon himself by his own neglect. He not only omitted to pay the money into court on the 19th of December, when he received it, but allowed the whole remainder of that month to elapse before he took any proceeding whatever. If the money had been paid into court, it would have been there for the benefit of the plaintiff, and would have been paid out as a matter of course, and every difficulty avoided in which the sheriff was placed at present. The cases of bankruptcy and awards which had been cited were not applicable to the present question, as in all those cases there was a dispute as to the property in the subject matter in question. But what mortal could doubt here that the money was the property of the plaintiff? This being so, and no case having been cited in which the application of *vis major* was held to be a sufficient excuse on the part of the sheriff for non-performance of the exigency of a writ directed to him, there was no legal reason why the rule should not be made absolute. It was certainly much to be regretted that the sheriffs should be placed in a situation of such difficulty and doubt; of that he should say no more, thinking it quite sufficient to touch upon the point. Of the other topics alluded to he should say nothing until they were brought forward by necessity and force; but, as in point of law, no cause had been shown against the rule, it ought, in his judgment, to be made absolute.

Mr. Justice COLERIDGE said that he so entirely agreed with the rest of the Court in the decision as well as in the grounds of it, that in any other case he should have contented himself

with briefly expressing his assent. This was an undefended action in which, after various delays a levy was made on the 19th of December, and from the very affidavit itself there appeared no reason why the money should not be paid on the 20th. The plaintiff's demand was satisfied by the levy, the defendant was discharged, and if the sheriff became a defaulter, the plaintiff would have had no remedy against the defendant. The present rule was obtained on the 11th of January and the first step taken by the sheriff was not until the 15th of that month. There were two modes of redress open to the plaintiff—that which he had adopted, or an action. As to the latter course, he (Mr. Justice Coleridge) agreed in what was stated by Mr. Platt, that it would lead to an interminable series of suits, which would be a complete disgrace to the administration of justice, and that it would be a gross dereliction of duty in the Court if they were to compel the plaintiff to have recourse to such a circuitous and ineffectual method of recovering money from an officer of the Court, who declared that he had it in his possession for the plaintiff's use, and ready to be handed over to him. He (Mr. Justice Coleridge), if allowed to refer to the difficulty and peril in which the sheriffs were placed, while their conduct was admitted by all parties to be without reproach, could say a great deal upon that subject. But it could not be forgotten that the sheriffs were the officers of the Court, and was their—the judges'—primary duty to see that the sheriffs, and all other officers, did justice to the suitors by procuring for them the fruits of the proceedings which they had instituted. The statement which had been made about the cases of bankruptcy and award might all be conceded, and yet it must notwithstanding be evident that the money here in question was undoubtedly the property of the plaintiff in the action. Of the action he should say no more at present than that until the judgment obtained in it should be reversed by a competent jurisdiction, it was for all purposes binding upon that Court, notwithstanding any opinions which might be expressed in another place; and that, therefore, this Court would now be guilty of abandoning their duty unless they made the present rule absolute.

RULE MADE ABSOLUTE.

#### IN RE THE SHERIFF OF MIDDLESEX.

Mr. Richards then asked for leave to move for a *habeas corpus* on the part of the Sheriffs.

Lord DENMAN said that the regular business of the Court must be proceeded with; the learned counsel might make the motion at the rising of the Court, if he pleased.

Jan. 23.

ards moved for a writ of *habeas corpus* directed to Sir Wm. Gossett, the Arms of the House of Commons, him to bring up the bodies of the in his custody, in order that the the course assigned for their might be enquired of by the Court law. ted accordingly.

#### AT AGAINST THE SERGEANT-AT-ARMS.

ards said that he did not know was a proper occasion for his another part of his application upon d intended to trouble the Court at in the event of their Lordships any reason any difficulty in granting *corpus*. What he alluded to was on for an attachment against Sir ssett, for having dared to take the custody in contempt of the au- is Court, and in obstruction of the justice, through the medium of writs.

MAN thought any discussion upon lication to be premature, as the Sir William Gossett could not be ed by the Court until they had the authority under which he act. The consideration of that application must, therefore, be il after the discussion upon the *habeas corpus*. rose immediately after granting on.

#### OF EXCHEQUER.—Jan. 15. Sittings in Banco.

WILLIAMS v. BRESFORD.

DISTRINGAS—*Distinction between lant being "not at home" and me."*

moved for leave to issue a writ of compel the appearance of the de- affidavits which showed, that ing been made at his residence in the 10th December last, the appli- d that he was at the Plough Inn, that the inquiry was resumed on the same month and five following he anow was made by the servant "from home."

in ALDERSON.—All that is quite ith the defendant's being actually

absent from home on business, and does not raise a necessary presumption that he is keeping out of the way to avoid service. There is a distinction being "not at home," and the de- fendant's being "from home."

Rule refused.

#### INSOLVENT DEBTORS' COURT.

Jan. 22.

CASE OF JOHN JOSEPH STOCKDALE.

The COURT ordered the rule obtained in this case (a) to be enlarged for a fortnight.

#### TRIAL OF JOHN FROST FOR HIGH TREASON. CHIEF JUSTICE TINDAL'S ADDRESS.

(Continued from p. 190.)

The witness then went on: he heard Frost say, "March!" and that the mob then moved down Charles-street. Now, here there was a discrepancy between this witness's statement and that of Coles, who said they came down Stows-hill; but how far one or the other was correct was not very material, as one or other might be mis- taken, as some might have dropped away from the general body and gone another way. But it was for the jury to say how far credit was to be given to these witnesses on this, which, after all, was only a collateral point. The difference on their evidence amounted to an incongruity rather than a contradiction, as might arise from any two persons giving an account of the same transaction. In the evidence of Thomas Brough it was said that the demand at the Westgate by the mob was "Surrender yourselves our prisoners!" This had been met by other evidence, and very properly, he thought, it had been conceded, that the words might have been "Surrender up our prisoners," and not "your prisoners." So far as the part of the charge related to an attack on the Westgate, it appeared that the first challenge was a demand by some one or other that the persons who were taken into custody during the night should be surrendered up to them, showing, as far as the evidence had yet been considered, a determination to get those persons out of custody, rather than a direct attack on her Majesty's troops. He did not think there was any evidence showing an earlier firing than the gun going off in the hand of Oliver: how that occurred hardly appeared, but it was said that the man's arm struck against the door, and thus caused the gun to go off. That, however, appeared to be the signal for firing the guns carried by the mob. The

(a) Ante, p. 190.

deposition of this witness before the magistrates was read, and a very proper mode that was of testing the credibility of a witness on the correctness of his memory. Oliver said then he heard the words, "Surrender yourselves our prisoners," and he saw a man act as the leader; but here in his examination he said the man whom he meant by the leader was the man who came to the door and summoned them; and he (the Lord Chief Justice) thought it very probable he might, in first using the term "leader," not mean the person having control over the mob, but the person who merely summoned them at the door. Daniel Taylor, in his evidence, spoke of the first man in the mob as "Rees the Fifer," and whether that was the same person as "Jack the Fifer," who two boys said they saw with a pistol in one hand and a pike in the other, there was no evidence to show. This man gave a similar account as the former one, as to the time when the firing commenced at the window of the room where the soldiers were, and, according to his statement, it began from the outside, and not the inside, and just at the moment simultaneously with the opening of the shutter at the time in question.

(To be continued.)

### COURT OF EXCHEQUER—Jan. 23.

#### ORDER.

#### Sittings in Banco.

#### BUSINESS OF THE COURT.

"The Court will hold sittings on Monday, the 17th of February, and proceed in disposing of the business now pending in the new trial paper on the same day and on the following days, namely, the 18th, 19th, 20th, and 21st days of February. And on the said 21st and on the 22d days of the same month, the Court will proceed in disposing of the business now pending in the special paper.

ABINGER,  
J. PARKE,  
E. H. ALDERSON,  
J. GURNEY,  
R. M. ROLFE."

#### NOTICE TO CORRESPONDENTS.

C. B.—S. A. W. has replied to your letter, which shall appear next week.

S. A. W. has been received.

A Constant Reader.—We eschew politics. You will find your question answered by referring to *Western's Commentaries*.

Alphonso.—We much wish that we could adopt your suggestion. The majority of our subscribers are however of a different opinion.

A. L.—N. S.—A Subscriber—J. W.—Anon. Lincoln—C. L.—W. A. T.—M. H.—all under consideration.

A. X.—Every affidavit *not* made for the immediate purpose of being filed, read or used.

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Vol. III. was published Dec. 1, with Tables of Contents, price 17s. Price of Vols. I & 2, £12. London: JOHN RICHARDS and Co., Law Bookellers, 194, Fleet-street.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, January 23, 1844.

# The Legal Guide.

[.] SATURDAY, FEBRUARY 1, 1840.

[No. 14.]

## SEPARATE USE.

We paid particular attention to this important question, and as it is now and we have been favoured with the writer's notes of the judgments, with the pleadings in the cause, to give our readers all the benefit of advantage. In doing this we beg attention to the letter we addressed to the Chancellor on the subject, and also of the judgment of the Master of the Rolls, in *Tullett v. Armstrong*, and to our satisfaction, not only that the established is in perfect accordance with what we diffidently took of the subject, so that we were correct in thinking so much importance was placed on a judicial opinion given by the Chancellor in *Massey v. Parker*. (a) Nowing is the judgment of the Master of the Rolls, which is now affirmed. In *Keen* is very unsatisfactory. (b)

OF THE ROLLS.—In this case claiming to be entitled to two annuities granted to him by the defendant, Armstrong, and Mary Augusta, his bill prays that an account may be taken of what is due to him for the arrears of annuities, and the same and payments thereof, may be paid of the rents and profits of the

freehold, leasehold, and copyhold estates, comprehended in certain indentures, dated the 16th of March, and 22nd of September, 1832, or if necessary that there may be a due execution of the trusts and powers of those indentures for the sale or mortgage of the said estates. The bill also prays for an inquiry respecting an annuity alleged to have been granted by Armstrong and his wife to one J. Izod, and that such annuity may either be declared invalid, or if a valid incumbrance on the estates, that an account may be taken of what is due in respect thereof and for further relief.

The case is, that N. Bradford by his will, dated the 27th of March, 1820, gave to his daughter, A. Bradford, and the defendant, William Gates, all his freehold, leasehold, and copyhold estates, and all his residuary personal estate, in trust for his wife, A. Bradford, for her life, and after her death upon trust; and he gave the particular property therein for that purpose described to his daughter, Ann Bradford, and after the death of his wife on trust; and he gave unto and equally between his daughter, A. Bradford, and his grand-daughters, G. Pierpoint and M. Tilt, a copyhold messuage and appurtenances in the possession of one Collier, to hold unto and equally between his daughter, A. Bradford, and his grand-daughters, Georgiana and M. Tilt, during their joint and several lives as tenants in common, so, and in such manner, that neither of my said

Vol. I. p. 169.

(b) 1 Keen, 434.

daughter and grand-daughters may anticipate, charge, sell, assign, or dispose of their several and respective lives or life estates or estate so devised to them, of or in the aforesaid copyhold premises, and the rents and produce thereof, and so and in such manner that neither any husband or husbands of my said daughter or grand-daughters may have, or acquire any right of or in, or control over the life estates or interests of my said daughter and grand-daughters respectively, nor shall the same be liable to the debts, contracts, forfeitures, or engagements of any such husband; and I declare and direct that the receipt or receipts of my said daughter, Ann Bradford, and my grand-daughters, G. Pierpoint and M. Tilt shall, from time to time, be good and effectual discharge and discharges for the money therein expressed to be received; and after the decease of the survivor of his daughter and grand-daughters, he gave over the property so devised to them for life, and after devising a moiety of a copyhold tenement on the east side of East-street, in Brighton, he gave, after the death of his wife, unto his grand-daughters, the other moiety, and also the entirety of a certain leasehold premises in his will, particularly described, to hold, to Mary Tilt, for her life, with remainder to her children, and he gave the residue of his personal estate unto, and equally between, his daughter, A. Bradford, Wm. Gates, G. Pierpoint, and M. Tilt, as tenants in common, and he declared "that all or any of the bequests and devises hereinbefore made by me to my granddaughters, G. Pierpoint and M. Tilt, not hereinbefore bequeathed and devised to them, exclusive of any husband, are so given and devised to them, my said grand-daughters, free, clear, and exonerated from, and not subject to any husband's right, control, interference, debts, contracts, and engagements, and which said several and respective bequests and devises so given and bequeathed to them by me as aforesaid, are to be taken

and received by them respectively, as if they were sole and unmarried, and so held and enjoyed by them, my said grand-daughters respectively, and that their several and respective receipts or receipt, for any sum or sums of money, shall be good and effectual discharge and discharges." And he appointed his daughter and William Gates executor and executrix of his will. The testator died in October, 1820, leaving his wife, A. Bradford, and his daughter, M. A. Tilt, in the will called M. Tilt, and now the defendant, M. A. Armstrong, surviving now the whole of this property, became vested in his wife for life, subject to that life interest. The testator gave a portion of it to his grand-daughter, Mary Augusta, for her life, for her separate use, and he intended that the interest he gave to her in a copyhold messuage or premises, constituting part of his property, should be vested in her without power of anticipation.

When the testator died, the grand-daughter, Mary Augusta, was unmarried, and it has been argued, as she was not married at the time of the testator's death, when the gift became vested in her, the limitation to her separate use is not effectual, and secondly, if that limitation can be sustained, the restraint on its forbidding her to dispose of it in anticipation is void, because it is not accompanied by a gift over, in the event of an attempt to alienate.

On the 25th of August, 1826, Ann Bradford, the daughter of the testator, made her will, and thereby, among other things, and subject to her mother's life estate, she devised to her trustees, N. Bradford and M. Bradford, a certain messuage in Church-street, Brighton, "upon trust, that they, or said trustees, or the survivor of them, or their heirs, do and shall receive and take the rents, issues, and profits thereof, and pay the same unto my niece, M. A. Tilt, for and during the term of her natural life, so as in such manner as the said M. A. Tilt shall

or dispose of her life interest therein, part thereof, nor raise or borrow thereon by anticipation, mortgage, or otherwise, and so and in such manner that the rents, issues, and profits thereof, shall be subject to, but exclusive of any claim, which the said M. A. Tilt shall have, right, control, or interference; nor shall the same be liable to his debts, confiscations, or engagements, and I certify that the receipt or receipts of my said niece shall be a good and sufficient discharge and discharges to my said trustees for the time being, of such rents and profits, and for so much thereof as shall be in the receipt or receipts expressed to be received; and that any sale or disposition raised by mortgage or otherwise, of or in respect of said niece's life interest, shall be void to time null and void;" and after the testatrix gave the same premises to her children of M. A. Tilt, and she named her trustees executors of her will. On the date of this will, and in April, 1832, the legatee, M. A. Tilt, married the Wm. Armstrong, and two days afterwards, namely, on the 25th of April, 1832, she made a codicil, and thereby devised in her will, and in all respects confirmed the same, and she died on the 10th of October following; M. A. Armstrong, being married at the time of the testatrix, when the gift under her will was vested, it is not denied that the separate use might take effect; but the restraint or alienation is not binding, because there is no gift over in the will to alienate. In July, 1830, the testator, Bradford, the first testator died, and the gift under the two wills took effect. In March, 1832, Armstrong, his wife, having sold an annuity of £300, to the plaintiff for £300, executed a conveyance and assignment of Mrs. Armstrong's life interest to the plaintiff to the use of the annuity, and a like

deed was executed in the following month of September to secure to the plaintiff an annuity of equal amount. The annuities were paid up to some time in 1834; but in January, 1835, Armstrong took the benefit of the Insolvent Debtors' Act, and thereupon the plaintiff filed this bill to enforce payment of the annuity.

(To be continued.)

### PRIVILEGES OF THE HOUSE OF COMMONS.

JUDGMENT pronounced by the CHIEF JUSTICE of NEWFOUNDLAND in the Chambers, Aug. 13, 1838, upon the application of EDWARD KEILLY, to be discharged from custody under the Writ of Habeas Corpus, he having been committed by the Speaker's Warrant for an alleged Breach of Privilege.

(Continued from p. 197.)

It is laid down in the books of authority that the decisions of the two Houses of Parliament, in cases in which they are admitted to be the sole competent judges, are fully governed by usage and controlled by precedent. But how can the House of Assembly here, whose existence commenced scarcely six years ago, be said to be governed by usage or controlled by precedent in the present case, as to which manifestly neither usage nor precedent exists? If it is to the usages and precedents of the Imperial Parliament, or those of other colonial assemblies, they refer, certainly they do not understand the meaning of the terms.

But if the House of Assembly on the first occasion upon which they choose to exercise a power of imprisonment consider themselves invested with it because the House of Commons exercise the same power, then they are equally entitled upon the same ground, and for the like reason, to all the powers and privileges of the House of Commons; for the rule by which they claim forbids them to choose some powers and privileges and reject others—they must take all or none; and if in addition to the *lex et consuetudo Parliamenti* they are at liberty to cull and choose from among the customs and usages of other colonial legislatures all such as in their judgment are desirable or convenient, they would be, I fear, a much more powerful body than the Imperial Parliament itself, or indeed any other known to the British constitution.

That the House of Assembly are here invested with some privileges as incident to their condition

but I do not mean to deny that of those I do not mean to establish myself the subject for it of importance to the present occasion that should be the most and most extensive they are out of a very early and an imperative duty to take care that they should be preserved and exercise in power, which they are beyond question entitled to do so, which they exercise with the undoubted privilege, the greatest privilege of every British subject recognized and confirmed by Magna Charta, that in that shall be improved but in the wisdom judgment of the people or by the law of the land, secured and by the statute of the 28th of Edward III. which enacted that "no man shall be put out of land or tenement, nor taken or imprisoned, nor disinherited, nor put to death, without being brought in to answer by due process of the law." It has been shown in argument, as it is said down by the highest authorities, and as every law, that a statute made in the affirmative, without any negative expression or implied, does not take away the common law—much less such a statute liberty, of which our laws are so tender, be restrained by implication or analogy.

The courts of record in England exercise, and always have exercised, the power of commitment for contempt, which power is part of the law of the land, and the superior courts of this country also possess the like power, but it is by virtue of an express Act of the Imperial Parliament; and the power of the House of Commons to commit for the like offence originates, among other sources, in its being part of the highest court of record in the realm, whose powers and privileges were originally assigned by statute, and have been sanctioned by immemorial usage; for, as Lord Ellenborough says, "there is no pretence for treating the privileges of the House of Commons, as some persons have treated them, as things of a novel origin and constitution, beginning with the time of legal memory, and standing upon no authority of prescription or statute." But can it be shown that there is in force in this island any negative statute, any law or usage whatever, which would, in defiance of Magna Charta and the 28th of Edward III., interfere with the liberty of the subject in the mode now under consideration? If it be said that the King's commission, which called the Assembly into existence, if it even contained express words to that effect, could grant such a power, I deny it, for the King can no more make a law than either branch of the legislature. If it be said that it is necessary to the House of Assembly to possess the power of punishing summarily, as for a breach of their privileges (whatever those privileges may be assumed to be), as the House of Commons do, I deny it also. They are entitled, and I will admit particularly entitled, to protec-

tion in the due performance of their duties, and the laws of the land are equally applicable to them as to every other lawful community, and should be equally protected and secured against the intrusion and interference of wrong and oppression. Their rights are not necessary to be in the public thought, as those of the people should be, but certain that if the law should know how to preserve order and decorum in their meetings and of a public body well understoodly have the power and of the privilege and authority to protect them. If the power of imprisonment is not absolute necessary in itself, it cannot for any other reason than I can discover, if indeed it could possibly be the one, be said to be inherent in them, as they would have it any more than the power of impeachment or any other of the extraordinary powers of Parliament is inherent in them.

But let us look at the present case, for we cannot shut out the whole fact of it as contained in the affidavit before me, and it clearly appears that, without defining what their privileges are, the Assembly assume the power of adjudging and determining at pleasure upon an act committed by an individual which they consider to be a breach of those privileges, or this too without permitting the person accused or his witnesses, to be parties to the investigation, when the offence complained of was done. Here at least the House of Assembly have not conformed to the practice of the House of Commons, who invariably call on the offender to admit or deny the charge, and disprove it if he can. My duty now, however, is not to pronounce upon the merits of the complaint, but upon the legality of the punishment with which it has been visited.

Again, this power of vindicating what they assert to be their privileges by summary punishment cannot, according to the same rule by which they claim to exercise it, i. e. the law of Parliament, in any manner be drawn in question nor can the party imprisoned obtain redress or in any court in the Queen's dominions. And yet such absolute powers as these are claimed to be exercised by a body not being a court of record, scarcely six years in existence, consisting of but fifteen individuals, of whom six only form a quorum, eligible upon a qualification which England would not entitle them to vote for member of Parliament; without the sanction of any law, usage, or precedent, and having other abundant means of protection and redress; but merely because the House of Commons, formed with the House of Lords the supreme court of the realm, and consisting of several hundreds of the most eminent men in the nation for talents, learning, wealth, and influence, exercise similar powers and privileges, originally assigned

a positive statute, and sanctioned by usage from the remotest ages. sworn to do equal law and execution of all the Queen's subjects, rich and poor, having regard to any one; and as I find so will I to the best of my ability administer.

We live, thank God, under a system to boast of the civilized world, and the ark of British freedom, which will not the liberty of any subject of the Crown be sustained upon light or trivial grounds; there is no man more chary of the just privileges of any of the constituted than I am, no man will be more enforcing, so far as lies within my power, laws which hedge round and secure the rights of the subject, and which are the supporters of the freedom of the state.

(To be continued.)

#### PROBLEM XIV. VOL. III.

##### TITLE DEEDS.

AT CASES WILL EQUITY COMPEL THE OWNER OF TITLE DEEDS TO PRODUCE THEM TO OTHER PERSONS, AND IN WHAT CIRCUMSTANCES WILL THEIR PRODUCTION BE COMPELLED IN ADVERSE SUITS AND ACTIONS?

EDITOR OF THE LEGAL GUIDE.

#### ANSWER TO PROBLEM VII. VOL. III.

##### MERGER.—WHAT IS IT?

Definition of merger is not easily given, and it is less easy to present the reader with an accurate and summary view of the principles which furnish the conclusion, than to say "merger has taken place." But Mr. Williams, whose words I quote, has himself alluded to these difficulties (a).

It is the absorption by act of law of one estate in another, by the union of two estates, without any intervening estate, and the same person, in the same right; or if in different rights, by such union the same person by the act of the

party, and not by mere act of law, and so that the person in whom the estates thus unite in different rights by act of the party, shall have an absolute power of alienation over both estates (c). Thus, for example, where A, tenant for life, with reversion to B in fee, surrenders his life estate to B, or B releases to A in fee. By this union A's life estate is absorbed in the inheritance; and the consequence is, the acceleration of the estate in reversion; which is not enlarged by the union of A's life estate, but is brought into possession (d). We shall, however, best learn "what merger is" by an analysis and examination of the above definition.

*Merger is the absorbing of one estate in another.* The effect of merger is to consolidate two or more estates into one, whose duration is precisely the same as that of the more remote of the estates consolidated. The more proximate estates are absolutely annihilated; so that the only subsisting estate continues exactly of the same quantity and extent of ownership as it was before the accession of the estate which is merged (e).

"Merger is the absorption by act of law of one vested estate in another." Nothing can be more clear than that merger is an act of law; but in order to its operation, the estates must be vested; because it is obvious that a vested estate cannot merge in a contingent interest, for until the contingency occur, it is not an estate at all (f). For the same reason it follows that a present vested term cannot merge in an *interesse termini* (g). And from this it appears that the estate in immediate remainder or reversion must in quantity be as large as, or larger than, the preceding estate: and in this case the less estate will always merge in the greater.

(c) White in Cru. Dig. Tit. 39. s. 1. Ed. 4.

(d) Id. s. 2.

(e) 3 Prest. Conv. 7.

(f) 6 Cru. Dig. 467, Pauling v. Hardy, Skin. 3. 62.

(g) 3 P. Conv. 161.

say on Merger, 3 vol. Conv.

1. Com. 177; 3 Prest. Conv. 7. Ed. 3.



What estate will for this purpose be considered the greater, we shall notice shortly.

"*By the union of these estates in one and the same person,*" there must be more than one estate. On this head the law is positive; indeed it is demonstrably clear, that unless there be two estates, in the same person, in the same land, there is not any estate in that person to merge, or occasion a merger (*h*).

"*Without any intervening estate;*" because, just as the intervention of a second particular tenancy prevents the prior particular tenant from surrendering to the ulterior remainder man; so does the interposition of a second particular estate with remainder over, prevent that remainder from merging the tenancy in possession, should the first and the last happen to unite in the same person. This it does by keeping the estates distinct, by preventing their union. But if the intervening estate be not vested but in contingency, it will not prevent the union and consequent merger of the estates: although this union, in some instances, will not produce an absolute but only a temporary or conditional merger (*i*); so that the estate will open again to let in the contingent estate, when the event happens upon which it is to arise (*j*).

"*And in the same right;*" else, if the freehold be in the tenant's own right, and he has a term in right of another, there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion

in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. (*h*) An estate tail is however an exception to this rule, for a man may have in his own right both an estate-tail, and a reversion in fee: and the estate-tail, though a less estate, shall not merge in the fee. (*l*) But this privilege ceases after possibility of issue extinct, for then an estate-tail is considered, for the purpose of merger, merely as an estate for life.

"*Or if in different rights, by act of the party.*" For where two estates meet in the same person, in different rights, merger will not ensue, unless the union takes place *by act of the party*: as where the husband holding a term in right of his wife, purchases the reversion; or the lessee assigns his term to the wife of the lessor; or where an executor has a term in right of his testator, (*m*) and purchases the reversion. (*n*) And this last condition is further limited by this proviso, that the person in whom they meet, must have absolute power of alienation over both estates. (*o*)

I have already promised to shew what estates are for the purposes of merger considered the *greater*, and with this and a few words on terms merging in terms, I shall conclude. It was maintained by several of the earliest and highest legal authorities, that one term could not merge in another; (*p*)

(A) 3 P. Conv. 55.

(i) I ask the reader's pardon for not noticing much earlier, that merger is usually divided into absolute and conditional; but as little more can be done than merely to state this distinction, it being difficult to speak clearly of it in any other than an incidental and occasional manner, I hope he will not suffer much unnecessary inconvenience from this neglect. Merger absolute is what is understood in the absence of special description; and of conditional I cannot convey to the reader a more clear idea than he will form from the words next following in the text. A.

(j) 6 Cru. Dig. 472. Ed. 4.

(h) 2 Bl. C. 177.

(l) 2 Bl. 178, where the reasons upon which this dogma is founded, may be seen.

(m) But in this case, although the term will merge at law, in equity it will be considered assets for the benefit of the creditors.

(n) 6 Cru. Dig. 479, and the cases and authorities here cited.

(o) Id. lb.; and *Lichden v. Windsmore*, 2 Roll. Rep. 472.

(p) For instance, 1 Co. Lit. 273; *Shepp. Touch* 341.

important case of *Stephens v.* (q) has completely settled the opposite opinion. In that case a mortgage was created in 1720 for one year. The executors of the mortgage made an assignment of another mortgage on the same premises, created for five hundred years, and assigned the terms to a lady who was entitled to the land under A. E.'s will. The Vice-Chancellor held, that the term for one thousand years merged in the reversionary term for five hundred years. And he (Sir JOHN ELLERBIE, C.) observed,—“It is settled by authority that there is no difference [in regard to] term merging by union with the term, whether the party is entitled to the interest of the reversion, or to the interest in reversion for a limited time.” In reference to the rule that the less term always merge in the greater, it is greater in quality; and, it appears from the above case, that the term is not for the purposes of merger, considered greater to the extent of its possible duration or legal quantity, but from its being the interest of reversion. (r) From which it is clear that a term of one thousand years is annihilated in a reversionary term for five hundred years. (1)

ALPHONSO.

It is not clearly put—It was forbidden, that a term for years could merge in a term; but in *Hughes v. Thame*, (Cro. Eliz. 302.) as well as *Stephens v. Bridges*, it was determined that if there be two termors, he who has the less estate may surrender to the term, and the term will merge in the reversion, and although the reversion be for a longer period of years than the term in possession, the term in possession shall drown in the reversion; for it does not depend

upon one term being longer than the other, but on the relation which the two termors bear to each other, while the estates are kept distinct. In such case the person, who has the term which was first created, is, in right of it, entitled to the possession; and the person who has the term in reversion is entitled to the rents and services, where any are reserved, of the first termor, as holding a grant of the reversion, to which those rents and services were incident. The first termor is therefore, in fact, legally tenant to the other, and this tenancy equally subsists where there is not any rent payable. The consequence is, that the first termor can surrender to the second: and on such surrender his estate becomes extinguished in the portion of the reversion, which is vested in the latter, whose estate then becomes an estate in possession. And where both the estates meet otherwise in the same person in one right, the same effect follows by operation of law; and the term first created will merge in the reversionary one, in right of which alone the person will become entitled to the possession, see Cru. Dig. tit. Merger, 475.; Bac. Ab. tit. Leases (S.) s. 2.; Sug. Vend. and Pur. vol. 3. p. 23, last Ed.; Watk. Conv. p. 55, Ed. 8.—Ed.

## Law Reports.

## COURT OF CHANCERY.—Dec. 5.

NEWLANDS v. HOLMES.

## SEPARATE USE of Married Women.

Since we reported this case, (a) we have been favoured with a copy of the Order, which is as follows:—

Let the Order made in the cause, dated the 28th day of November last, and the 2nd day of December instant, be discharged. And let the injunction issued in this cause, in pursuance of the said order, dated the 28th day of November last, be dissolved. And let the defendant, Samuel Paynter, Esq. Sheriff of the County of Surrey, be restrained by the order

Add. [ &amp; Geldart ] 66.

u. Dig. 240, Ed. 4.

(a) Ante, pp. 184-185.

and injunction of this Court from selling, or proceeding to sell, any part of the property, consisting of the leasehold premises, being Nos. 14, 15, and 19, West Square, in the parish of Saint George, Southwark, in the County of Surrey, with their appurtenances, or the goods and chattels now in the house of No. 19, West Square, aforesaid, under the writ of execution issued, or any other writ or writs of execution that may be issued out of the Court of Queen's Bench, in a certain action, wherein the defendant George Holmes is the plaintiff, and the defendant William Newlands is the defendant, until this Court shall make other order to the contrary. And upon the plaintiff giving to the said defendant, George Holmes, a sufficient security for the amount of the execution, and levy such security to be settled by the Master of this Court in rotation, the due execution of such security to be certified by the said Master, or upon the plaintiff's paying the said amount into the bank to the credit of this cause. Let the execution be withdrawn; and any of the parties are to be at liberty to apply to this Court as they may be advised.

Jan. 22.

TULLETT v. ARMSTRONG.

#### SEPARATE USE.

THE VALIDITY OF SEPARATE ESTATE WITH ITS QUALIFICATION OR PROHIBITION AGAINST ANTICIPATION, ESTABLISHED WHERE PROPERTY IS LIMITED TO THE SEPARATE USE OF UNMARRIED WOMEN.

The facts of this case we have fully detailed in our first volume (a), and we can vouch for their correctness, as we were kindly supplied with the papers by a Solicitor in the cause.

This was an appeal from the judgment of the MASTER of the ROLLS.

The LORD CHANCELLOR now gave judgment. The question was as to the clause against anticipation; as to that he agreed with the Master of the Rolls that it embraced separate estate, and if separate estate without power of anticipation must exist, it was only with that qualification that it existed at all. It was clear that without a clause against anticipation or alienation, nothing would be easier than to defeat the intention of the donor of property to the separate use of women. When once it was decided that a married woman

could act in respect of her separate property as a *feme sole*, it was clear that it became necessary to establish some control against disposing of her separate estate; and this was effected by prohibiting anticipation, and the power to do this had been long established, and was founded upon the power of the Court to model and qualify an interest in property which it had itself created without regard to those rules which the law had established for regulating the enjoyment of property in other cases. When the donor intended to give a woman a separate estate, why should the Court prevent the execution of that intention? Both modes of provision were the creatures of equity, and he should assume that there was no ground for separating the two points. If any rule were now to be adopted by which separate estate would be given without a clause against anticipation, it was clear the property would be in a less secure situation than it is with the clause. A married woman depends on the protection of the clause; but without it, she depends on the protection of other persons. She is therefore less secure (in such case) than if the property had been held simply upon trust for her benefit. In the case of a gift with that clause the donor thinks he has guarded his bounty sufficiently. On what ground, then, can a Court of Equity disappoint his intention. The separate estate and the provision against anticipation are both creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other, and therefore this Court cannot separate them. His Lordship then proceeded to review the cases, and observed, he would assume that there was no ground for separating them. In delaying his judgment in a case of so much importance, he thought it his duty to examine all the cases on the subject, and to derive assistance from every source accessible to him. He commenced by examining the cases supposed to support the proposition, that the absolute interest of a *feme sole* in property given for her separate use, though with a provision against anticipation up to the time of her becoming *covert*, becomes subject to all the qualifications and restrictions of the gift upon such marriage. Sir Edw. Turner's Case (b), and Tudor v. Samyne (id. p. 227.) His Lordship considered as of too early date to be of any value now. Jones v. Salter (c); Barton v. Briscoe (d); Woodmeston v. Walker (e); Newton v. Reid (f); Brown v. Pocock (g);

(a) P. 21. See the Editor's letter to the Lord Chancellor, vol. i. p. 225; also his review of the judgment of the Master of the Rolls, now appealed against. Id. p. 22. *et seq.* Also the leading article in the present number.—Ed.

(b) Ante, vol. i. p. 228.

(c) Id. p. 39.

(e) Id. pp. 22. 30. 70.

(g) Id. p. 38.

(d) Id.

(f) Id. p. 224.

Parker (A); which latter case his Lordship excited an interest to which he was entitled, either from the authority of the case or from any novelty in the doctrine *denied* what he said on the subject of *extra judicial* (A), because it was a question directly at issue, and the decision might have been made. It could not be said that the case was sufficient to support the decision. It could not be said that the question was that upon which his Lordship was founded, and for that reason it was paid to the various considerations belonging to it than it was entitled to. It would have received if the parties had depended upon its decision, and the case was not fairly had then been decided, that it was impetent to affix restrictions upon male or female, inconsistent with the gift. *Wodmerton v. Walker*; *Reid*. It did not occur to me that it could survive into a subsequent case from the restraint upon anti-trusts the doctrine singular? Only *Polm v. O'Callaghan* (2 Mad. 349.); *Iscoe*; *Newton v. Reid*; *Massey v.*

*Johnson v. Freeth* (6 Sim. 127) even more pointed. True it is in *Benson* (6 Sim. 127), although the decision on the subject, some seems to have been drawn by the conflict between separate estate and jointure clause; and in *Davies v. Johnson* his Honour expressly states his Lordship although the restraint cannot be a subsequent coverture, yet the estate may remain. Now I agree with the MASTER OF THE ROLLS this doctrine should be maintained. The case of *Widd* (1 Term. Rep. 193), upon respondent reliefs, turned entirely on the construction of the instruments, and the express power reserved to the donor. *Widd v. Davies* (2 P. Wms. 316) arose upon there being no trustee. *More v. Bowes* (1 Vcs. l. 22; 2 Bro. C.C. 10) the trusts were "to such uses as

she should, whether sole or covert, appoint." *Anderson v. Anderson* (2 Rup. & Myl. 427) may, from its circumstances, be the most important in favour of the separate estate being in force during a subsequent coverture; but there are no grounds for the judgment by either Sir JOHN LEACH or LORD ELDON. His Lordship then stated the case of *Plant v. Lyne* (1 You. 562) from the papers, as nothing could be gained from the report of that case, not even the point in discussion; and there this question did not arise, for the property was settled before marriage to the separate use of the wife. It is said to have been generally understood in the profession, that the separate estate would continue to operate during a subsequent coverture, and that conveyancers have acted so continually upon that supposition, that very many families are interested in the question, which therefore becomes one of very great importance. I am anxious to find some principle of property by which the preservation of the separate estate may be supported during a subsequent coverture; believing, as he did, that, when property was settled, all parties expected it should continue so; and he was disposed, for some time, to adopt the suggestion that the husband might be held to be tacitly bound by a gift to his wife's separate use, of which he was previously cognizant; but, after the gravest consideration, he was desirous to rest the rule on a broader foundation, and which he thought the interests of society required. Equity has already violated the rules of property between husband and wife; and if, subsequently to a deed of gift, the after-taken husband were now permitted to interfere with his wife's separate property, why should not the Court go further and extend its rules? It was not a stronger measure to prevent the husband from such interference than to establish the clause against anticipation. I have come to the conclusion, that the jurisdiction which this Court has assumed in similar cases justifies it in extending it to the protection of the separate estate, with its qualifications and restrictions attached to it throughout the subsequent coverture, and in resting such jurisdiction upon the broadest foundations. This the interests of society require. When this Court first established separate estate it made this rule, that a wife might enjoy separate estate as a *feme sole*, and that the laws of property attached to this new estate, part of which law was the power of alienation in the wife, which destroyed her security. Then came the restraint upon alienation — this equity also adopted. In both these cases the law of property was violated by the Court. Why then, in this case, should not equity interfere? and if it

ol. i. p. 225.  
is said in that case must not be taken as  
the question, for it was not necessary  
point, and his Lordship seems rather  
himself to the question, whether there  
anticipation, than to the question  
can be a limitation to the separate use of  
Chancellor, *Davis v. Thornycroft*,  
the Editor's observations, ante, vol. i. p.

by the Ed.

cannot protect the wife consistently with the ordinary rules of property, extend its own rules in regard to separate estate, and secure to her the enjoyment of the gift made to her for her benefit: the wants of society require this being established. It is no doubt doing violence to the rules of property to say, that property which being given with restrictions which are held to be void, therefore belongs absolutely to the woman up to her marriage, shall not be subject to the ordinary rules of law, as to the interest which the husband is to take in it, and that is the only sense in which the expressions in *Massey v. Parker*—"Why may she not by the Act of Marriage give it to her husband"—are to be understood; but it is not a stronger act to prevent the husband from interfering with such property, than it was originally to establish the separate estate, or to maintain the provision against alienation. In establishing the validity of separate estate with its qualification which constitutes its value, I mean the clause against anticipation, I am not doing more than my predecessors have done for similar purposes.

*Decree appealed from affirmed.*

#### SCARBOROUGH v. BORMAN.

The question in this case was the same as in the last, and the facts we reported in our first volume.<sup>(1)</sup>

The Lord Chancellor dismissed the appeal without costs.

#### COURT OF EXCHEQUER.—Jan. 18.

##### *Sittings in Banco.*

##### MARSHALL v. LYN.

#### CONTRACTS FOR GOODS.—STATUTE OF FRAUDS.

*No distinction to be observed in Contracts for Lands, and Contracts for Goods, where the latter are required to be in writing—Cuff v. Penn—OVER-RULED.*

This was an action for not accepting a quantity of potatoes, tried at the last Cambridge Assizes. The declaration contained a special count to the effect that the original contract for the sale of these potatoes having been made on certain terms which had been reduced into writing, in accordance with the Statute of Frauds, the defendant had given verbal directions to the plaintiff, by which the time stipulated for their delivery was altered from the first to the second voyage of the *Kitty*, a vessel belonging to one of

the parties. Evidence having been offered at the trial to prove this count, and to make out the variation in the written contract, it was objected that it was not competent to the plaintiff to go into such matters, unless the alteration had been reduced to writing themselves.

The plaintiff had a verdict for the amount claimed, with leave to move for a nonsuit.

Mr. *Kelly* now opposed the rule, to enter nonsuit, and contended that the Statute of Frauds should not be construed with such extreme strictness; that the variation in the time or place of delivery was not the essence of the contract, or was, at least, so far susceptible of parol variation, as that the plaintiff should recover, the original contract having been once reduced into writing. Construing the provision of the statute as reasonable men, the Court would see that great inconvenience would result from holding that the time of delivery stipulated in a written contract could not be altered by word of mouth, as in the instance where a written order for the delivery of goods by a particular coach; might not the purchaser, on finding that a different hour or mode of conveyance would suit his purposes better, call in person and give verbal directions to the tradesman to send the goods by the 12 o'clock coach instead of the 11 o'clock one, or by the waggon instead of the coach? In support of these arguments the learned counsel cited to the Court the case of *Cuff v. Penn*, 1 M. and S. 21, where it had been expressly laid down that performance of a written contract may be waived or dispensed with, as to the time and quantity specified therein, by a subsequent parol communication.

The COURT, however, without calling in counsel in support of the rule, made it absolute, laying it down that the decision on "*Cuff v. Penn*" was bad law. There was no distinction to be observed in the cases of contracts for land and those for goods, when the latter are required to be in writing. Both are susceptible of variation by subsequent contracts also in writing; if then the last is the contract at which the parties are to be supposed to arrive ultimately. So also, when the original contract is varied by parol. That alteration creates a new contract whether it regard the time or place mentioned in the original contract, and, if the first ought to be in writing, so ought also the second; and, if the first be not, then is it a new parol contract on which subject which ought to be in writing, and such is void. In this case the first voyage was expressly stipulated for, and the substitution of the second for that ought to have been reduced to writing.

Rule made absolute.

(1) p. 22.

QUESTIONS

EXAMINERS TO APPLICANTS FOR  
AS ATTORNEYS AT THE EXAMINA-  
LARY TERM, 1840.

PRELIMINARY.

a)

STATUTE LAW, AND PRACTICE OF  
THE COURTS.

Does amend defects in records after  
n? If so, how must it be done?  
es may the judge certify to deprive  
f costs, and when and how must  
be obtained?

several defendants, who defended  
mitted, will he now, as formerly,  
forty shillings only for his costs,  
portion will he be entitled?

es may a defendant be now held  
ow must you proceed?

sole obtain judgment and marry  
on, what must be done in order to  
gment?

stant joins an adult in a warrant of  
wholly void, or to what extent?

old tenant of a manor a right to  
inspection of the court rolls and  
manor? and if so, before or pending

es may cattle be impounded? and  
or an excessive sum, what are the  
against the party impounding, or  
ind-keeper?

r be good if clogged with any and  
s?

f the nuisances affecting dwelling-  
ds for which an action will lie.

stances (if any) in which a carrier  
or the loss of goods intrusted to

liable to pay the rent of premises  
stroyed by fire, under any and  
nces?

ner of a horse which was stolen  
e it in any and what place?

aster answerable for damage done  
and when not?

lord grants a mortgage, and after-  
premises by lease or at will, can

distrain for rent if the tenant has  
o him, or what remedy has he

nant? and would the remedy be  
e had been granted of the pre-

he mortgage? and if not, what  
ference?

CONVEYANCING.

What are the denominations of the several  
parts of a deed of conveyance by release? and  
state the form to prevent dower.

What are the usual covenants for title entered  
into by a vendor in his conveyance to a purchaser  
of a fee-simple estate?

What is the difference between an estate in fee  
simple and an estate in tail general?

How far back has a purchaser of land a right  
to require the title thereto to commence?

Is it customary for the vendor or the purchaser  
to bear the expense of preparing the abstract of  
the title to the estate to be conveyed? and which,  
according to custom, bears the expense of the  
conveyance?

What is the difference between a freehold and  
a copyhold estate?

If a copyhold estate is to be the subject of a  
conveyance, by what means is it usually con-  
veyed?

What is the meaning of the assignment of a  
term to attend the inheritance?

If an outstanding term has never been assigned  
to attend the inheritance, at whose expense is  
such assignment to be made?

In what respect does an estate limited to joint  
tenants in fee, and tenants in common in fee,  
differ?

In what respect does an incorporeal heredita-  
ment differ from a corporeal hereditament?

Who are incapable of making a will?

What are the requisites to be attended to in  
the execution of a will under the recent Statute  
of Wills?

If a person die intestate, leaving a widow, one  
child, three children of a deceased child, and a  
brother and sister, in what manner would the  
intestate's personal estate be distributable?

Should the direction to sell an estate be abso-  
lute or discretionary, in order to constitute an  
equitable conversion of the freehold into perso-  
nality?

EQUITY AND PRACTICE OF THE COURTS.

Through the intervention of what person must  
an infant sue in a Court of Equity?

Can or cannot a bill be filed on behalf of an  
infant without his consent?

If a suit be instituted on behalf of an infant  
which is considered to be injurious to his inter-  
ests, in what way will the Court, on a repre-  
sentation to that effect being made, proceed in  
order to ascertain whether it be well or ill founded?  
and if the former, what course will it adopt?

If a bill be filed on behalf of a married woman  
against her husband without her consent, will  
this circumstance, on its being made out to the  
satisfaction of the Court, involve any, and if any,  
what consequences?

(a) See ante, p. 75.

If a bill be filed by a man and his wife touching the personal property of the wife, and the husband die pending the suit, does or does not that circumstance cause an abatement of the suit?

Is the objection for want of parties to a bill taken in the same manner, where such objection appears on the face of the bill itself, as where it does not so appear? If different, then state what are the proper modes of objection applicable to each of these two cases.

Where a cause has proceeded to a hearing, and is then ascertained to be defective for want of parties, does or does not that circumstance form a ground for the dismissal of the bill, or will the Court adopt any other, and if so, what course in consequence of such defect?

Is there or is there not any, and if any, what circumstance appearing on a defendant's answer, which will prevent a plaintiff from proving a deed *viâ voce* at the hearing of a cause?

In a suit for a specific performance of a contract for the sale of an estate, is it competent to either the vendor or the purchaser to obtain a reference to the Master as to the title, or can this be done by one only, and which of such contracting parties?

Can or cannot an infant maintain a suit for the specific performance of a contract? And give the reason for your opinion, whatever it may be.

Where a submission to reference has been made a rule of a Court of Common Law, has or has not a Court of Equity jurisdiction to afford relief against the award which has been made in pursuance of such submission?

In a suit in Equity by an incumbrancer against a purchaser for valuable consideration, in which such purchaser is sought to be affected with notice of the incumbrance, and in which such notice is proved by one witness only, but is positively and expressly denied by the answer; in whose favour will the Court decree?

Are there any circumstances under which an agreement for a lease for twenty-one years, not made in writing, would be enforced by a Court of Equity? If so, state those circumstances, and on what grounds such an equity would prevail.

At what period after a mortgagee has taken possession of the mortgaged estate, and under what circumstances, is the mortgagor barred of his right to redeem the estate?

A testator, by his will, having given a pecuniary legacy to A. is induced, when in a state of great mental and bodily weakness, and through the fraud, influence, and circumvention of B., to revoke the legacy, and by a codicil to his will to give it to B. himself. Is or is not this a case in which, after the testator's death, and assuming that the facts above stated could be clearly established, you would advise A. to have recourse to a Court of Equity against B.? If yes, state

the relief that you would seek to obtain for him. If no, give the reasons for your not recommending the suit.

#### BANKRUPTCY AND PRACTICE OF THE COURT

What are the facts necessary to be stated in the petitioning creditor's affidavit of debt to sit the docket?

State the most usual acts of bankruptcy.

Within what time must a town fiat be prosecuted? and within what time must a county fiat be prosecuted?

Does a fiat abate at any, and what time, after the death of the party against whom it has issued?

Can a creditor, having a security for his debt by way of mortgage, be a petitioning creditor?

For what purposes may joint creditors of a firm prove under a fiat against one of the firm?

Can a creditor, holding a joint and separate security (such as a bond or note), prove his debt under both the joint and separate estates, must he elect?

If the funds under a fiat are insufficient to pay the expenses, are the creditors who have proved liable to contribute, or must the assignees bear the loss?

What amount of debt proved entitles a creditor to vote in the choice of assignees? and what amount entitles a creditor to sign the certificate of conformity?

If the certificate be signed by a sufficient number of creditors in amount and value, have the commissioners a discretionary power to refuse the certificate?

What is the course to be taken by creditors to expunge an improper proof of debt under a fiat?

Has the landlord any and what priority for his rent in cases of bankruptcy?

If, after adjudication, the petitioning creditor's debt should be found insufficient, can any other what course be taken to remedy the defect?

What proceeding must be taken by a creditor to enforce payment of his dividend?

Under any and what circumstances do goods and chattels of which the bankrupt has taken possession, but of which he is not the owner, pass to his assignees?

#### CRIMINAL LAW AND PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

What is a constructive taking, in larceny?

In an indictment, or in a summary proceeding for a malicious injury to property, is it necessary to state against the owner essential?

When is a prisoner said (legally speaking) to stand mute?

What offence is the advising a prisoner to stand mute, and how is it punishable?

Who is an accessory *before* the fact?

Who is an accessory *after* the fact?

any crimes in which there cannot be before the fact? If any, give ex-

any crimes in which there cannot be either before or after the fact? If am- ples.

dict of a coroner's jury be "wilful d the grand jury, upon a bill of in- wilful murder being preferred, find r "manslaughter" only, how must be arraigned and put upon his trial? mber of peremptory challenges of risoner entitled to on his trial for ? and what number on his trial for lony?

ny limit to challenges for cause or ed?

n indicted for a felony entitled, on o the Court, to have aliens on the n he is to be tried? If so, how

at circumstances are justices of the d to admit to bail a person charged

at circumstances are justices required person so charged?

Court of Queen's Bench, or a Judge admit a prisoner to bail in any, and

## OF JOHN FROST FOR HIGH TREASON.

### STICE TINDAL'S ADDRESS.

(Continued from p. 206.)

Adams said, he saw Frost at ten e morning of the 4th of November, e outbreak in Tredegar park, with hief to his eyes. This witness asked as the matter at Newport, but Frost ver. Frost then went towards Car- a gate into a field, and then through into a coppice wood. This was an er the unhappy events had taken the prisoner was found retreating ort, with a view, no doubt, not to be t that time, because he had taken a part in the proceedings that had led nts. But that did not make out the he was guilty of high treason, be- must have been conscious of having vey serious offence in forming part multitude of persons guilty of such e could not but be conscious of that; t but know that he had been guilty of the law, and therefore determined loof for some limited time. In Sir 's evidence there was some discrepancy

as compared with that of Captain Gray, in respect to the opening the shutter and giving the order to fire, but it was very immaterial, as it might exist between the statement of different witnesses without breaking in on the weight of testimony to which the jury ought to give credit. It seemed clear, however, from all the evidence, that a soldier never fired a single gun until the firing commenced outside the house. In the course of Sir Thomas Phillips's examination, Edward Hopkins was called in to produce some of the arms taken from the prisoners, and Sir Thomas Phillips said the people he saw were armed with such weapons. The learned Judge then proceeded to read the evidence of Captain Gray. Captain Gray, in his evidence, said that he had every reason to believe that the mob deliberately fired on the military after they were unmasked. He thought it necessary to observe here, that the jury would find other evidence which seemed to throw some doubt on the correctness of Captain Gray's evidence on this point. It would be the duty of the jury to compare the different testimonies together, and to decide which was correct. The next witness on whose evidence the learned Judge commented was Matthew Williams. He said that this witness, together with one or two more that followed, took up the transactions, as far as the prisoner was concerned, as far as the bill. All that he had previously read related principally to the events at Newport.

(To be continued.)

### REVIEW OF NEW BOOKS.

COMPENDIUM of the LAWS of ENGLAND, SCOTLAND, and ANTIEN T ROME, for the Use of STUDENTS. Part I. MARRIAGES. Fraser and Crawford, Edinburgh; H. Washbourne and A. Maxwell, London; W. Curry, jun. and Co. Dublin. 1839.

We have read with satisfaction this little treatise upon a large subject, and although we are familiar with many parts of it which are derived from Taylor's Civil Law, Roper's Law of Husband and Wife, and some other writers, we think the author is entitled to much credit for the very compact manner in which he has brought the subject-matter together, and the clear and distinct view he has given of its various parts.

He observes in his preface that the ordinary division into the rights of persons, of



things, and actions, rests solely on the example of the Institutes of Justinian, and that it has, therefore, appeared to him at least deserving a trial, in a work that does not profess to be a complete institute of English and Scottish law, to commence with marriage, which, along with property, may truly be said to form the foundation on which civil society is built. From marriage, the principal relations which the law contemplates are derived. On it the descent of real and personal property depends. With it, the most important rights of persons and things are mediately or immediately connected. In a word, it forms the very *primum mobile* of the law.

The author commences his Treatise with "The English Forms of *Pleading*." *Pleading* is, doubtless, at all times the precursor of marriage, but we cannot see how it applies to the title of the work before us. "Real, mixed, and personal actions" do not at all harmonise with "Marriages." He next proceeds to "The English Law of Marriage," and in p. 29 he thus describes how marriages are to be solemnized at home and abroad:—

*In what Churches.*—Marriages since the 26 Geo. II. in chapels not having chapelries, or districts annexed to them, and in which banns have not been usually, although often, published, were upon the construction of that statute void. *Rex v. Northfield*, Cald. 115. 2 Dougl. 659. In an action for *Crim. Con.* if the plaintiff's marriage was solemnized in a chapel, he must give some evidence that banns were usually published there before the passing of the Marriage Act. *Taunton v. Wyborn*, 2 Camp. 297. Ellenb. But it is *prima facie* sufficient for this purpose to produce an old register of marriages, solemnized in the chapel before the Marriage Act, and a regular register of banns published there since, and to prove that within the recollection of witnesses who have attended the chapel, marriages have been solemnized and banns published from time to time of late years. *Id.*

*In Scotland.*—A marriage celebrated in Scotland without banns or licence is good. *Ex parte Hall*, 1 Rose, 30. A marriage in Scotland by an infant who was an English

subject, without consent, was held good by the Court of Delegates. *Compton v. Bearcroft*, Bull. N. P. 113. A marriage celebrated in Scotland (but not between persons who thither for the purpose of evading the laws of England) will entitle the woman to dower in England. *Ilderton v. Ilderton*, 2 H. Bl. 145. And the lawfulness of such a marriage may be tried by a jury. *Id.* A replication, therefore, to a plea of *ne unques accuple* in writ of dower, alleging a marriage in Scotland, may conclude to the country, and, on such replication it is not necessary to shew that the marriage was had in any place in England by way of *venue*. *Id.*

*In Ireland.*—A marriage in Ireland, performed by a clergyman of the Established Church in England, is valid, though it be celebrated in a room of a private house, without any special licence having been granted to the parties. *Smith v. Maxwell*, 1 C. & 271. R. & M. 80. Best.

*ABROAD.*—The validity of a marriage celebrated in a foreign country must be determined in an English court by the *lex loci* where the marriage is solemnized. *Lacombe v. Higgins*, 3 Stark. 178. D. & R. N. P. C. 11. Abbot. The articles of the Law of France which prescribe the forms essential to a marriage, but which do not annul a marriage in fact for non-observance of such forms, are to be considered as merely directory; but previous evidence is admissible to show that by the law of that country a marriage in fact, without observance of the requisites prescribed by such laws, is void. *Id.* A marriage between two Protestant British subjects, solemnized by a Portuguese Catholic priest at Madras, according to the rites of the Catholic Church, followed by cohabitation, but without the licence of the Governor, which it had uniformly the custom to obtain, is a valid marriage. *Lantour v. Teesdale*, 8 Taunt. 82. Marsh, 243. Evidence that British subjects in a foreign country being desirous of marrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, interpreted into English by the official clerk, which service the parties understood to be the marriage service of the Church of England, and they received a certificate of marriage, which was afterwards lost, is sufficient whereon to found a presumption (not appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after eleven years cohabitation as man and wife till the death of the husband's death, and such British subjects being attached at the time to the British

vice in such foreign country, and tary possession of the place; it such marriage, solemnized by a ly orders (of which this would be evidence), would be a good marriage law of England as a marriage or *verba de presenti* before the t, marriages beyond sea being ex of that act, and it would make no solemnized by a Roman Catholic v. Brampton, 10 East, 282.

*Cohabitation as Man and Wife*, 150,

a man is conclusively liable for supplied to a woman while he is her as his wife, when they have is not liable for necessities supplied on the ground that he has lived represented her as his wife, if he at in point of fact they were not vro v. D. Chemant, 4 Camp. 215. h.

allows a woman to use his name his wife, he shall be bound to pay rished to her, even by a man hat the parties were not married. hrelkeld, 2 Esp. 637. Kenyon.

nan who had for some years coha- woman, who passed for his wife, leaving her and her family at his this country, and died abroad:— he woman might have the same bind him by her contracts for as if she had been his wife: but ctor was not bound to pay for applied to her after his death, but e of it had been received. Blades . & C. 167; 4 M. & R. 282.

dea of the general issue to an ac- upsit against husband and wife, ld before the marriage, it is com- ove that she was then married to band, who is still alive. Cowley v. 3 Camp. 438. Ellenborough.

marries a woman, and holds her world as his wife, he does not dis- self from his liability for necessa- d to her, by proving a previous tween himself and another woman, rings home a clear knowledge of tion of the first marriage to the supplied the necessities to the . Robinson v. Nahon, 1 Camp. orough.

woman has passed as a married l given herself out as such, having e house of the man with whom she d which are ostensibly his, neither al be permitted to say there is no

marriage, or that the goods do not belong to the reputed husband. Mace v. Cammell, Lofft, 782.

*Quare.* Whether a woman who cohabits with a man, assumes his name, represents herself as his wife, can maintain trespass against a sheriff for taking in execution furniture alleged to be her property, but being in the house in which the parties reside? But it having been left to the jury to say whether, under the circumstances, the property might not have been given up by the woman to the man during cohabitation, and they have found it in the affirmative; the Court refused to disturb the verdict. Edwards v. Fairbrother, 2 M. & P. 293; 3 C. & P. 521.

A deed of separation need not necessarily contain a covenant to indemnify the husband from the wife's debt. Westmeath (Earl) v. Westmeath (Countess), Jacobs, 126.

Declaration on bond—plea that it was conditioned for performance of covenants which were to indemnify the obligee from alimony and debts incurred by his wife after their separation, and that defendant had performed the covenants; replication that a judgment was recovered against the obligee by a creditor of his wife, and he paid debts and costs, of which defendant had notice; demurrer, and joinder. The defendant is liable for the costs as well as the debt paid by plaintiff, for the covenant to indemnify is general, and it was not necessary for plaintiff to give notice that an action was commenced, and if it had been necessary the plaintiff must have recovered on these pleadings, for the defendant has admitted notice. Duffield v. Scott, 3 T. R. 374.

We think the treatise well adapted for students, and if a copious index be added we shall pronounce it a useful book of reference.

#### NOTICE TO CORRESPONDENTS.

We are very much obliged to Mr. SANGER, 4, Essex-court, Temple, for the loan of the papers and short-hand writer's notes in *Tullett v. Armstrong*.—We have also to thank one of the solicitors in *Newlands v. Holmes* for the paper in that cause.

S. A. W.—Thanks for your offer. Your second communication has been received.

A. J. H.—C. D.—O. L.—C. N. F.—B. W.—R. S. H.—A. L.—A Subscriber, Worcester.—An Attorney, recently examined—are all under consideration.

A Subscriber's remarks upon the last Examination must be authenticated.

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Vol. III. was published Dec. 1, with Table of Contents, price 17s. Price of Vols. 1 & 2, £1.10s.

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*This Work will be completed in Four Vols.*

## ERRATA.

Vol. III. p. 208, 1st column, last line—not to be read Second column, second advertisement.—The paragraph after the tenth line from the top, commencing "This work," and continued for twelve lines ending with the words "Mining Leases," is misplaced, and applies to and should have been incorporated with the first advertisement.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West in the City of London.—Saturday, Feb. 1, 1840.

# The Legal Guide.

[ SATURDAY, FEBRUARY 8, 1840.

[No. 15.

## SEPARATE USE.

(Continued from p. 211.)

Court, a married woman has, for in a century past, been considered of possessing to her own use, of her husband; such property separate estate, and, in respect considered in this Court as a enjoying and capable of exercising as such. The property may be her by contract with the husband marriage, or by gift from him or er, wholly independent of such far as his legal rights as husband re. The Court will treat him as nd property held by or for the wife rate use, if unaccompanied by nt, is subject to her power of nd the other incidents of property or single women. e for separate use, as sanctioned f Equity, has a peculiar existence state of marriage. It operates as to a married woman against the over the wife's property vested nd. It acts in contravention and he legal rights of the husband, nst his legal power, is a sufficient but the power of alienation re- the wife, the separate estate s no protection against the moral the husband, and many instances

have occurred, and daily occur, in which the wife, under the influence and persuasion of the husband, has been and is induced to exercise that power of alienation in his favour and for his benefit, and thus to defeat the protection intended for her; but as the separate estate owes its origin and support to the Courts of Equity, it was understood that the same Courts might so modify it as to secure the protection which was intended; and accordingly it was intimated by Lord *Thurlow*, that if a gift clearly expressed that the separate estate should be capable of assignment in anticipation or alienation, that that intention could be carried into effect; and his Lordship being of that opinion, afterwards set the example in a case in which he particularly took an interest, and from that time, now nearly half a century ago, it has been usual to introduce into all wills and settlements a clause giving women real and personal estate for their separate use, independent of their husbands, without power of assignment by way of anticipation and without power of alienation, and such clauses, though their operation has been considered to be, as undoubtedly it is, inimical and irreconcilable with the ordinary legal rules affecting the limitation of estates and the legitimate incidents of property, has been repeatedly approved and carried into effect by this Court, and family settlements and provisions to a very great extent has been framed in a reliance on them. And in

do so under the two following divisions:—

1st. What is a sufficient conversion of real estate into personalty so as to prevent a resulting trust in favour of the heir?

2ndly. What is a partial conversion only, so as to prevent the residuary legatee from taking?

*First. A conversion out and out.*

When a will creates a trust to sell real estate, the testator's object and clear intention being to convert his real property into personalty for all the purposes of such will, or to invest it with the quality of money, and to dispose of it as part of his general personal estate, the heir-at-law will not take a resulting trust in case of lapse or otherwise. *Mallabar v. Mallabar*, Forrester, 79.

In the case of a lapsed legacy, to be paid out of a mixed fund of real and personal estate, the next of kin will take the whole benefit of the lapse if it appear upon the will to have been the testator's intention that the produce of his real estate, directed to be sold after his death, should for all purposes have the same quality as if it had been part of his personal estate at his death. *Phillips v. Phillips*, 1 Myl. & K. 648.

A legacy out of the produce of a copyhold estate directed to be sold, failing, was held to pass by the residuary clause against the heir; the object being a general conversion out and out. *Kennell v. Abbott*, 4 Ves. 802.

If an estate be devised, charged with legacies, which fail, the devisee, and not the heir, shall have the benefit of them. *Id.* 811.

A specific legacy bequeathed to a residuary legatee of the testator's personal estate directed to be paid out of his real estate, devised to be sold for that and other payments (the overplus to be paid to another legatee), becoming lapsed by the death of the residuary legatee in the testator's lifetime; it was held not to be a resulting trust for the benefit of the heir-at-law, nor to be applicable in exoneration of the personal

estate for the benefit of the next of kin, but to discharge the devised estate again in favour of the legatee of the residue of the produce of the sale. *Noel v. Lord Henley*, 7 Price, 241.

The case of *Amplett v. Parke*, 1 Sim. 275, is a leading case on this subject. There a testatrix gave her real and personal estate to trustees to sell; and directed that the proceeds of her real estate should be taken as part of her personal estate; that out of the monies to arise by such sale, and out of all other her personal estate, her legacies should be paid, and gave the residue to A. for life, with remainder over; and it was held that the real estate was absolutely converted into personalty, and that some of the legacies which had lapsed, belonged to the residuary legatee, and not to the heir.

Where a testator directed his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gave the residue of the mixed funds to A. and B.: the failure of the charitable legacies, as far as they would affect the real estate, was held to enure to the benefit of A. and B. *Green v. Jackson*, 5 Russ. 36.:—Lord Eldon, in this case quoted with approbation the following extract from a judgment of Lord Hardwicke.—“I will point out the nicety of distinction, as it appears to me upon which this Court has gone. If I give to A. and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise be upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of these two modes admits just this difference: the former is a devise of an estate in inheritance, for the purpose of giving the devisee the beneficial interest subject to a particular purpose; the latter is a devise for a particular purpose, with

tion to give him a beneficial interest where land was directed to be sold together, with the personal estate, (inter alia) in charitable purposes, trustees were to place out all the money of testator's estate, and the interest on securities, and divide it, &c. *Re, C.* held—1st. That the bequest of charity was void; and 2ndly. that the estate was absolutely converted into a personalty — *Durroux v. Motteux*, 1

use of real estate in trust to sell, of the money to pay debts, &c. the surplus to maintain and educate the daughter of the testator until she should marry, or marriage. But if she should die under twenty-one, all such money should remain in the hands of the trustees for such parts of the real estates as remained unsold (if any), to be to the use of the daughter. The daughter lived to attain her majority; this is a conversion out and the real estate remaining unsold, goes to her personal representatives. *Hy v. Palmer*, 1 Mer. 296.

by empowering other persons to dispose of his estates, disinherits himself, such as by his own actual disposition. Therefore, where a testator appoints a trustee to sell his estate, it is turned into a personalty, and leaves no resulting trust for the heir; but if a testator says,—"my heir shall sell the land, he is bound to sell it," *Cook v. Duckenfield*, 6, 568.

an estate is charged with an incumbrance for payment of debts, and after payment the surplus is given over, the property vests in the residuary legatee. *Harkins v. Chappel*, 1 Atk. 621,

#### By.—A Partial Conversion.

there is a mere trust to sell real estate, the testator's object being to cause a

conversion for a limited purpose only, as to pay debts, legacies, &c. and the Court has no direction from the testator, to whom the money arising from such sale shall go, the heir takes by resulting trust the surplus of the money raised by the sale, after payment of debts and legacies.

And, in such cases, a lapsed legacy would result to the heir-at-law. *Cruse v. Barley*, 3 P. W. 20; *Hutchison v. Hammond*, 3 Bro. C. C. 128, cited 4 Ves. 810; *Digby v. Legard*, 2 Dick. 500, 3 P. W. 5th ed. 22 n. *Collins v. Wakeman*, 2 Ves. 687.

A conversion for a particular purpose which fails has been held a resulting trust for the heir.

A devise of real estate to be sold, the object being a provision for legacies, is not an absolute conversion, and is, therefore, as to the surplus, a resulting trust for the heir, though a residuary legatee is appointed, *Berry v. Usher*, 11 Ves. 87; *Sheddon v. Goodrich*, 8 Ves. 481.

Where a real estate is devised by payment of debts, and no more is said, there is clearly a resulting trust; but if a particular reason occurs why the testator should intend a beneficial interest to the devisee, there is no precedent that it shall not be held a beneficial interest, *Hill v. Bishop of London*, 1 Atk. 619.

A bare intention, or even negative words, will not exclude an heir-at-law from insisting on a resulting trust, *Cook v. Duckenfield*, ante.

The bequest of a legacy payable out of real estate to an heir-at-law will not be sufficient to exclude a resulting trust for the heir. As where land was devised to trustees to sell, and, out of the money arising by the sale, amongst other things, to pay £100 to the testator's heir-at-law, and no disposition was made of the surplus, it was held that the land was converted into a personalty, that no more should be paid to the heir, and that the surplus was necessary to pay the debts and legacies.

sums, and that the surplus resulted to the heir-at-law, *Randall v. Bookey*, 2 Vern. 425, Pre. Chan. 162, S. C.

In *Cruse v. Barley*, ante, and *Ackroyd v. Smithson*, 1 Bro. C. C. 402, lapsed legacies were held to result to the heir-at-law.

Lastly, as before stated, it is a rule in equity that an heir-at-law can only be disinherited by express words or necessary implication, 3 Dow. 248, 254.

Considerable alterations having been made in the law of lapse by the recent statute of 7 W. IV. & 1 Vic. c. 26, it must be borne in mind that the foregoing cases have reference only to what the law was before the passing of this act, and that now the residuary legatee or devisee (if such be appointed by the will) will take, to the exclusion of the heir-at-law, in all cases of lapse. For, by sec. 24, it is enacted that every will shall be construed with reference to the real or personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

A residuary devise shall include estates comprised in lapsed and void devises, sec. 25.

Gifts to children, or other issue who have issue living at testator's death, shall not lapse, sec. 33.

J. A. M.

### Imperial Parliament.

#### HOUSE OF COMMONS—ENGLAND.

February 3.

#### PRIVILEGES OF THE HOUSE OF COMMONS.

##### PETITION OF THE BAR.

Sir E. SUGDEN presented a petition signed by 599 Members of the Bar of England, (twenty-seven of whom were Queen's Counsel or Serjeants-at-Law) of every shade of political opinion, and a very considerable number of them belonging to the two great parties into which the state is divided. No document which ever had come before that House was more entitled to the notice of the Hon. Members,

from the standing of the parties, and from the consideration that they rarely came forward, and only upon occasions of the highest importance, before that House in the character of petitioners. The petitioners stated that they had heard with alarm the recent proceedings in that House, which had terminated in the committal of the Sheriffs of London and Middlesex to the custody of the Serjeant-at-Arms, for executing a process of the Court of Queen's Bench. The petitioners deplored that the House should have thought it necessary to take any step for the infliction of punishment on the ministers of justice, and humbly prayed that the persons now in custody should be discharged. The right hon. gentleman said that he would take the liberty of founding a motion during the course of the evening upon this petition, which was ordered to be printed. The following is the petition:—

"To the Hon. the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled.

"The humble Petition of the undersigned Queen's Counsel, Serjeants, and Barristers-at-Law.

"That your petitioners have heard with alarm of the recent proceedings of your Hon. House in committing to the custody of the Serjeant-at-Arms, the persons who now hold the office of Sheriff of Middlesex, and also the plaintiff in an action brought against the printer of your Hon. House, feel deep regret that punishment should thus be inflicted on a subject of the realm for having brought an action in one of Her Majesty's Courts in Westminster Hall, and on the officers of that Court for having, in the ordinary course of their duty, executed Her Majesty's writ in carrying into effect a judgment of that Court. Your petitioners therefore humbly pray that the persons so in custody may be discharged."

### Law Reports.

#### COURT OF CHANCERY.—Dec. 24.

HILL v. GOMME.

##### APPEAL from the Master of the Rolls.

We have before fully reported this case, as heard by the Master of the Rolls on the 15th July and 10th August last, when the plaintiff's bill was dismissed.<sup>(a)</sup> Against this order the present appeal was made.

The LORD CHANCELLOR said, the Master of the Rolls was clearly right in dismissing the bill, and the present appeal must be dismissed with costs.

(a) Ante, vol. ii. p. 328.

Jan. 13.

GOMPERTZ v. ANSELL.

—Upon an Interlocutory Application for an Issue—Whether the parties abide the result.

THE CHANCELLOR.—In this case there was an interlocutory application for an issue to be tried by a jury. Henry Gulling Isaac was the plaintiff and Joseph Isaac was the defendant. That issue was the result in such cases is generally held. In this case however the parties had not abided the cause, and gone into evidence. It is not conclusive on this Court. It is a matter of evidence, but merely a matter of fact. It was competent to the parties to go into the cause. It is quite obvious that the cause is attended with inconvenience. Hereupon on an interlocutory application I am not to grant an issue, I shall consider much more so, unless the parties will undertake to abide the result. That, however, was not adopted in this cause. There are matters of evidence now produced which were submitted to me before I directed the case to the jury by whom that issue was tried, which may have considerable effect on the jury. I cannot say there has been a change of practice of the Court shows that it is not upon itself to decide without a jury, but of such controverted facts. Is, then, now such as not to conclude the plaintiffs on the issue? Upon the whole I cannot say that the verdict upon another trial would be different from that upon the former trial. It is to be understood as not directing the jury upon the ground of any thing that the Judge who tried the issue. It will go to a new trial upon the same issue.

DEBTORS' COURT.—Feb. 5.

OF JOHN JOSEPH STOCKDALE.

The nisi obtained in this case (a) came into effect this morning. Mr. Nichols appeared on the part of Mr. Stockdale to show cause against the rule, and to object to the rule. He stated, as Mr. Stockdale was discharged from the act in January, 1831, that the presentment was made under the 59th section of the 7th George IV., and he would not submit to the consideration of the Court. The words were, "That in case any

person or persons, body politic or corporate, shall after any such insolvent shall have become entitled to the benefit of this act become possessed of any stock in the public funds of this country, or any legacy, money due or growing due, bills of exchange, promissory notes, bank-notes, securities for money, goods and chattels, or any other property whatsoever, belonging to such insolvent or held in trust for him, or in case any such person or persons, body politic or corporate, shall be indebted to such insolvent, it shall be lawful for the said Court, upon the application of any assignee or creditor of such insolvent, to cause notice to be given to such person or persons, body politic or corporate, to hold and retain the said property till the said Court shall make further order concerning the same; and it shall be lawful for the said Court to order such person or persons, body politic or corporate, to deliver over such property, and to pay such debts as aforesaid, or any part thereof, to the provisional or other assignee for the general benefit of the creditors entitled to claim under such judgment entered up by order of the said Court as aforesaid; and such delivery and payment shall be made in obedience to such order, and such person or persons, body politic and corporate, shall by such payment and delivery be discharged in respect of such property and debts against all persons forever." The Court would clearly see that the section required the application to be made by an assignee or a creditor, and Mr. Nichols believed the practice of the Court in cases of subsequently-acquired property was that it should be shown that the person was not a stranger; he was asked to state whether he was assignee or creditor, or one or other he must state on oath, and for a rule, so as to bring under the words of the Act of Parliament. It had been obtained on the affidavit of Mr. Nicholain, coach-builder, in the case in which he stated that Mr. Nichols was appointed, but he did not say that Mr. Nichols was now submitting that he was a creditor or assignee.

Mr. Woodroffe, who was called a creditor, said that Mr. Nichols could not be called an assignee, and that it was now the practice of the Court, as Mr. Nichols believed, was a practice which it had been the practice of Mr. Channell, and that the application of Mr. Nichols, which part of the affidavit was printed.

The CHIEF CLERK said that the

Ante p. 186; see also ante, p. 207.



Mr. *Nichols* thought, as it was written in, it showed the necessity and the intention of the Court that the application should be founded on the application of a creditor, which circumstance was required to be set forth in the affidavit of the party applying. The fact was not to be supplied by *inuendo*. He (Mr. *Nichols*) supposed they would be told that the schedule showed that Mr. Chamberlain was a creditor, but that the document was not to be incorporated with an affidavit; he did not know that Samuel Chamberlain appeared on the schedule as a creditor, and if he did, the objection he had taken would apply in the same manner. There might be a junior and a senior, or any other person of the same name.

Mr. Commissioner BOWEN observed, that there was this further difficulty, as it struck him. Supposing Mr. Chamberlain was an admitted creditor in the schedule, that would, perhaps, be sufficient as against Stockdale, but the omission would be an estoppel against the sheriffs. How then could this rule act against the sheriffs?

The CHIEF COMMISSIONER said, the affidavit of Mr. Chamberlain, on which the rule had been issued, in addition to not stating that he was a creditor, did not say what he thought was usual—that he made the application for the benefit of himself and the other creditors.

Mr. *Nichols* was unwilling to appeal to the recollection of the Court respecting cases in which applications had been made under the same section, but he apprehended not one could be found in which the omission he had mentioned had occurred. They were not to be driven to any long reason or circuitous route to find that Chamberlain was a creditor. His point was, that he was not so described in his affidavit. He therefore objected to the rule *in limine*, on the ground of the insufficiency of the affidavit. There was a circumstance here that required the Court to see that the preliminaries were properly made out. The application might result in an attachment, and the Court would therefore see that all was correct, that before they proceeded to an attachment, the law had been set in motion on a sure foundation. In Equity the Courts were strict that all parties were properly described, so at common law; and on these grounds he made his application for the dismissal of the rule.

Mr. *Cooke*, in support of the rule, said, whatever circumstances had transpired in this case elsewhere could not influence the Court on the present application. All they had to consider was, whether the rule had been drawn up so as to satisfy the act of Parliament. The act said the rule was to be granted on the application of an assignee or a creditor; there was not a word about an affidavit. The Court

was to satisfy its mind that the applicant was a creditor.

Mr. Commissioner BOWEN remarked that this satisfaction required an affidavit.

Mr. *Cooke* said it was known that the Court on all motions referred to the schedules; that they not only required affidavits, but always referred to the schedules; and he thought the schedule in this case was the most important document, and one to which the Court had referred before the rule was granted. It was drawn up in the usual form.

The CHIEF COMMISSIONER referred to the rule. The words "a creditor" were written.

Mr. *Cooke* contended that the affidavit was sufficient. It described Mr. Samuel Chamberlain, of No. 10, Great Newport-street, Long-acre, and if the Court referred to the schedule they would see the same description; and on reference to the record they would see that the same Mr. Chamberlain was the opposing creditor on the hearing. It would be better, his learned friends had proved that Mr. Chamberlain was not a creditor. The rule was the speaking document, and it ordered Mr. Stockdale to come forward and oppose the application. Did he say that Mr. Chamberlain was not a creditor? No; but he endeavoured to evade this application by saying that the affidavit did not mention the fact, although the rule called him a creditor, and required him (Mr. Stockdale) to show cause why a sum of money should not be set aside for his creditors, as subsequently acquired property. The Court had been told that there was a probability that an attachment might be asked for against certain parties. There were no doubt circumstances connected with this case of a peculiar and public nature. But was this case different from all others? The Court were in all matters to look forward to the chance of an attachment. Suppose an attachment in this case issued against the parties, could they come and say they had disobeyed because it was informal—because the affidavit did not state that the person applying was a creditor? It was always presumed that the Court of Law was satisfied before a rule was granted. The Court had issued a rule, could proceed to attachment, and the parties could not say it was informal. It was presumed the Court was satisfied that Mr. Chamberlain was a creditor. Mr. Chamberlain might have been at the time proving his debt; it was merely for the Court to satisfy its mind that the party was a creditor. There was nothing in the act about an affidavit; the party might give *vide voce* evidence of his debt on which the Court could act.

Mr. Commissioner BOWEN—The Court has never done so.

## Address of Chief Justice Tindal.

ke—The question was, whether the was sufficient; he said it was, because on the application of a creditor. had satisfied themselves that Mr. in was a creditor, and let the other he was not.

hols rose to reply.

EF COMMISSIONER said the learned ed not trouble himself. It was petent for the Court to see after a rawn up whether the affidavit on ad been asked was sufficient or not. eared to him that the affidavit in mitted what it was required it should the party who came to the Court hitor. The affidavit does not state plication was made for himself and creditors, therefore he had not self in a situation to proceed. Mr. in might have been a creditor in a variety of circumstances might ed to prove that he was not now a He was perfectly satisfied that if on of the Court had been drawn to hen the application was made, the not have been granted, and there- amissioner BOWEN concurred. It argued that the rule had been im- granted, but he had no doubt the told that Mr. Chamberlain was a d that the Court was kept in igno- the fact was omitted from the — Rule discharged.

## OF JOHN FROST FOR HIGH TREASON. JUSTICE TINDAL'S ADDRESS (Continued from p. 221.)

ness (Matthew Williams) gave evidence took place the night before the riot, eared from his testimony that on that risoner was at a beer-house at Argoed, ons were preparing themselves for the ifferent divisions, subject to the con- erent persons, 10 men being assigned der.

ost.—It was not the prisoner, my is the witness who attended the beer-

ief Justice TINDAL, after referring to said the prisoner was quite right, it itness who attended. Evidence had given of what was going on the night that arrangements had been made her men, but how far they could after- raged to have a connexion with the jury must judge. This witness he people were told to go to Newport, they were to go there to stop the

coaches, the post, and all traffic. This highly material evidence; for though it at a place where the prisoner was not present the time, yet it was to be weighed by the rations afterwards made by the prisoner presence. It was for the jury, and not Court, to decide how far the testimony witness was corroborated by subsequent A great question had been made of the degree, credibility which ought to be attached to, the witness's evidence. He stated that, in his evidence before, he called a man by the of George Reeves, instead of George Reed. The jury would doubtless recollect the nation which took place on this point, and say how far it tended to depreciate his title credence. In cross-examination it was usual to ask a witness whether he had ever disgraced himself on a former occasion by any of dishonesty and theft; and it was for the to judge of the credit due to the witness, and say how far the circumstance of his having a bit of coal, and been imprisoned for the offence detracted from the reliance to be put upon testimony. Upon this matter he was not to form a judgment; but the jury, from their knowledge of the world, and from knowing how persons such a condition of life as the witness's did things, must decide how far his conduct inconsistent with his afterwards becoming a worthy witness when called upon oath to give testimony. Undoubtedly the act of which witness was guilty was a disgrace to any because it was a great breach of law and but it was not that kind of breach. perjury, prevented a man from giving in a court of justice. The witness Reed observed, "If they did not break law, they could not have a new the conversation which passed between ness and Reed in the absence of the and therefore more immediately the conduct of the witness than is the bar. This evidence, then, laid before the jury; had not been or operation on the prisoner: a answer to a question put by the witness stated that they have addressed George Reeves; and this upon by the common sense that the witness could not have Reed with any degree of he had mentioned: it is an improper name.

The next witness gave evidence of a important one. It is stated that he was alleged to have seen the prisoner in the bar. If these circumstances were proved, served the jury with material evidence.

It had been denied on the part of the prisoner that such declarations were ever made, and therefore it became the jury, before they gave any weight to the testimony of this witness, to be satisfied that he was deserving of credit. Many objections had been made to the evidence of this witness, and one person had been called to prove his statement, in one particular instance, to be untrue. It was the province of the jury to determine whether or not these declarations were made. The witness said that the people were told that the soldiers were ready, and that it was only for them to go down and fetch them. If this took place in the presence of the prisoner, and he made no objection, it was a declaration of a most important character. He also said that they were told the people ought to be out on the road with guns to stop any person that passed. This was at Blackwood; and it was not immaterial to call the attention of the jury to the fact that Walker, a witness previously examined, described, that being sent out as a special constable to make observations, he came up to about a dozen persons on the road, one of whom had a gun loaded, and that he himself was wounded. This tended to show that something of the sort mentioned was on the road, but whether with reference to any planning was another question. The evidence of this witness was extremely important, since they had to inquire what was the real intention of the prisoner at the bar in bringing together, or assisting to bring together, a large number of persons in the night, and marching them towards Newport. No doubt, if the prisoner had the intention imputed to him, of stopping all traffic by means of a large body of men, with a view of effecting an alteration of the law or any other general purpose, his offence would amount to high treason. It was, therefore, extremely important to determine on the degree of veracity with which this witness spoke, and the degree of credit to be attached to him. Here was another point for their consideration, because the value of such testimony of what was said in a person's presence, when you sought to fix him with a design, must depend upon whether what was said was said loud enough for him to hear, or whether he assented to it, or whether it was said in a low tone of voice, and he was at a distant part of the room, so that he was not likely to hear it. They would also inquire whether or not they believed the testimony of the witness when they came to a decision that this was a communication to which he was privy at the time. There was one point of alleged contradiction between this witness and one who was called on the part of the prisoner. This witness said he fled away from Pie-corner as fast as he could, and he was sure he did not get home till 10 o'clock.

(To be continued)

OPINIONS OF THE JUDGES upon the QUESTIONS raised at the Trial, as communicated to the Secretary of State for the Home Department, and read in the House of Lords, 3rd of Feb. 1840.

"Westminster Hall, Jan. 28, 1840.

"My Lord,—I have the honour to inform your Lordship that the argument upon the three cases of 'the Queen v. Frost,' 'the Queen v. Williams,' and 'the Queen v. Jones,' closed this afternoon, and that the judges after considering the subject, have come to the following determination upon the two questions which have been argued before them viz. :—

"First, a majority of the judges, in the proportion of nine to six, are of opinion that the delivery of the list of witnesses was not a good delivery in point of law.

"But secondly—A majority of the judges in the proportion of nine to six, are of opinion that the objection to the delivery of the list of witnesses was not taken in due time.

"All the judges agreed that if the objection had been made in due time, the effect of it would have been a postponement of the trial, in order to give time for a proper delivery of the list.

"The result, therefore, of the determination of the judges is, that the conviction is legal.

"I will have the honour of calling on your Lordship to-morrow at the rising of the Court, if I should receive any intimation of that effect.

"I have the honour to remain, my Lord, your Lordship's faithful and obedient Servant

"N. C. TINDAL

"The Lord Marquis of Normanby, &c."

The following letter on the same subject was also read at the same time :—

"Westminster Hall, Jan. 31, 1840.

"My Lord,—As to the law, the uniform practice has been, so far back as we have any means of knowledge, that if the judge upon the trial of an indictment feels any serious doubt as to an objection that occurs in point of law, he decides the point against the prisoner, and allows the trial to proceed, reserving such point of law, in order that he may take the advice and opinion of all the other judges thereon. After consulting them, and hearing argument thereon (if thought necessary), the opinion of the judges is taken, and that the majority binds the judge who has reserved the question. If that opinion should be against the prisoner, the law is suffered to take its course, and the sentence which has been passed remains. If the opinion of the judges is in favour of the prisoner, the constant course is for the judge who tried

## The Case of Frost—Opinion of the Judges.

22

d passed the sentence to apply to  
ry of State for a free pardon. And  
in no way depends on any consent,  
plied, on the part of the prisoner;  
ursues it at his own discretion, and  
point for the present against the  
ving him the benefit of further con-  
and advice with the other judges.  
ourse is pursued for the manifest  
preventing a failure of justice; in-  
if the judge decided under his im-  
pression, supposing it to be in favour  
ner, and directed an acquittal, there  
new trial, although upon reference  
r judges his own opinion was held  
5. On the other hand, if the opi-  
judge is at the time unfavourable  
oner, it can be reserved by that  
if erroneous set right. With re-  
statement in the memorial of what  
at the trial, so far as relates to our-  
annot but remark, that the learned  
our under a complete misapprehen-  
ch we are the more surprised, as  
y stated that no distinction would  
etween this and other cases tried at  
but that it must follow the ordi-  
At the time of the discussion  
is entertained serious doubts, more  
ng, on the objection that was raised  
And if the law had obliged us to  
immediate and final decision, with-  
er of consulting the judges, which  
s not, we were not prepared, with-  
further consideration, nor without  
argument on the part of the Crown  
to come to any determination on  
We therefore followed the ordi-  
pursued on similar occasions, de-  
count against the prisoner by allow-  
l to proceed, subject to the revision  
red to. We beg to inform your  
at we think the circumstance stated  
on in the memorial, viz. that two of  
under the special commission ul-  
lared their opinion in favour of the  
loes in our judgment make no dif-  
ference; nor do we think that any  
in their minds at the time of the  
to affect the question: the law is  
the majority of the judges when  
Under the circumstances above-  
we beg leave to represent to your  
that in our opinion there is no  
atever to entitle the prisoner, John  
free pardon.

“ N. C. TINDAL,  
“ J. PARKE.  
“ J. WILLIAMS.

Most Noble the Marquis of  
Normanby, &c.

The Marquis of NORMANBY, after reading these documents to the House said, he did not see that any case could be made out which would entitle the convicts to a free pardon. Government was now of opinion that the conviction was, under all the circumstances, legal one, and that the prisoners had sustained no substantial injustice. Still there was a question whether or not the extreme penalty of the law should be inflicted, and the difference of opinion amongst the judges on the reserved points opened a door to the consideration of certain other points. This consideration, and this alone, induced the Government to make an alteration in the sentence, for if this difference of opinion had not taken place amongst the judges, and if the doubts and difficulties by which the case was marked had not arisen, he had no hesitation in saying that he never knew an instance in which the lives of the convicts would have been justly forfeited to the offended laws of the country. Looking at the atrocity of the crime, at the influence and position of the parties convicted, at the number of persons who have been involved by them, together with the abortive attempts which had been made in other parts of the country, he had not the slightest hesitation in saying, that were it not for the circumstances which he had already stated, the Government would have withheld the recommendation for the exercise of the royal mercy, and, however painful, would have felt it to be its imperative duty to suffer the law to take its course. There was, he repeated, no ground made out for a free pardon, and Government, in changing the sentence, resolved to commute it to transportation for life.

The following is stated to be the opinion of the fifteen judges upon the case reserved:—

“ That the prisoner had no case reserved according to the statute, and the objection was good if made before the sentence was pleaded.”—

FOR.

Littledale  
Patteson  
Williams  
Coleridge  
Parke  
Erskine  
Alderson  
Rolt  
Colman.

"But that the objection ought to have been made before the prisoner pleaded :"—

FOR.	AGAINST.
Lord Denman	Littledale
Lord Abinger	Patteson
Chief Justice Tindal	Williams
Bosanquet	Coleridge
Gurney	Parke
Maule	Erskine.
Alderson	
Rolfe	
Coltman.	

Therefore a majority held that the prisoner had not what the statute entitled him to, but a majority also held that the objection was not made in time.—*Times*.

#### TO THE EDITOR OF THE LEGAL GUIDE.

Jan. 20, 1840.

SIR,—I have noticed in your last a letter from C. B., in which he suggests that I should refer to the statute 12 Car. II. c. 24, and having acted up to that suggestion, I beg to return my sincere thanks to C. B. in having pointed out to me two very material errors; first, an erroneous extract (which is almost unpardonable) from a statute; and, secondly, giving a description of what *Socage was*, and not what it is.

I am, Sir,  
Your's most obediently,  
S. A. W.

#### TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—As I think we ought to think of our more humble fellow-clerks, those who are not articulated, I beg to suggest to you that there should be a general holiday in all Attornies' offices on the 10th, being the wedding day of our most gracious Queen. I have thus troubled you, as there does not seem at present any disposition to make the holiday general, although, as a matter of course, every articulated clerk will so make it.

I remain, Sir, your very obedient servant,  
AN ARTICLED CLERK.  
Feb. 4, 1840.

#### REVIEW OF NEW BOOKS.

*LAW and LAWYERS, or Sketches and Illustrations of LEGAL HISTORY and BIOGRAPHY* in 2 vols. London: Longman, Orm Brown, Green, and Longman, 1840.

This is a work full of wit and anecdote, and to be appreciated as it deserves, must be read. "The improvement of reason; the diverting men from sensuality and idleness; the maintaining of propriety and justice; and consequently, the peace and welfare of the kingdom, is very much to be ascribed to the Judges and Lawyers," so said Richard Baxter. The author in his observations upon *Legal Education*, p. 5, says:—

It is a practice too common with controversialists, to argue against things in extremes. There is no necessity, because a lawyer devotes a certain portion of his time to the improvement of his mind, and the cultivation of his taste, by the study of literature, that he should therefore neglect the calls of his profession. "Moderation," says Fuller, "is the silken string running through the pearl chain of all virtues."

As to the sort of education best calculated for the bar student, we would, in the first place, observe, that let libellers say what they will, the bar is composed, for the most part, of gentlemen. That sort and extent of information usually found amongst gentlemen will, consequently, be expected from any one who enters the profession. An acquaintance with the classics, more or less intimate, usually forms a part of the education of every English gentleman; for this reason, a classical education is desirable to all who intend to become members of the bar. There have been men, indeed, who have risen to the very highest honours of the profession without the advantages of a classical education; but it would be as prudent to imitate their conduct as it would be to obtain for a son, a lieutenancy in the French artillery, under the expectation that he would, therefore, become Emperor of the French.

Again, in p. 11, he observes—

General knowledge too is unquestionably necessary for the lawyer. Ludicrous mistakes have frequently occurred through the deficiencies of some of them in this respect. We have heard an anecdote, somewhere, of an eminent barrister examining a witness in a trial

t of which was a ship. He asked, other questions. "Where the ship particular time?" "Oh," replied the the ship was then in quarantine." antine, was she? and pray, Sir, quarantine?"

instance given by Mr. Chitty of the eral knowledge to the lawyer is worth is well known that a judge was so norant of insurance causes, that g been occupied for six hours in action "On a policy of insurance (Russia duck) from Russia, he, in s to the jury, complained that no ad been given to show how Russia taking the *cloth* of that name for the l be damaged by sea water, and to t!"

. 29—

ship in a solicitor's office has also imended by high authority as a ol for the bar. Lord Tenterden, esolved to turn his attention to the r some time in the office of a large aig's Court. This step he was in-ake upon the recommendation of er. Mr. Bentley, the Conveyancer, two or three years ago, was for a e time in one of the principal es in London; and has been often eclare, that he owed to the habits-quired, a facility of mastering every and case that came before him, ifficult or repulsive it might be. leman, who was eminent in his the profession—and there is none ires more positive learning—never e advantage of pupillage in any bar-ambers. All the information and he obtained, he acquired during ip. Chief Baron Thompson com-legal studies in an attorney's office; d Lord Wynford and Sir William ord Thurlow was articled, together er the poet, to a solicitor near Bed-; and his great predecessor, Lord , passed through the same ordeal. was in his father's office for some le time. Lord Macclesfield actually is an attorney. Lord Kenyon served . Sir William Garrow passed some solicitor's office, as did Sir Samuel Lord Gifford was regularly articled; so was Lord Lifford, Chancellor of nd Sir George Wood and Sir Francis ry learned and distinguished judges.

chapter of EARLY STRUGGLES of : LAWYERS, p. 39, we read—  
s and Poverty," said Lord Chan-

cellor Talbot, "are the only things needed by the law student." "Pray, my Lord," asked a fashionable lady of Lord Kenyon, "what do you think my son had better do in order to succeed in the law?" "Let him spend all his money, marry a rich wife, spend all her's, and when he has not got a shilling in the world, let him attack the law!" Such was the advice of the old chief justice.

Such sentiments as these it has been the fashion to laud. In themselves they are true, but they are only half-truths, or perhaps we should rather say they are the precise converse of great errors. A wealthy man is less likely to make a good lawyer than a man who is not rich, just as we are told he is less likely to inherit eternal life. But we read no where in Scripture that poverty is the road to salvation. An individual who "has every thing handsome about him," on whom fortune has abundantly showered her gifts, and to whom pleasure offers her thousand inducements, is assuredly not the most likely, nay, is just the least likely person, with Sir William Blackstone, to—

"— welcome business, welcome strife,  
Welcome the cares, the thorns of life;  
The visage wan, the purblind sight,  
The toil by day, the lamp by night."

So he is the more likely to tread "the primrose path of dalliance," than "the steep and thorny way to heaven."

It may be questioned whether poverty, and the difficulties which so often beset men in their passage through life, have all the beneficial influence which is ascribed to them. The school of adversity as often indurates as softens the affections of mankind. In many minds instead of producing humility and industry, it produces only disgust and indifference. Again, looking particularly to our profession, it may be doubted whether poverty has not in many cases the effect of distracting the attention from professional subjects. When the unfortunate *Donald*, the author of "*Vimonda*," was asked how he was getting on with his tragedy, he replied in a tone of indescribable sorrow, "Talk not to me of my tragedy, I have more tragedy than I can bear at home." With a family reduced almost to starvation, we could hardly expect his mind to have been devoted to his noble subject.

*Lord Erskine* said that the first time he addressed the Court, he was so overcome with confusion that he was about to sit down. "At that time," he added, "I fancied I could feel my little children tugging at my gown, so I made an effort—went on, and—succeeded." With a man of less sanguine temperament the same feeling would have only added to his confusion—the conviction that upon his

cess at that time depended the future welfare of those he loved would only have aggravated the embarrassment of his novel situation.

*Fletcher Norton* toiled through the routine of circuits and Westminster Hall for many years without a brief. *Mr. Bearcroft*, one of the most eminent barristers of the last century, and who died *Chief Justice of Chester*, underwent the severest difficulties in his passage to wealth and fame. His industry and perseverance were indomitable. For many years his practice was so limited as hardly to suffer him to subsist with the strictest economy. He sometimes, however, thought of relinquishing the law as a profession, but a just estimation of his own acquirements induced him to continue, and he at last made himself known, and obtained an immense practice and a high reputation. It was a long

time before the eminent merits of *Mr. Holroyd* afterwards a puisne judge in the King's Bench became recognised. *Lord Kenyon* spoke of him, when in his 47th year, as "a rising young man." *Sir W. Grant* travelled many circuit before he obtained a single brief, and at last owed to the friendship of a Minister what he was entitled to expect from his own merits.

We would willingly make further extracts but that our space denies it. The whole work is an illustration of the rewards that have attended industry and perseverance, and it richly merits the notice of every aspirant to legal fame and distinction.

### EXCHEQUER OF PLEAS.

Sittings at Nisi Prius in Middlesex and London, before the Right Honourable *JAMES LORD ABINGER*, Chief Baron of her Majesty's Court of Exchequer, after Hilary Term, 1840.

#### MIDDLESEX.

Saturday	Feb.	1	-	-	Common Juries.
Monday	"	3	-	-	Revenue and Common Juries.
Tuesday	"	4	-	-	} Common Juries.
Wednesday	"	5	-	-	
Thursday	"	6	-	-	
Friday	"	7	-	-	} Special and Common Juries.
Saturday	"	8	-	-	
Monday	"	9	-	-	
Tuesday	"	11	-	-	} Common Juries.
Wednesday	"	12	-	-	

#### LONDON.

Monday	Feb.	3	-	-	To Adjourn only.
Thursday	"	13	-	-	Adjournment day.—Common Juries.
Friday	"	14	-	-	} Common Juries.
Saturday	"	15	-	-	
Monday	"	17	-	-	
Tuesday	"	18	-	-	} Special and Common Juries.
Wednesday	"	19	-	-	
Thursday	"	20	-	-	
Friday	"	21	-	-	} Common Juries.
Saturday	"	22	-	-	
Monday	"	24	-	-	
Tuesday	"	25	-	-	} Common Juries.
Wednesday	"	26	-	-	

The Court will sit at half-past Nine o'Clock.

COURT OF EXCHEQUER—Jan. 29.

ADMISSION OF ATTORNIES.

NEW RULE.

ordered, that every person who shall apply for admission as an Attorney at Law, and who shall not have been an Attorney and Solicitor of any Court, shall (in addition to the notices sent to the Examiners, Masters, &c. by a Rule of Hilary Term, 6 Wil. 4, 1836, read in all the Courts) for the next full Term, previous to the Term at which he shall apply to be admitted, cause to be affixed to his name and place or places of abode for the last preceding twelve months, and also the names, and place or places of abode of the Attorney or Attornies to whom he shall be Articled, written in legible characters, and affixed in the Exchequer Office of such place as public notices are affixed, and also enter or cause to be entered in two books to be kept for the purpose in the chambers of the Lord Chief Justice, and the other at the chambers of the Clerks of this Court, his name and places of abode for the last preceding twelve months, and also the name or names of the Attorney or Attornies to whom he shall have been

(Signed) ABINGER,  
J. PARKE,  
E. H. ALDERSON,  
J. GURNEY,  
R. M. ROLFE.

COURT OF EXCHEQUER.

HILARY TERM, 1840, 3 VICT.

23.—This Court will, on Monday, 28th day of February next, hold sittings, and proceed in disposing of the business now pending in the New Trial paper on the 28th, 29th, and on the following days, viz. the 28th, 20th, and 21st days of February, and on the same 21st day of February, and on the 22nd day of the same month, will proceed in disposing of the business now pending in the Trial paper.

By the Court.

NEW POSTAGE ACT.

POSTAGE OF LETTERS between FRANCE and GREAT BRITAIN.

A correspondent has furnished us with the following answer, just received, to his strong remonstrance against the old (British) rate being still charged here at the post-paid office. He has set the question at rest :—

“Sir—I beg to acknowledge the receipt of your letter of the 16th instant, and to acquaint you, in reply, that the British rate on a letter from France to Sligo, or any other part of the United Kingdom, is 10d. only, under half an ounce; and that the French Post-office has been furnished with a copy of the new regulations to that effect. I have no doubt that the errors which have been committed by the office at which the letters sent by you were post-paid will be corrected on a proper representation being made to the Director-General of the Posts of France.

“I am, Sir, &c.

“THOS. LAURENCE, Assistant-Secretary,  
“General Post-office, London, Jan. 25.”—*Galignani.*

SPRING ASSIZES.

HOME CIRCUIT.

(Before Lord Abinger and Sir Joseph Littledale.)

Hertfordshire.—Wednesday, February 26, at Hertford.

Essex.—Monday, March 2, at Chelmsford.

Kent.—Monday, March 9, at Maidstone.

Sussex.—Monday, March 16, at Lewes.

Surrey.—Monday, March 28, at Kingston-upon-Thames.

NOTICE TO CORRESPONDENTS.

A Country Articled Clerk.—Your letter is under consideration. We much wish that our large mass of correspondence had vanished from our table, so as to admit of your request being complied with. You will have *your turn* if approved.

R. H.—C. V. B.—J. L.—Young Coke—(*Young Vanity* would have been a better adoption)—W. K.—E. D.—An Old Subscriber—all under consideration.

C. B.—We have your letter and enclosure. In reply to your P. S. see the advertisement. It appears to be the first edition, revised and corrected to the present date.



## TO COUNTRY SUBSCRIBERS.

A Stamped Edition of this paper is published every Saturday, which will be forwarded to Subscribers, postage free, at any part of the United Kingdom, upon application to the Publishers.

ANNUAL SUBSCRIPTION £1. 10s.

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## HUMAN PUNISHMENT.

Mr. Western makes the following observations upon the manner in which "human punishment may be considered with regard to its power, end, and measure."

"With respect to the power or right of the legislature to enact punishment, any one must see the mischief that would arise, if men were allowed to redress their own grievances. But no man being a proper judge in his own case, the power of enacting punishment is, with the strictest justice, transferred from individuals to the sovereign authority, and thereby one of the evils which civil government was intended to remedy is prevented.

"The justice of human punishment can originally be maintained on no other principles than those of the laws of nature, which authorise every man to secure himself against the assaults of others. But with regard to the particular mode of punishment which may be thought best calculated to defend every individual, in his civil capacity, from injury, that must be left to the wisdom and determination of the supreme legislative authority. And it is in vain for any criminal to say, that this or that penalty is too severe for his crime; for it is a maxim of the constitution, that every man is consenting expressly or impliedly to every act of the legislature. The criminal code, therefore, is a constituent part of that original contract into which every man enters when he first becomes a member of society; and was intended to contribute to his personal safety and happiness, till his own folly brought down its terrible vengeance upon his head.

"As to the end of human punishment; it is not inflicted by way of revenge: for that would be to usurp the prerogative of God, to whom only vengeance belongeth. Neither is it awarded to make an atonement. For every wilful violation of human laws that are not contrary to revelation, is a breach of the moral law; and no human suffering can remove the guilt of the offender, or make whole the law which he has broken. Suffering is the effect of transgression. Now it is utterly impossible that an effect should destroy the cause which produced it. No length of confinement of a debtor, for instance, will discharge the debt

which he owes. In short, it is from the Scripture alone that we learn how sin can be pardoned consistently with the Divine attributes and government (Rom. ch. 3. v. 20, 26; 1 Pet. ch. 3. v. 18.) The design of the legislature in enacting punishments is to prevent the commission of the same crime in future, so as to secure the public safety; therefore the punishments should be merciful in proportion to the crime committed, and not savour of revenge. Crimes are more effectually prevented by the certainty than by the severity of punishment. Great severity of law has always been found to defeat its own end; its execution is hindered by public humanity, and the criminal escapes punishment. The certainty of suffering a mild punishment will deter men from breaking the laws much more effectually than (as was very recently the case) the uncertain penalty of death."—B. II. c. xi. p. 377.

The FIRST EDITION of this Work was dedicated by COMMAND to HER MAJESTY the QUEEN, and was honoured by the most distinguished patronage at home and abroad. It is a work well adapted for STUDENTS.

JOHN RICHARDS and Co., 194, Fleet Street.

*On March 1, price 4s, to be continued Monthly,  
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**PRECEDENTS IN CONVEYANCING** adapted to the Present State of the Law, Illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq. F. R. A. S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. in continuation of the PRECEDENTS by S. VALLIS BONE, Esq.

This work, independent of the Precedents, which are all drafts of *actual practice*, abounds with valuable practical information to TOWN and COUNTRY SOLICITORS. The NOTES are to the purpose only. Among these, the term "CUSTOM OF THE COUNTRY," is fully explained, and Tables are given, shewing those Customs in the SEVERAL COUNTIES of ENGLAND for granting LEASES as to the Term—time of entry—rent—days—rotation of crops—restrictions on tenants—repairs—draining—maturing—also the law relating to MINING LEASES.

Vol. III. was published December 1, with Table of Contents, price 17s. Price of Vols. I. and II. £1. 10s.

London: JOHN RICHARDS and Co., Law Booksellers, 194, Fleet-street.

*This Work will be completed in Four Vols.*

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West in the City of London.—Saturday, Feb. 8, 1840.

# The Legal Guide.

[.] SATURDAY, FEBRUARY 15, 1840.

[No. 16.]

## SEPARATE USE.

(Continued from p. 227.)

confirming the judgment of LORD LANGDALE, M. R., in *Tullett v. Armstrong*, delivered by the Lord Chancellor, well understood by our readers, that *has been published in this paper*, and the authenticity may be relied upon.

LANGDALE continued upon the question, came distinctly under the consideration of the Court, in *Anderton v. Anderton*, and *Keen*.

There leasehold property given by will to a woman, then single, for her sole and separate use, free from control of any present or future husband, or any husband to come. The property was single at the testator's death, and continued so for several years afterwards, before she married she desired to have the property settled to her separate use. Her husband refused, and she remained in that place without a settlement.

After marriage, the wife claimed the property for her separate use, and although her husband insisted, not only that a separate use of an unmarried woman was unsustainable, as an attempt to take away the power of disposition; but in that case there was an agreement to forego her separate use, it was decided that she was entitled to the leaseholds for her sole and separate use.

This was a decree of Sir John Leake, who had, in a previous stage of the case, granted an injunction to restrain the husband from receiving the rents, and his

order in that respect was confirmed by Lord Eldon, by whom an order was made to discharge the injunction. Unfortunately this case was not reported, until the order on which the question now arises had been made; but up to November, 1832, when that decree was pronounced, it seems to have been considered as clear, that a gift to a woman for her sole and separate use, independently of her husband, conferred on her a separate estate during her marriage, though she might be single, when the gift vested in interest or possession. The separate estate was considered simply as an estate vested in a woman, which this Court would protect against the marital power of her husband, and no question has been raised further as to the validity of the restraint or alienation affecting the separate estate; and according to the law thus understood has been the constant practice of the profession, and there are many cases in which married women, and through them their families derive their sole support from provisions made for them, on this understanding, if the gift is so limited as to be for her separate estate, during the period of coverture only, this Court would not extend it further, and the case of *Benson v. Benson* is in conformity with that principle.

The cases which raise the question are *Newton v. Reid*, *Massey v. Parker*, and the two orders in *Newton v. Reid*, and

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Brown *v.* Pocock, there being two cases of the same name, were made by the Vice-Chancellor, as it would seem, without any argument at all. In each case property was given to the woman for her separate use, without power of assignment by way of alienation, and the alienation was made during her coverture. In the first case the Vice-Chancellor is reported to have said, that at the time the restriction was void, because the annuity was not given over on alienation; and subsequently he is reported to have said, that the restriction or alienation was rendered ineffectual by the context of the will in that case. In the other case no reason whatever is assigned by the Judge, though the reporter has transferred an observation of Counsel to his marginal note; but on a subsequent occasion the Vice-Chancellor is reported to have said, that the case of Benson *v.* Benson, and Newton *v.* Reid, proceeded upon this, that the policy of the law being in favour of the power to assign, the Court will not permit that power to be restricted by a fetter which is to take effect on a subsequent marriage. On this it is necessary to observe, that in Benson *v.* Benson, the alienation took place during widowhood, while in Newton *v.* Reid the alienation was during coverture. In Massey *v.* Parker, it was a question whether the property was given to the separate use of the wife; if it was so given in, fetter was imposed on it, and in that respect it differs from the present case. The Lord Chancellor, then the Master of the Rolls, having determined the estate was not given to the woman for her separate use, the case might there have ended; but his Lordship proceeded to declare his opinion, that if the property had been given to the woman's separate use, it would upon the marriage become the property of the husband, as the validity of the restraint on alienation appears to me to depend on the existence of the separate estate, it is not to be denied that the case of Massey *v.* Parker is to be considered as an established decision, while it negatives the existence of the separate estate in such cases as the present, which would alone put an end to the restraint or alienation; and must be admitted that the case, Newton *v.* Reid, though the order was made with opposition, has been more than once referred to without disapprobation. In the subsequent case of Davis *v.* Thorncroft, the Vice-Chancellor has expressed himself to be always understood that property may be given to the separate use of a woman, married or unmarried; and he stated, as I have conceived correctly, that the practice of the profession has been in accordance with that opinion without variation, and in some cases it has been stated also, as I conceive correctly, that the cases of Newton *v.* Reid, and Benson *v.* Benson, and Jones *v.* Salter, are all cases in which the question was whether, if the Court permits property to be settled for the separate use of a woman, it will admit of there being a restraint in disposition of it; but upon this statement it is important to add, that this case of Jones *v.* Salter, Benson *v.* Benson, and the first case of Brown *v.* Pocock, only shew that the Court does not admit of such a restraint while the woman is single; whilst the cases of Newton *v.* Reid, and the second case of Brown *v.* Pocock, are the only reported cases in which, notwithstanding the fetter annexed to the separate estate, the Court has permitted alienation during coverture. On the review of the cases to which I have last adverted appears to have been the opinion of the Lord Chancellor, when Master of the Rolls, that the separate estate would not arise on coverture if the subject of it vested in the woman while single; and it appears to be the opinion of the Vice-Chancellor, that the separate estate would arise on coverture, though the subject of it vested in the woman while single: that the Court would not sanction any restraint on alienation of such separate estate. In this statement of the authorities, I own I have found myself extremely embarrassed, and I could have

to have had this case re-argued before the Chancellor, and in the presence of the Chancellor. Not finding that course of, I have given the subject my attention; and though after what has I must own my own opinion with trust, yet, as it does appear to me, opinion expressed in *Massey v. Par-* necessarily inconsistent with the decision in *Newton v. Reid*, and the orders in *v. Reid*, and the second case of *v. Pocock*, are not warranted by authorities and doctrines of the Court, I refuse to the parties in this case the benefit of my opinion, such as it is. I considered all the cases I have been told on the subject, and I am unable to find any authorities prior to those I have read, or any satisfactory principle for the proposition, that a gift to a woman for separate use is invalid, if she chances to die at the time when the benefit of the uses vests; or for this proposition, that a restraint of alienation of the separate estate in a married woman is invalid, if accompanied by a gift over an alienation, or sanction either of those propositions, as it appears to me, defeat the purpose which was contemplated by the Court, when it framed its principles for the separate estate of a married woman. As this subject has given occasion to much discussion, and as a decision rendered here cannot settle the question, of great importance, I am desirous that the case should be brought under the consideration of a higher tribunal without unnecessary delay, and I will afford every facility in my power for the correction of error into which I have fallen.

(To be continued.)

#### PROBLEM XVI. VOL. III.

##### AGREEMENTS.

Is a sufficient Signature by the Agent, to an Agreement for the Purchase of Land?

#### TO THE EDITOR OF THE LEGAL GUIDE. ANSWER TO PROBLEM XII. VOL. 3.

##### SCINTILLA.

What is the doctrine of Scintilla?

By the statute 27th H. 8. c. 10. commonly called the Statute of Uses, it was enacted "that the estate, &c. that was in such person or persons, that were or should be seised of any lands, &c. to the use, confidence, or trust of any such person or persons, should be from thenceforth deemed to be in him or them that had or should have such use, &c. after such quality, manner, form, and condition as they had before in or to the use, &c. that was in them." It transferred the legal estate to the *cestui que use*. Thus, if a feoffment be made to A. and his heirs to the use of B. and his heirs, the seisin is transferred to, and the use executed in B. To attract the legal estate under the statute, it is necessary that there should be an use *in esse*; a question arose, therefore, how the statute operated upon contingent uses. As the statute was supposed to extract all the estate of the feoffee to uses, various opinions were held as to the person in whom was the seisin to serve the contingent uses as they should arise. (a) The point arose in *Brent's case*, 2 Leon. 14., and *Manning and Andrewes' case*, 1 Leon. 256. But the case where the question came more directly under the notice of the judges, and where the doctrine of *scintilla* is said to be established is *Chudleigh's case*, 1 Co. Rep. 120. There Sir Richard Chudleigh conveyed an estate to the use of trustees and their heirs during the life of his son Christopher, remainder to the use of the sons of Christopher successively in tail, remainders over. The feoffees enfeoffed Christopher of the lands

(a) In order to give effect to the contingent uses, and to prevent the "universal disquiet of the realm" (*Popham, C. J. in Chudleigh's case*), the judges resolved that a possibility of seisin still remained in the feoffees; not an actual estate, but a *Scintilla juris et tituli*.

before he had a son. Whether the contingent use to the unborn sons of Christopher was destroyed, was the question. Periam and Walmesley held that the use was not destroyed; but rejected the doctrine of *scintilla* (Periam comparing it to Sir Thos. More's *Utopia*, 132 b), and insisted that the seisin of the feoffees was sufficient to serve the future uses when they came in esse: they held also that as the uses were never in esse, they could not be suspended, 133 a. The remaining judges agreed that the feoffment made by the feoffees who had an estate for life by limitation of the use, divested all the estates and future uses also, 134 b.:—that the statute could not execute any uses that were not in esse; and after arguing that the statute did not divest the feoffees of the estate, it was held by Popham and Anderson, C. J.J. and four other judges that the feoffees, since the statute had a possibility to serve the future use when it came in esse; and that in the mean time all the uses in esse shall be vested; and when the future uses come in esse, then the feoffees (if the possession be not disturbed by disseisin or other means) shall have sufficient estate and seisin to serve the future use when it comes in esse, to be executed by force of the statute, and that seisin and execution by force of the statute ought to concur at one and the same time. And they held that if the possession was disturbed by disseisin or otherwise, the feoffees would have power to enter to revive the future uses, according to the trust reposed in them, unless they did by any act bar themselves of their entry, 137a.(b) That which weighed with the judges to be of opinion for leaving a right of entry in the feoffees to preserve the contingent uses, was,

(b) From Anderson's report of this case which Sir E. Sugden (1 Pow. 22) says is the best, it appears that the judges were of opinion that not a mere *scintilla*, but a sufficient estate remained in the feoffees to support the uses.

their fear of perpetuities, 2 Cruise's Dig. 408.; Kent v. Hartpool, 1 Vent. 306. That the contingent remainder was destroyed, by the destruction of the particular estate by feoffment or conveyance, before the contingent remainder came in esse was settled by Chudleigh's case, and confirmed by Archer's case, 1 Co. rep. 66., though Archer's case was reported first, Sug. on Pow. 125. In the case of Wegg v. Villiers, 24 Car. 1.: 2 Ro. Ab. 796, Roll, C. J., with Nicholas and Aske resolved (*inter alia*), that if the tenant for life in remainder, did not, upon feoffment by immediate tenant for life, enter so as to support the contingent uses, the feoffees may enter to revive the contingent use, and then by their entry the contingent use shall be executed in the person entitled, for there is a *scintilla juris* in the feoffees, otherwise the contingent use will be destroyed. And in the same case, in B. R. Newdigate, J. thought that rather than the contingent use should be destroyed, the covenantees might employ their *scintilla* to preserve it. These expressions seem to imply a want of conviction in the stability of the doctrine.

What (says Sugden, 1 Pow. 31.) is this *scintilla juris et tituli*? If it be an actual interest, it cannot be revested in the feoffees against their own feoffment. If it be not, why should it not be considered in the light of a collateral power which the donee cannot destroy?

The doctrine of *scintilla* seems now to be treated as a nullity, or as a theory only curious as showing the astuteness of the Judges in their desire to support contingent uses and prevent perpetuities. (Mr. Sanders, however, Uses, vol. I. supports it). Where is the necessity for it? As we are compelled to hold that the estate is executed in the remainderman, so as to exhaust the seisin of the feoffees until the rising of the use, what is there in the act which should enforce us to say that the estates shall not open, and be once let in the contingent uses as they com-

The intention of the act was to make the feoffee of every thing; he was to have the use of the unborn *cestuique* when they come in *esse*, the words of the statute are satisfied. Sug. on Pow. Of the same opinion is Hayes.

The statute makes no alteration in the use, but merely converts the legal estate. Then, the use is no sooner executed, than the statute converts the use with legal qualities, converted to a *contingent remainder*. When a conversion to uses is made, all the present uses are converted into legal estates, and all contingent uses are converted into legal estates, capable in due time of ripening into legal estates. As, before the statute of land conveyed by A to B, to the use of A for life, and after his death to the use of A's sons, the disposition in favour of A's sons would have presently charged the land of B with a contingent *equitable* use, since the statute of land be thus made, the statute acting on the use, will convert the charge the land with a contingent use. Hayes's Introduction to Conveyancing, 69, 70.

Then a conveyance to the use of A for life, remainder to the use of his unborn sons, remainder to the use of B in fee; in which B. derives from the release of A, would seem to be a *qualified reversion*, to open and admit the son when he comes in *esse*.

A. J. H.

## Imperial Parliament.

HOUSE OF COMMONS—ENGLAND.  
February 11.

### THE SHERIFFS OF LONDON.

MR. KNATCHBULL moved "That it having been stated by W. Broaches, Esq., medical attendant on J. Whealton, Esq., that in his judgment Mr. Whealton's life would be endangered by confinement, the sheriff be forthwith removed from the custody of the Sergeant-attending this house."

The question having been put from the chair, the motion was agreed to.

MR. HUME wished to have it understood whether the sheriff was to be discharged on payment of his fees in the usual way, or otherwise.

THE SPEAKER stated it to be his opinion that persons in custody of the Sergeant, who had been ordered into confinement by the house, and whose health, it was stated, would be endangered by further confinement, ought to be at once discharged by the house without payment of their fees.

## SCOTLAND.

### JUDGES OF THE SUPREME COURTS.

MR. WALLACE rose to move, in pursuance of notice, for a committee to inquire into the administration of the law in the Supreme Court of Scotland, with a view to ascertain whether the number of judges may not be diminished. The hon. member proceeded to say, that it was a considerable number of years since he first introduced the subject to the notice of the house, but that a great increase having been made to the salaries of the judges, while the business of the court had considerably decreased, it was now more especially necessary to inquire whether the same number of judges ought to be employed as was considered requisite when the amount of business was greater. In the year 1831 the five judges who sat in one of the courts had before them 1,956 causes, but in the year 1838 the number of causes before the same court was 1,486, showing a diminution of about a quarter. With regard to the other two courts, the eight judges who sat in them had in the years 1831-2 decided 495 causes, but in 1839-40 they had only decided 218. It seemed clear that if there were only one court of review which sat for a reasonable time, the whole business might be effectually done. The length of the vacations taken by these courts was very great, and was considered to be one cause of the great delay and expense of the proceedings in them. He had last year alluded to a suit which had lasted upwards of four years, during which the court had sat 16 months only. During the last year two very great misfortunes had happened, which, however, made it manifest that the number of judges might be reduced without any public inconvenience. One very distinguished judge had been afflicted by a very severe complaint, which had prevented him from attending to his duties, and a calamity had befallen another eminent judge, who had now quitted the bench; the consequence was, that for some time there were in two of the courts only three judges, but no complaint was made of the insufficiency of the learned judges who remained to do the whole duty of the court, either on the part of those learned persons

themselves, or on the part of the profession. He thought, therefore, that some reduction in the number of judges ought to be made, but it would be much more satisfactory if the Noble Lord who was the leader of the administration in that house would consent to take the inquiry into the hands of the Government. The Hon. Member concluded by moving according to his notice.

Mr. F. MAULE said, it was not the intention of the Government to oppose the motion, because, after the measure which the house had generously passed last session for increasing the salaries of the judges, it would not be proper to withhold from public inquiry the question whether the judicial strength at present existing was greater than was necessary to carry on the business of the court. He was not going to pre-judge that opinion by pronouncing any opinion upon it at present, but he knew that in Scotland an opinion prevailed that there were too many judges; and, such being the case, it was in his opinion better, as well for the due administration of justice, as for the credit of the court, to institute a full, impartial, and satisfactory inquiry into the subject. He was sure that nothing would emanate from any committee to be appointed for this purpose which could be prejudicial to the characters of those learned officers who now acted as judges in those courts; if he supposed that such a result could be produced by the appointment of a committee, he should be the last man to consent to the present motion. There were other matters to which such a committee might properly direct its attention. It was impossible to read the report of the commission of 1834, and to doubt that a general dissatisfaction prevailed as to the mode of administering justice in the Court of Session. At the same time it would be expedient that the inquiry, if agreed to, should be carried on by the Government, and he therefore proposed to the Hon. Member, if his motion were agreed to, to leave in the hands of the Government the selection and nomination of the committee.

Mr. R. STEUART supported the motion, in the expectation that the result would satisfy the people of Scotland that the judges were not over-paid, or the establishment too large.

Mr. HOPE opposed the motion. He should regard it, if carried, as tantamount to a censure on the Scotch judges.

The LORD-ADVOCATE was convinced that the result of the inquiry would be that the Court of Session had not too many judges, and that they had properly conducted the business. He adhered to the opinions he had expressed in the former debate on this question. The impression which prevailed in the country had arisen from the shortness of the time occupied by the judges in giving their decisions in court. But this feeling of dis-

approbation of the manner in which business was there conducted was not shared by the profession or by any one whose opinion was worth having. The best way to satisfy the country would be to institute a full inquiry before a committee, and he had therefore no objection to that course, especially as he was sure that the result would be to give additional support to the court.

Sir R. PEEI. said, that he formerly agreed to an increase of salary for the judges, because he felt that the salaries they had received were inadequate. He thought that there ought to be that relation between the bench and the profession, that you might always be able to get competent persons to fill the former. It was true economy to give such salaries as would purchase the highest talents at the bar, so as always to insure an equality at least, if not a superiority of the bench as compared with the profession. But what surprised him was that the Government should agree to this motion in the way they had done. They had made up their minds, they said, that there should be no reduction. Why, then, did they not state the grounds of that determination, and resist the motion? Such a motion might be made to-morrow to inquire into the manner in which the English judges conducted business. The Government might say to that, too, "We have made up our minds;" but how could they resist the motion? Would they say to such a motion—"We think the result of inquiry will be to add credit to the judges." Having, then, on one side, not only the opinion of the Government, but that of every man whose opinion was worth having, according to the hon. and learned gentleman, was it decent to enter on such an inquiry? The hon. member (Mr. Wallace) said that the number of four judges was preferable to three, and the hon. member and his seconder said that their minds were made up on the subject; that they had considered these matters, and of course they would adhere to their opinions. There was another point mentioned by the hon. member, with respect to the conduct of the judges—that several persons thought that the judges were not sufficiently patient in hearing long law arguments, and that was the particular point on which he recommended inquiry. He said that there had been a change made in the mode of conducting the business of the court; that formerly the judges were very patient and listened to the arguments of counsel, but that now the arguments of counsel and their written pleadings did not receive the same attention as formerly. How could they come to a satisfactory inquiry upon that point without an examination of the judges; and how could they conceive anything more improper than to ask the judges, "Why did you not give more attention to those arguments?" And suppose the judge

ty, "If you press me on that point, I know that the counsel was so tedious that he was consuming the public time, preventing the court performing the duty which it owed to the public." He (Sir James) must say his leaning would be with the side which could not conceive a judge better qualified to discharge his duties to the public, when his duty was made up, and when he heard counsel waste the time of the court with frivolous and irrelevant saying, "Other cases are pressing, and I am satisfied on the question." He heard a speech made by a Scotch counsel of the House of Lords of 11 hours 15 minutes one day, and 5 hours the next; altogether three days were consumed in the

DGE-ADVOCATE.—Sixteen hours.  
PEEL continued—When he said eleventh hour of the Scotch bar, corrected him—"You do injustice to the Scotch bar of eleven hours, the speech was not so long." Could there be anything more ridiculous than calling on these judges to say, when they had made up their mind about the eighth or ninth hour, they could tell the counsel that the time of the speech was valuable, and that they begged pardon to pronounce their judgments, their duty having been made up some time before? A degrading inquiry! The reasons assigned by the Hon. Member for the inquiry were, that the House would best preserve its duty, and best consult the dignity of the judicial functions of the Court of Session, by giving the inquiry.  
ALLACK begged leave to move for the adjournment with the understanding that the appointment of a committee should be given up to the next day, the leader of the House.  
The House divided—  
The motion . . . . . 128  
Against it . . . . . 111  
Majority for the motion . . . . . 17

## Law Reports.

### CHANCELLOR'S COURT. Jan. 14.

#### STURGIS V. CHAMPNEYS.

and WIFE—*Right of a FEMME TENANT, Tenant for Life of Real Estates, Rents and profits after the decease of husband.*

have before fully reported this case, as for the Vice-Chancellor on the 9th July

last, (a) and the appeal heard by the Lord Chancellor on the 7th November last; (b) since that time (Nov. 21) Sir Thomas Champneys died.

Mr. Stuart now applied on behalf of Lady Champneys, that the receiver which the Court had appointed of the estates of Sir T. Champneys, and to which he had become entitled, in right of his marriage with her, might be forthwith discharged from his office, and that she might be let into possession of the estates, and the future receipts of the rents and profits. The Court made a decree in favour of the plaintiff, and a receiver of the rents and profits of the estates was appointed. It was now contended that all the interest which the plaintiff had in the estates under the decree of the Court was now at an end, that the receiver should therefore be discharged, and Lady Champneys be allowed to take possession of the estates.

Mr. Jacob opposed the motion on behalf of the assignees of the late Sir T. Champneys under his second insolvency, submitting that the Court would not now take upon itself to discharge the present receiver, inasmuch as Lady Champneys had, by certain instruments which she had executed in the year 1838, bound her interest in the estates in question to pay the sum of £35,000 to the creditors under the second insolvency. There were also arrears of rents which had accrued due anterior to the death of Sir T. Champneys, which those who claimed an interest in the estates through Sir T. Champneys would be entitled to receive, and which had not yet been received by the receiver of the Court.

Mr. K. Bruce, for Mr. Sturgis, opposed the motion, upon the ground that the whole of his claims were not yet satisfied, and that the receiver ought to be continued until the rents which had accrued due previous to the death of Sir T. Champneys should have been got in, applied, and accounted for.

Mr. Stuart, in reply, drew the attention of the Court to the decree which had been made in the suit under which the receiver had been appointed. By its terms the receivership could only continue during the coverture. The death of Sir Thomas Champneys had put an end to the interest the plaintiff, in right of the creditors, claimed in the estates; and as to the arrears of rents which had accrued due anterior to the death of Sir T. Champneys, and which had not been yet received, he submitted it was clear law they belonged to the wife by survivorship; and in support of that position he cited the authority of Co. Lit. 351 A. With regard to the claims of Mr. Sturgis on the estates, he contended it appeared from proceedings in the cause that they were now all satisfied, and, under the circumstances, Lady Champneys

(a) Ante, vol. ii. p. 232.

(b) Ante, p. 30.



was fully satisfied as to the state of the account, and the amount of the balance due to the assignees under the several assignments of Sir T. Champneys was ascertained. It was also ascertained that the balance due to the assignees was £4,631. 6s. 6d.

The Vice-Chancellor was of opinion that as they were at the instance of the assignees, they could not be bound by the receipt. They could only have been bound if they had signed the receipt as such, and not as a receipt for the balance due to the assignees. The receipt was not signed as such, and therefore it was not binding.

Mr. Justice Stirling said that the Court could not now charge the present receiver with the balance due to the assignees, as the receipt was not signed as such, and not as a receipt for the balance due to the assignees. The receipt was not signed as such, and therefore it was not binding. The Court could not now charge the present receiver with the balance due to the assignees, as the receipt was not signed as such, and not as a receipt for the balance due to the assignees. The receipt was not signed as such, and therefore it was not binding.

The Vice-Chancellor was of opinion that, by the terms of the decree in *l*, the plaintiff, as provisional assignee, was only entitled to the rents and profits of the estates during the coverture, so that Lady Champneys since the death of her husband was entitled thenceforth to receive the rents and profits, and take possession of the estates. There was no objection to her now doing so, but the present receiver should continue to receive the rents and profits which had accrued due up to the 21st of Nov. 1839, when Sir T. Champneys died.

#### COURT OF EXCHEQUER—Dec. 19.

Sittings at Nisi Prius.

Special Jury.

MORTIMER v. M'ALLAN.

**STOCK BROKERS and JOBBERS—Liability of a Principal for Stock transferred to him by his Broker, which the latter had obtained by fraud.**

The plaintiff is connected with the Stock-Exchange, and sought to recover by this action a sum of £4,631. 6s. 6d. from the defendant, a tailor, carrying on business in King-street, Covent-garden, under the following circumstances. The defendant, it appears, had been in the habit of intrusting "the working of his capital," as he termed it himself, to a broker named Taylor. According to the system adopted between them, the broker would seem to have been confided in to a considerable extent, until Mr. M'Allan, in September last, came to the determination to re-

commence a course of dealing with his own capital, which he thought had been productive of a small profit, and which he thought he might have done better with. He therefore determined to withdraw his capital from the hands of the broker, and to invest it in the purchase of stock. He accordingly communicated to Mr. Taylor his intention, and requested him to sell the stock for him, and to transfer it to his own name. Mr. Taylor, however, begged him to wait till the next day, and in the mean time offered to give him a check on his own bankers, Messrs. Roberts and Co., which he wished to be presented until the following day, as he said he had received a check from his principal on a west-end banker, which he could not get till that time. Mr. Mortimer, however, insisted on that being handed over to him, when Mr. Taylor said he could not do that, as he had already paid it into his bankers; but this Mr. Mortimer answered by saying, "Oh! very well, then come and walk with me to your bankers, and we can easily get the check back again." This course Mr. Taylor assented to, and they were proceeding on their way to Messrs. Roberts and Co. when Taylor turned round and confessed that

had any check from the defendant; being indebted to him for stock previously for him, and also for money paid, amount of £5,000. stock, he had been called upon to invest that amount, and been driven unavoidably to perpetrate upon the plaintiff. Mr. Mortimer caused a *distringas* to be placed upon so transferred to Mr. M'Allan's name, the same day proceeded to lay his case before the committee of the Stock-Exchange, in the presence of Taylor he made the statement, which was admitted by Taylor, an additional statement that though he could not pay the purchase-money of the stock he had friends in town and country who he hoped to receive the necessary money as the transaction was revealed to him he never after this day appeared at his office, shortly afterwards absconded from his residence; nor was he traced until the stranger was found stricken by apoplexy in a cab, we believe, which turned the inquest to be that of the absentee. In these melancholy circumstances it was an action was brought, the plaintiff contended the defendant was liable to him. Sir W. Follett, for the defendant, contended according to the regulations of the Stock-Exchange, the credit on all such transactions was that of the broker buying the stock, not of his principal, who, being in most cases unknown to the seller, was not likely to give such credit from those in the habit of trading in the money-market. It would be a mistake if the plaintiff should make out that the defendant was liable to whom a broker had sold stock purchased by him, no matter how many accounts between them might be. The brokers transacted all the business and knew each other well, and their credit; the transfers and sales, therefore, made on the faith of being paid by the brokers doing the business, and the usual course of their business seemed to be to take their money from the broker who was a doubtful man, the seller would not back the transfer till he was satisfied with the money, and as some one is to bear the loss consequent upon this fraud of the defendant but right that the plaintiff should be dealt with a man whose position he is to judge of.

Sir W. Follett, in reply, said that it was not the statement of the usual course of the business of the Stock-Exchange, for so far from usual to look to the broker, the credit was given to him, nor is he always held responsible as the principal neglects to pay; that the object of the fourth regulation of the Stock-Exchange, which expressly says that the broker

shall be liable, even though he gives a reference to a third party, if that third party neglects to pay; so that, in fact, he is only the last resource of the seller. The evidence, however, in this case, fully proves that no credit had ever been given to Mr. Taylor, who had none on the Exchange at the time of this transaction, and who was immediately asked by the plaintiff to give the check of his principal, and not his own, with which Mr. Mortimer would not have anything whatever to do. There could be no doubt but that the plaintiff had been defrauded out of the stock, which he had immediately put a *distringas* upon, and to recover the entire of which he had brought this action at the very earliest point of time. If the fraud was that of Taylor alone, at any rate it was one in favour of the defendant, who had imposed such blind confidence in him, and who ought to bear the loss rather than the plaintiff, a stranger to him, and one who certainly showed no inclination to trust him to any amount.

GURNEY, B. said, the main question was, whether the plaintiff had trusted to Taylor, and to Taylor alone, in the transaction for the payment of the value of this stock so transferred by him to M'Allan.

A verdict for the plaintiff for the full amount claimed, which was entered accordingly, subject to a motion on a point of law raised by Sir W. Follett as to the right of the plaintiff to maintain the present form of action, which was *indebitatus assumpsit* for the value of this stock, with reference to the statute of 7 George II., c. 8, s. 8, by which it is enacted that all sales and transfers of stock by persons not actually possessed of the same shall be illegal and void in law. He cited the case of *Child v. Morley*, 8 Term. Rep. 610, (a) in support of this position, but the learned Baron determined to allow the verdict to stand, subject to future proceedings, if he should be wrong in the opinion entertained of the case, which seemed to be favourable to the plaintiff's right to sue in the present form.

(a) In this case, which was an action of *assumpsit*, it was held that a broker who contracts with others for the sale of stock at a future day, by the authority of his principal, who afterwards refuses to make good the bargain, cannot by paying the difference to such third persons maintain an action on an implied *assumpsit* against his principal for the amount. If the principal were really possessed of the stock so bargained to be sold, such contract is not illegal within

the stat. 7 G. 2. c. 8. against stock-jobbing, although the broker did not disclose the name of his principal at the time of the bargain made, and the purchaser may maintain an action for the difference against the principal.—Lord KENYON said, he admitted that no man could by a voluntary payment of the debt of another make himself that man's creditor, and recover from him the amount of the debt so paid; but what pressed on his mind was that the plaintiff was under some sort of compulsion to pay the differences. He knew that it was the common practice on the *Stock Exchange* for the broker who is employed to sell stock not to disclose the name of his principal at the time of making the bargain; and the buyer deals with him upon the confidence of his character. Therefore his Lordship considered that *his* character was at stake in making good the engagement he had entered into on behalf of his principal; and having been placed in that situation of responsibility by the act and procurement of the defendant, he considered that his paying the differences under such circumstances was not altogether a voluntary act, but done under the pressure of a situation in which he was involved by the defendant's breach of faith. He remembered a case in *Rolls' Abridgment* (tit. *Act. sur le Case*, 24, pl. 31, Editor), where a party met to dine at a tavern, and after dinner all but one of them went away without paying their quota of the reckoning, and that one paid for all the rest; and it was holden that he might recover from the others their aliquot proportions. If the plaintiff here had been bound as guarantee for the defendant to the purchasers of the stock, there could have been no doubt but that he might have recovered his whole demand in this action.—Ed.

The EDITOR directs attention to *Sanders v. Kentish*, 8 Term. Rep. 162—310; 1 id. 20; Burr. 489; 3 Campb. 49—51, 168; 1 id. 88.

## PRIVILEGES OF THE HOUSE OF COMMONS.

JUDGMENT pronounced by the CHIEF JUSTICE of NEWFOUNDLAND in the Chambers, Aug. 13, 1838, upon the application of EDWARD KEILLY, to be discharged from custody under the Writ of Habeas Corpus, he having been committed by the Speaker's Warrant for an alleged Breach of Privilege.  
(Concluded from page 213.)

I shall now consider, as the last point, the validity and sufficiency of the warrant set forth in the return to the *habeas corpus*; and here I will say in *limine*, that if the House of Assembly do really possess the powers which they claim to exercise equally with the British House of Commons, the warrant of the Speaker (provided it discloses a sufficient ground of commitment) ought not to be scanned with that critical nicety as to technicalities which is requisite to the validity of other commitments. But, admitting, for argument sake, that they have the same authority with the House of Commons to direct their Speaker to issue his warrant in such a case as this, does this warrant disclose a sufficient ground of commitment? In my judgment it does not. The prisoner is not stated to have been adjudged by the House to be guilty of any offence, for the proceeding of the House is of the nature of a judgment, or it is nothing; no does it recite any order or resolution that the party should be committed for the offence, and that the Speaker should issue his warrant to the sheriff accordingly.

But having shown that the House of Assembly is not a Court of Record, nor part of a Court of Record—that it does not possess the power which it claims to exercise by virtue of any law, usage, or precedent, upon no one, in short, or the grounds or authorities, by virtue of which the House of Commons must exercise such power, let us see whether, under these circumstances, there is anything in this warrant which gives it any efficacy; for in a warrant which is to take away a man's life, nothing is to be inferred but what the words themselves fairly and strictly import. A warrant, then, must be in writing and made by a person having competent authority. It must be under seal: without this the commitment is unlawful, the gaoler is liable to false imprisonment, and the wilful escape by the gaoler, or breach of prison by the prisoner, makes no felony.\* A warrant committing one in execution (which is the case here) must state that the party has been convicted;† and it may be for a time certain,‡ and should set forth clearly the authority under which it is made.

\* 1 Hale, 563.

† 5 B. and A., 304.

‡ 3 T. R. 209.

§ 2 Hale, c. 18, s. 19.

essentials this warrant is utterly de-

entertained doubts only that this warrant by a court of competent jurisdiction could still have been my duty to see in form and substance legal and valid pretexts for which it professed to be the Queen's Bench upon a *habeas corpus* to examine into the commitment of a person to contempt by any other court of law without competent authority to commit, and will be the prisoner if the process of such a warrant, though the judgment upon it should be unquestionable; but under all circumstances, having no doubt of the want of authority in the Assembly, it is the more incumbent on me to pronounce upon the legal effect of this warrant.

Powers and privileges affecting the subject are for the first time arranged by a man or body of men, who claim to be in question and pronounce definitively upon any act which they may deem to be a breach of these privileges, and to punish for the same in their own authority as they may see fit, and to behave those who administer the same in such a manner that no one is subjected to such punishment unless it be clearly warranted by the law. And if the power which has never been exercised can be shown to be warranted by the law of the land, and to be the same as in any other Court, then I say, with deference, that such a power is of the most liable to be so abused as to the liberties of all who dwell in this portion of the British dominions dependent upon as much as those of the subjects of the Queen's Government in the world.

I have already said, the powers which they have claimed to exercise upon this subject are not necessary for them, and the powers of the land are abundantly sufficient for their own use; but if it be considered that the powers which they have arrogated to themselves, then let it be so declared and the Legislature. Until, however, in my mind that the laws of the land do not give them such powers, I shall withhold my sanction from them.

#### VISIBILITY OF ATTORNEYS.

ROCKDALE V. HANSARD.

*of the House of Commons.* (a)  
House of Commons last week, SIR JOHN STURGES-BURTON said he had always been of opinion that it was like the present the attorney was most responsible; being the adviser in the proceeding, he ought to be held more responsible than the plaintiff,

who being an unprofessional and possibly an ignorant man, smarting under a sense of injury, went to take the advice of one more conversant with affairs than himself. In such circumstances it most certainly was the duty of the attorney to warn an unprofessional client against the dangers of persevering in a course by which he might incur the displeasure of the House of Commons. The duty which an attorney owed to a client in such circumstances was altogether to discountenance the action. If he abstained from dissuading his client he must, on account of his superior attainments and on account of the absence of personal prejudice, be considered much more liable to the displeasure of the house than any other party concerned. For these reasons it did appear to him that they had fallen into a mistake in not calling the attorney to the bar in the first instance. He certainly ought to have been examined by the house previous to any examination of the Sheriffs; but the error could not now be remedied. When Mr. HOWARD was called to the bar, he fully intended to vote for his committal. He had of course listened attentively to the statement and observations made by that gentleman at the bar, and he confessed that he thought them equivocal, at the same time that there was such an approach to submission that he was bound to say it deserved the consideration of the house. Mr. HOWARD said that if he were mistaken he could not too strongly express the regret which he should in consequence feel. He added, that he should express further regret if he could find stronger terms than those which he had already used. He after hearing such language as that, did think that committal would be rather too severe a course, at the same time that he doubted whether Mr. HOWARD ought to be immediately discharged. He did not entertain the least doubt that the house had a right to commit him; the committal would be just, but justice ought to be tempered with mercy; he should advise that Mr. HOWARD be recalled, and that Mr. SPEAKER be instructed to inform him that he had been guilty of a breach of the privileges of that house, but that having shown a desire to submit himself to the consideration of the house, they did not wish to proceed to extremity. This course would place on record their conviction that the attorney was the responsible party. He thought that that course would be most consistent with the moderation and mercy which he wished to see observed by the house upon all occasions.

(a) No new laws can be made, nor old laws abrogated or altered, but by common

consent in Parliament, where bills are prepared and presented to the two houses and then delivered, but nothing is concluded but by the King's royal assent; they are but embryos, it is he that giveth life unto them.

Yet the HOUSE OF PEERS hath a power of judicature in some cases; properly to examine, and then to affirm; or, if there be cause, to reverse the judgments which have been given in the Court of King's Bench, which is the Court of highest jurisdiction in the kingdom for ordinary judicature; but in these cases it must be done by writ of error in *parlamento*; and thus the rule of their proceedings is not *absoluta potestas*, as in making new laws, in that conjuncture as before, but *limitata potestas*, according to the known laws of the land.

But the HOUSE OF COMMONS have only power to censure the members of their own

House, in point of election or misdemeanours in or towards that House, and have not, nor ever had power so much as to administer an oath to prepare a judgment.

The true use of Parliaments in this kingdom is very excellent; and they should be often called, as the affairs of the kingdom shall require, and continued as long as necessary and no longer; for then they be but burthens to the people—by reason of the privileges justly due to the members of the two Houses and their attendants; which their just rights and privileges are religiously to be observed and maintained: but if they should be unjustly enlarged beyond their true bounds, they might lose the just power of the Crown, it borders so near upon popularity. — Lord Bacon, vol. i. p. 266. Ed. Fo. 1788, tit. *Advice to a George Villiers*.—EDITOR.

### SITTINGS AFTER HILARY TERM, 1840.

#### COURT OF CHANCERY.

Saturday	Feb. 8				First Seal—Appeal Motions and Appeals Causes.
Monday	" 10				
Tuesday	" 11				
Wednesday	" 12				
Thursday	" 13				
Friday	" 14				
Saturday	" 15				Appeals and Causes.
Monday	" 17				
Tuesday	" 18				
Wednesday	" 19				
Thursday	" 20				
Friday	" 21				
Saturday	" 22				The Second Seal—Appeal Motions and Appeals Causes.
Monday	" 24				
Tuesday	" 25				
Wednesday	" 26				
Thursday	" 27				
Friday	" 28				
Saturday	" 29				Appeals and Causes.
Monday	March 2				
Tuesday	" 3				
Wednesday	" 4				
Thursday	" 5				
Friday	" 6				
Saturday	" 7				The Third Seal—Appeal Motions and Appeals Causes.

" 9	-	-	
" 10	-	-	
" 11	-	-	
" 12	-	-	
" 13	-	-	
" 14	-	-	
" 16	-	-	
" 17	-	-	
" 18	-	-	
" 19	-	-	
" 20	-	-	
" 21	-	-	
" 23	-	-	
" 24	-	-	
" 25	-	-	The Fourth Seal—Appeal Motions and ditto. Petitions
" 26	-	-	

Appeals and Causes.

The Sittings will close on the 3rd day of April.

Before the VICE-CHANCELLOR, at Lincoln's-Inn.

Feb. 8	-	-	The First Seal—Motions.
" 10	-	-	
" 11	-	-	
" 12	-	-	
" 13	-	-	
" 14	-	-	
" 15	-	-	The Last Paper of Causes to be disposed of previous to Pleas, Demurrers, Exceptions, Causes, and Further Directions.
" 17	-	-	
" 18	-	-	
" 19	-	-	
" 20	-	-	
" 21	-	-	
" 22	-	-	The Second Seal—Motions.

The Vice-Chancellor will hear Short Causes and Unopposed Petitions previous to the General Friday during the Sittings.

The Sittings will close on the 3rd day of April.

# CLERKS WHO PASSED THEIR EXAMINATION AT THE HALL OF THE LAW SOCIETY, HILARY TERM, 1840.

<i>Names.</i>	<i>Name and Residence of Attorney to whom articled, or assigned.</i>
Thomas Crawhall	Robert Wilson, Sunderland
Edward	Matthew Anstis, Liskeard, Cornwall; assigned to Edmund Hambly, Wadebridge, Cornwall
George	James W. Barrett, Gray's-inn
Benjamin	G. Sheppard, Otley
Henry Hugh	Wm. Beckett, Doncaster
Andrew Robert	Wm. Slater, Manchester
Thomas	Charles Cook, 1, New-inn
Edward	Robert Rogers, Liverpool; assigned to John Morris, Manchester
James Wilfred	Charles Chatfield, 22, Cornhill
F. Charlesworth	Charles John Shoubridge, 5, South-square, Gray's-inn
Henry Isaac	Thomas Dix, Bristol
Henry Edw.	James Witt, Lyon, Spring-gardens
Richard	Edmund Haworth, Bolton, Lancaster; assigned to Adam Haworth, Bolton
Henry Orlando	Francis Pender, and James Genn, Falmouth
Edward	Henry Woolcombe, Plymouth
William Smith	Eleazar Lawrence, Ipswich
John Ayling	Daniel Howard, Portsea

<i>Names.</i>	<i>Name and Residence of Attorney to whom articulated or assigned.</i>
Chileot, John Gilbert	Henry James Leigh, Hammet-street, Taunton
Clark, William Fox	James Baker, Bainton, Beverley
Clavering, John	George Delmar, 46, Lincoln's-inn-fields
Cook, Henry	Thomas Thompson, Kingston-upon-Hull
Cook, G. W. Francis	George Phillips Foster Gregory, 28, Poultry
Cooms, Thomas, the younger	Thomas Coombs, the elder, Dorchester
Cooper, John Martin	Thomas Thompson, Bishop Wearmouth: assigned George Smith Ranson, Bishop Wearmouth
Cox, Wm. the younger	Arthur Philip Groom, Henrietta-street, Cavendish-square
Crosse, Robert Jennings	Frederick Chase, Luton, Bedfordshire
Crotty, Edward	Richard Hollier Atkinson, 37, Southampton-buildings assigned to Christopher Crouch, 37, Southampton-buildings
Davenport, William	Robert Southee, 18, Ely-place, Holborn
Davies, Edmund William	Baker Gabb, and William Woodhouse, Secretan, Aber- venny
Davis, Isaac	James Phineas Davis, 14, Charlotte-street, Bedford-square
Davis, Thomas Hammond	Henry Harper, Kennington Cross (To be continued.)

## REVIEW OF NEW BOOKS.

**COMMENTARIES on the CONSTITUTION and LAWS of ENGLAND, incorporated with the Political Text of the late J. L. De Lolme, LL.D. Advocate.** By THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple. SECOND EDITION, Revised and and Corrected to the Present Time. London: John Richards and Co. Law Book-sellers, 194, Fleet Street.

The public press appears to have spoken in such commendatory terms of Mr. Western's valuable work, that little is left for us to say; indeed, when we recollect the high esteem in which JUNIUS had the original work—the long held opinion that "*De Lolme on the Constitution of England deserves to be written in letters of gold, and is worthy the consideration of every crowned head in Europe.*" (a) We need only repeat the expiring wish of Father Paul for his country,—  
"ESTO PERPETUA."

The present edition, we observe, contains much valuable information. The chapter "on the law that is to be observed in England in regard to civil matters," the author has practically explained for the benefit

of the student, and without being tiresome to the scientific or general reader—as an example under the title of "THE NEW LAW CONSTITUTION," b. 1. c. 10. s. 2. p. 111. Ed. 2. he says,

When it is still intended to hold a person to bail, an order may be obtained at any time after the commencement of the suit, and before final judgment, in all actions in which the defendant was previously liable to arrest, satisfying a judge by affidavit that the cost of action amounts to £20. or upwards, and that the debtor is about to quit England, or is less forthwith apprehended. On this the defendant may be arrested and held to bail nearly the same way as under the writ *capias*, provided by the Uniformity of Process Act. (b)

Except, therefore, in replevin and other actions removed from inferior courts, all cases under the 85th section of 1 & 2 Vict. c. 110. (c), the writ of summons is now the process by which a personal action can be commenced in any of the superior courts of law. (d) That act has made no change in the form or mode of proceeding under the writ of summons. (e)

If the writ be against husband and wife, a writ on the husband will be sufficient. (f)

(b) A Member of Parliament, being a trader, and being served with a summons, not paying or compounding with his creditors to their satisfaction, not appearing to any action within one month after service, commits an act of bankruptcy, upon which a writ may issue against him.

(c) *Turnor v. Darnell*, 7 Dowl. 346.

(d) 1 & 2 Vict. c. 110, ss. 1 & 2.

(e) See Archbold's Practice, Q. B. by Chitty.

(f) *Buncombe v. Love, Barnes*, 406; *Collins v. Shapland*, id. 412.

(a) We are truly glad to see among the subscribers to the present edition the names of his Imperial Majesty the Emperor of Russia, and the Grand Duke Alexander of Russia.

inst a corporation aggregate, it must be served on the mayor or other head officer, town-clerk, clerk, treasurer, or secretary of such corporation.

It must be served on the high constable of any of the high constables thereof. It must be served on the inhabitants of a county, of a town, or the inhabitants of a franchise, city, town, or place not being a hundred or other like district, it must be served on some peace-officer there-

It must be served against a printer, publisher, or editor of a newspaper, service may be at any place mentioned in the declaration of the writ. (h)

It must be served on a trading or other company or firm, in the meaning of the 7 Will. 4. & 1 Vict. c. 73. the service must be on the company or body, or left at the place, for the time-being, of the company; or if such clerk shall not be known, then service thereof on any officer employed by the company or firm, by leaving the same at the usual abode of such agent or officer, will be service. (i)

Person who serves the writ must, within a day at least after such service, indorse the writ with the day of the month and week of the service. (j) otherwise the plaintiff cannot enter judgment for the defendant according to the writ, and the affidavit upon which such writ is to be entered, must state the day on which such indorsement was made. (l)

For example we may add of Mr. Justice Giffard's mode of explanation. *On the jurisdiction exercised by Courts of Equity*, he

jurisdiction (m) exercised by Courts of Equity may be considered in some cases as concurrent with, and in some cases as exclusive of the jurisdiction of courts of law.

Assistant to the jurisdiction of courts of law. 1st. By removing legal impediments to the decision of a question depending in law: thus, if an ejectment be brought in a court of common law, the court of equity will restrain the party from proceeding (unless he has an equal claim to the land) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z) (aa) (ab) (ac) (ad) (ae) (af) (ag) (ah) (ai) (aj) (ak) (al) (am) (an) (ao) (ap) (aq) (ar) (as) (at) (au) (av) (aw) (ax) (ay) (az) (ba) (bb) (bc) (bd) (be) (bf) (bg) (bh) (bi) (bj) (bk) (bl) (bm) (bn) (bo) (bp) (bq) (br) (bs) (bt) (bu) (bv) (bw) (bx) (by) (bz) (ca) (cb) (cc) (cd) (ce) (cf) (cg) (ch) (ci) (cj) (ck) (cl) (cm) (cn) (co) (cp) (cq) (cr) (cs) (ct) (cu) (cv) (cw) (cx) (cy) (cz) (da) (db) (dc) (dd) (de) (df) (dg) (dh) (di) (dj) (dk) (dl) (dm) (dn) (do) (dp) (dq) (dr) (ds) (dt) (du) (dv) (dw) (dx) (dy) (dz) (ea) (eb) (ec) (ed) (ee) (ef) (eg) (eh) (ei) (ej) (ek) (el) (em) (en) (eo) (ep) (eq) (er) (es) (et) (eu) (ev) (ew) (ex) (ey) (ez) (fa) (fb) (fc) (fd) (fe) (ff) (fg) (fh) (fi) (fj) (fk) (fl) (fm) (fn) (fo) (fp) (fq) (fr) (fs) (ft) (fu) (fv) (fw) (fx) (fy) (fz) (ga) (gb) (gc) (gd) (ge) (gf) (gg) (gh) (gi) (gj) (gk) (gl) (gm) (gn) (go) (gp) (gq) (gr) (gs) (gt) (gu) (gv) (gw) (gx) (gy) (gz) (ha) (hb) (hc) (hd) (he) (hf) (hg) (hh) (hi) (hj) (hk) (hl) (hm) (hn) (ho) (hp) (hq) (hr) (hs) (ht) (hu) (hv) (hw) (hx) (hy) (hz) (ia) (ib) (ic) (id) (ie) (if) (ig) (ih) (ii) (ij) (ik) (il) (im) (in) (io) (ip) (iq) (ir) (is) (it) (iu) (iv) (iw) (ix) (iy) (iz) (ja) (jb) (jc) (jd) (je) (jf) (jg) (jh) (ji) (jj) (jk) (jl) (jm) (jn) (jo) (jp) (jq) (jr) (js) (jt) (ju) (jv) (jw) (jx) (jy) (jz) (ka) (kb) (kc) (kd) (ke) (kf) (kg) (kh) (ki) (kj) (kk) (kl) (km) (kn) (ko) (kp) (kq) (kr) (ks) (kt) (ku) (kv) (kw) (kx) (ky) (kz) (la) (lb) (lc) (ld) (le) (lf) (lg) (lh) (li) (lj) (lk) (ll) (lm) (ln) (lo) (lp) (lq) (lr) (ls) (lt) (lu) (lv) (lw) (lx) (ly) (lz) (ma) (mb) (mc) (md) (me) (mf) (mg) (mh) (mi) (mj) (mk) (ml) (mm) (mn) (mo) (mp) (mq) (mr) (ms) (mt) (mu) (mv) (mw) (mx) (my) (mz) (na) (nb) (nc) (nd) (ne) (nf) (ng) (nh) (ni) (nj) (nk) (nl) (nm) (nn) (no) (np) (nq) (nr) (ns) (nt) (nu) (nv) (nw) (nx) (ny) (nz) (oa) (ob) (oc) (od) (oe) (of) (og) (oh) (oi) (oj) (ok) (ol) (om) (on) (oo) (op) (oq) (or) (os) (ot) (ou) (ov) (ow) (ox) (oy) (oz) (pa) (pb) (pc) (pd) (pe) (pf) (pg) (ph) (pi) (pj) (pk) (pl) (pm) (pn) (po) (pp) (pq) (pr) (ps) (pt) (pu) (pv) (pw) (px) (py) (pz) (qa) (qb) (qc) (qd) (qe) (qf) (qg) (qh) (qi) (qj) (qk) (ql) (qm) (qn) (qo) (qp) (qq) (qr) (qs) (qt) (qu) (qv) (qw) (qx) (qy) (qz) (ra) (rb) (rc) (rd) (re) (rf) (rg) (rh) (ri) (rj) (rk) (rl) (rm) (rn) (ro) (rp) (rq) (rr) (rs) (rt) (ru) (rv) (rw) (rx) (ry) (rz) (sa) (sb) (sc) (sd) (se) (sf) (sg) (sh) (si) (sj) (sk) (sl) (sm) (sn) (so) (sp) (sq) (sr) (ss) (st) (su) (sv) (sw) (sx) (sy) (sz) (ta) (tb) (tc) (td) (te) (tf) (tg) (th) (ti) (tj) (tk) (tl) (tm) (tn) (to) (tp) (tq) (tr) (ts) (tt) (tu) (tv) (tw) (tx) (ty) (tz) (ua) (ub) (uc) (ud) (ue) (uf) (ug) (uh) (ui) (uj) (uk) (ul) (um) (un) (uo) (up) (uq) (ur) (us) (ut) (uu) (uv) (uw) (ux) (uy) (uz) (va) (vb) (vc) (vd) (ve) (vf) (vg) (vh) (vi) (vj) (vk) (vl) (vm) (vn) (vo) (vp) (vq) (vr) (vs) (vt) (vu) (vv) (vw) (vx) (vy) (vz) (wa) (wb) (wc) (wd) (we) (wf) (wg) (wh) (wi) (wj) (wk) (wl) (wm) (wn) (wo) (wp) (wq) (wr) (ws) (wt) (wu) (wv) (ww) (wx) (wy) (wz) (xa) (xb) (xc) (xd) (xe) (xf) (xg) (xh) (xi) (xj) (xk) (xl) (xm) (xn) (xo) (xp) (xq) (xr) (xs) (xt) (xu) (xv) (xw) (xx) (xy) (xz) (ya) (yb) (yc) (yd) (ye) (yf) (yg) (yh) (yi) (yj) (yk) (yl) (ym) (yn) (yo) (yp) (yq) (yr) (ys) (yt) (yu) (yv) (yw) (yx) (yy) (yz) (za) (zb) (zc) (zd) (ze) (zf) (zg) (zh) (zi) (zj) (zk) (zl) (zm) (zn) (zo) (zp) (zq) (zr) (zs) (zt) (zu) (zv) (zw) (zx) (zy) (zz)

ting up any title which may prevent the fair trial of the right as a term for years outstanding in a trustee, lessee, or mortgagee. (Harrison v. Southcote, 1 Atk. 540.) So also equity will, under certain circumstances, restrain a party from insisting upon the invalidity of a devise. (Anon. 1 Cha. Ca. 267.) 2ndly. By compelling a discovery which may enable them to decide. 3rdly. By perpetuating testimony when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. (The Earl of Suffolk v. Green, 1 Atk. 451; Duke of Dorset v. Serjt. Girdler, Pre. Ch. 551; Cressett v. Mytton, 3 Bro. Ch. Rep. 481.) It is, however, material to observe, that a bill to perpetuate testimony will lie, though the plaintiff might proceed at law, if he alleged by his bill, and by an affidavit annexed to the bill, any circumstances by means of which the testimony may probably be lost (Phillips v. Carew, 1 P. Wms. 117), as that the witness to be examined is the only witness to a material fact. (Shirley v. Ferrers, 3 P. Wms. 77; Hankin v. Middleditch, 2 Bro. Ch. R. 641.) It may also be said to be assistant, by rendering the judgments of courts of law effective; as, 1st. By providing for the safety of property in dispute pending a litigation, in some cases by ordering the property to be brought into court, or to be collected by a receiver, in other cases by restraining the party in whose hands it is from exercising any power over it, or parting with it until further order; 2ndly. By counteracting fraudulent judgments, &c.; and, 3rdly. By putting a bound to vexatious and oppressive litigation.

It exercises a concurrent jurisdiction with courts of law in most cases of fraud, accident (n), mistake (o), account, partition (p), and dower.

It claims an exclusive jurisdiction in most matters of trust and confidence, and "wherever, upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent."

It grants a prohibitory writ, called an injunction, in mixed as well as personal actions, and in waste (q), ejectment (r), and quare impedit (s), to stay proceedings in another court of equity (t), or in the Admiralty (u), or in

(n) Hatchett v. Pattle, 6 Madd. 4.

(o) Henkle v. Royal Exchange Assurance Office, 1 Ves. 317, by Lord Hardwicke; Taylor v. Radd, 5 Ves. 595, cited by Lord Thurlow.

(p) See Hargrave's Co. Litt. 169, b. n. 2.

(q) See Field v. Beaumont, 1 Swanst. 209.

(r) Lowe v. Jolliffe, 1 Dick. 390.

(s) Amhurst v. Dawling, 2 Vern. 401.

(t) 4 Madd. 362.

(u) 3 Swanst 605.

Will. 4, c. 39, s. 13.

7 Will. 4, c. 76, s. 9.

Will. 4, & 1 Vict. c. 73, s. 16.

Will. 4, c. 39, s. 1.

Will. 4, c. 3.

Blanque, Treat. Eq. vol. 1, p. 10.



the ecclesiastical courts (*v*), and in the courts of common law.

An injunction in the Court of Exchequer stays all further proceedings, in whatever stage the cause may be; but in Chancery, if a declaration be delivered, the party may proceed to judgment, notwithstanding an injunction and execution is only stayed: but if no declaration has been delivered, all proceedings at law are restrained (*w*).

The courts of equity have no restraining power over criminal prosecutions (*x*), nor will they stay proceedings on a mandamus (*y*), or interfere where redress may be had by certiorari (*z*).

An injunction may be had at various stages of the cause. It is in some cases issued of course, and when the answer comes in, the injunction can only be continued upon good grounds. Where it is applied for to stay injuries of an unjust nature, then, upon filing the bill, and its contents being well supported by affidavits, it will be granted immediately, and continue until the defendant has put in his answer, and till the court shall make further order; and after answer, the court will determine whether it shall be dissolved or continued.

A temporary injunction will be made perpetual, when the same reasons continue which prevailed at its being granted (*a*).

A dissolved injunction may be revived if there be ground for it (*b*).

Amending a bill dissolves an injunction (*c*).

The reader, who may be inclined to inform himself as to grounds taken by the friends and opponents of the jurisdiction of equity, may consult Hargrave's Law Tracts, p. 344.

An APPENDIX is added, containing all the new laws relating to real property and testamentary dispositions. We need but say in the words of our contemporaries, that "De Lolme's book, which had in a manner become obsolete, in consequence of the great alterations which have taken place in our laws since it was written, has now all the freshness of a work written within these last six months."—"That Mr. Western's execu-

tion of his design is at once great, laborious, and laudable, and well deserves to become popular."—It is a book that not only every student, but every person should make himself well acquainted with.

#### NOTICE TO CORRESPONDENTS.

J. A. B. We have directed attention to the subject of your letter.

W. M.—T. D.—C. A. L.—W. A.—T. R.—A Subscriber—under consideration.

An Observer.—We have no communication bearing this signature.

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#### PRECEDENTS IN CONVEYANCING.

adapted to the Present State of the Law, illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. in continuation of the PRECEDENTS by S. VALLIS BONE, Esq.

This work, independent of the Precedents which are all drafts of *actual practice*, abounds with valuable practical information to TOWN and COUNTRY SOLICITORS. The NOTES are to the purpose only. Among these, the term "CUSTOM OF THE COUNTRY," is fully explained, and Tables are given, shewing those Customs in the SEVERAL COUNTIES OF ENGLAND for granting LEASES as to the Term—time of entry—renewals—rotation of crops—restrictions on tenants—repairs—draining—manuring—also the law relating to MINING LEASES.

Vol. III. was published December 1, with Table of Contents, price 17s. Price of Vols. I and II. £1. 10s.

London: JOHN RICHARDS and Co., Law Booksellers, 194, Fleet-street.

*This Work will be completed in Four Vols.*

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunston-in-the-West, in the City of London.—Saturday, Feb. 15, 1840.

- (v) 1 Atk. 628; 3 Swanst. 418, n.
- (w) 3 Wood. 411; see Bullen v. Orey, 18 Ves. 141; and Mills v. Cobb, 1 Mer. 3.
- (x) Attorney-General v. Cleaver, 18 Ves. 220.
- (y) Montague v. Durham, 2 Ves. 308.
- (z) Kerrison v. Sparrow, 19 Ves. 449.
- (a) Askew v. Townsend, 2 Dick. 471.
- (b) Penfold v. Stoveld, 3 Madd. 472.
- (c) Bliss v. Boscawen, 3 Ves. & B. 102.

# The Legal Guide.

II.] SATURDAY, FEBRUARY 22, 1840. [No. 17.

## SEPARATE USE.

(Continued from p. 243.)

LANGDALE continued — I therefore think it right to state that it appears from the result of the authorities, constant practice of conveyancers, great and eminent Judges have had no mean evidence of the law, property given to a woman for her separate use, independent of any husband, according to the principles of this Court, is enjoyed by her during her coverture or separate estate, though the property originally, or at any subsequent period, may have become vested in her husband. In respect of such separate estate, it is by this Court considered as a separate estate; though covert, her facilities as to the property are to be collected from the nature of the gift, in which the gift is made to her, and not to be supported by this Court for her husband. The words 'independent of her husband' whether expressed or implied in the gift, mean no more than that this Court will not permit the material power of disposition to be used in contravention of the gift, if the gift be made for her separate use, without more, she is, during the coverture, an inalienable estate independent of her husband; if the gift be made to her for her sole use, without more, she has the present enjoyment

of an inalienable estate, independent of her husband. In either of those cases she has, when discovered, a power of alienation, the restraint is annexed to the separate estate only, and the separate estate has its existence during coverture; while the woman is discovered, the estate will not be in existence, it is suspended, and has no operation. Though it is capable of arising on the happening of marriage, the restriction cannot be considered distinct from the separate estate, of which it is only a modification. To say that a restriction exists, in saying no more than that the separate estate is modified, the donor in giving the woman when married, some of the facilities a feme sole has restricted her in alienation, under the terms of the gift; and by the aid of this Court the woman is a feme sole as to the present enjoyment of the property, but no further. Measuring those facilities by the terms of the gift, she is not a feme sole as to the disposition of her property, which is so restricted. If there be no separate estate, there can be no such restriction as that under consideration. The separate estate may, and often does exist without the restriction, but the restriction has no independent existence. When found, it is a modification of the separate estate, and inseparable from it; and, applying those principles to the present case, I am of opinion that those estates which, by the will of the testator, N. Bradford, and the testatrix, A. Bradford, were given to the defendant,

M. A. Armstrong, for her separate use, without power of alienation. The plaintiff has acquired no right under his security; but, as to the estate given by the will of N Bradford to Mrs. Armstrong, for her separate use, without any clause to restrain alienation, I think the plaintiff is entitled to the account he prays for.

We believe this to be the only *correct* statement published of the judgment of the Master of the Rolls, upon this serious and important question. The law is now, *for the present*, settled. How long it may remain so in these days of *continued change*, it is impossible to venture upon even a guess. The LORD CHANCELLOR has now determined, after the careful consideration of *twelve calendar months*, that he agreed with Lord Langdale upon the question as to the clause against anticipation, that it embraced separate estate, and that if separate estate without power of anticipation must exist, it is only with that qualification it exists at all; and when it was once decided that a married woman could act in respect of her separate property as a *feme sole*, it was clear that it became necessary to establish some control against disposing of her separate estate; and this was effected by prohibiting anticipation. His Lordship, therefore, inasmuch "as the interests of society so require it" has arrived at the conclusion, that the jurisdiction which the Court of Equity has assumed in similar cases, justifies it in extending it to the protection of the separate estate, with its qualifications and restrictions attached to it throughout the subsequent coverture, and in resting such jurisdiction upon the broadest foundations. We need only remark, that the doctrine was invented and established *very long* since, for the express purpose of protecting women in the sole enjoyment of property *when covert*. The question, we repeat, is now settled, and settled justly—in accordance, we believe, with the opinion of the whole bar, or to adopt the expressions

of the VICE-CHANCELLOR—"It is lawful to give property to the separate use of a woman, married or unmarried, and the practice of the profession has been according to that opinion, without any variation." (a)

## PRIVILEGES OF THE HOUSE OF COMMONS.

OPINION of LORD CHIEF JUSTICE HOLT upon the power of the Court of King's Bench, to discharge a man committed upon a warrant, signed by the Speaker of the House of Commons, for a breach of privilege. (b)

HOLT, C. J. said, that the legality of the commitment depended upon the vote recited in the warrant; and for his part he thought the prisoners ought to be discharged, though in this his opinion he was so unfortunate to go *contrary* to the act of the House of Commons, and the opinion of the rest of the judges of England, whose assistance he had desired, and there had been a meeting for that purpose. He said, this was not such an imprisonment, as the freemen of England ought to be bound by; for this, which was only doing a legal act, could not be made illegal by the vote of the House of Commons; for that neither House of Parliament, nor both Houses jointly could dispose of the liberty or property of any subject, for to this purpose the Queen must join: and that it was in the necessity of their several concurrences to such acts, that the great security of the liberty of the subject consisted. After giving his opinion upon the three first objections to the warrant, he said, the fourth matter was for bringing

(a) *Davies v. Thornycroft*, 6 Sim. 420.

(b) *Regina v. Paty*, Lord Raym. 1105.; S. C. 520, in which case *Paty* and others brought writs against the constables of *Aylesbury*, upon the ground that their votes having been rejected; they were committed by the House of Commons, and they sought writs of *Habeas Corpus* to be discharged.—Ed.

on at Common Law for not allowing a vote in the election of Members to Parliament. Now, to bring an action against a person who is not privileged, was no offence, though no offence could lie in this case, or though the action upon which the action was grounded. And so is 2 Rep. 3, p. 9. And a person charged with any false and scandalous matter, yet if it be by way of action, it is not *scandalum magnatum*. A person who brings an action against another, not a privileged person, is not to have his action stopped, especially if he has a cause of action, which that the defendant in this case has, appears by the judgment of this Court, in *Woccerum*, in the case of *Ashby v. White*. And this action, which was brought by the House of Commons, appears by the description of it to be a cause of action that that was : to suppose that the bringing such actions is a breach of their privilege; but that declaration will not make that a breach of privilege, if it was not so before. But if they have such privilege, they ought to shew it. The privileges of the House of Commons are well known, and are founded upon the law of the land, and are not but the law. As we all know they have no privilege in cases of (b) of the peace. And if they demand themselves to have privileges which they have no claim to, the people of England cannot be estopped by that declaration of their privilege of theirs concerns the people in a high degree, by subjecting them to imprisonment for the infringement of them, which is what the people

cannot be subjected to without an Act of Parliament. As to what was said, that the House of Commons are judges of their own privileges, he said, they were so, when it comes before them. And as to the instances cited, where the judges have been cautious in giving any answer in Parliament in matters of privilege of Parliament; he said, the reason of that was, because the Members know probably their own privileges better than the judges. But when a matter of privilege comes in question in *Westminster Hall*, the judges must determine it as they did in *Binyon's* case (Cit. Carth. 137.; 1 Show, 190.). Suppose these actions against the constables of *Aylesbury* had gone on, and the defendants had pleaded this privilege, we must have determined, whether there were any such privilege or no. (c) And we may as well determine it upon the return of this *habeas corpus*, for the defendants are here in a proper course of law; and the matter appears to us upon record as well this way, as if it were pleaded to an action. We must take notice of the *lex parliamenti*, my Lord Coke in his 1 Inst. ii. b. enumerates the several laws that are within this realm, and the *lex parliamenti* is one of them, and the *lex parliamenti* is the law of the land. As to what my Lord Coke says in the same place that the *lex parliamenti est a multis ignorata*; that is, because they will not apply themselves to understand it. He gave a great *encomium* of my Lord Clarendon, and cited a passage out of his history relating to the same doctrine with this that was then set up, that the House of Commons were the only judges of their own privileges, and therefore whatever they said was their privilege, was such. It is in his first part, fol.

(b) The *lex terre* is the *genus*, and comprises the law of the land: the Admiralty law and species of this grand law; so is the *lex parliamenti* and if it be, the judges either do, or ought to do it. — *Note to the 3rd edition.*

(c) He said, as to the high contempt of the jurisdiction of the House of Commons, neither House can hold plea in any action, not the House of Lords originally, therefore how can they have any jurisdiction in this case? — *From Banbury's MS. note to the 3rd edition.*

310, and is very applicable to the present case, but too long to be transcribed. He said he would cite a greater author than he, *King Charles the First*, in his answer to the declaration and votes of the two Houses concerning *Hull*, *Clarendon*, 1, part 400, and *Rushworth's Collections*, vol. iii. pp. 728, 730, 731, wherein, among other things, he says, he very well knew the great and unlimited power of a Parliament, but he knew as well it was only in that sense as he was a part of that Parliament; without him, and against his consent, the votes of either or both Houses together must not, could not, should not (if he could help it, for his subjects' sake as well as his own), forbid anything that was enjoined by the law, or enjoin anything that was forbidden by the law. (d) And the Chief Justice said, if the votes of both Houses could not make a law, by parity of reason they could not declare law. That the bringing this action is no breach of the privilege of the House of Commons, appears by the judgment in the case of *Ashby and White* (Lord Raym. 938), in the argument of which case before the House of Lords, this argument of the privilege of the House of Commons was insisted on; besides, if the bringing this action was a breach of the privilege of the House of Commons,

(d) He said a House of Commons can no more declare anything to be law by their resolutions than they can make a law by themselves, and who (says he) can shew me how an House of Commons can stop a lawful prosecution? No man has privilege against the law of the land. And nothing but an Act of Parliament can subject any man's person to imprisonment. It is true the judges do not interpose in the House of Lords in matters of privilege, because the Lords are well acquainted with that themselves; but when a question regularly arises in the Queen's Bench concerning privilege, there the judges must concern themselves. Suppose the action had gone on without the interposition of the House of Commons, and the defendant had pleaded privilege to the jurisdiction of the Court, and to this it had been demurred, must not the judges then have determined privilege?—From *Banbury's MS. Note to the 3rd Edition*.

why was not *Ashby* committed when he first brought the action; but the suffering him to go on with his action is an argument that this pretence of privilege is a new thing. *Ashby* recovered in his action, and these men have followed his steps, and yet they are here said to have acted in breach of the privilege of the House of Commons. I shall say nothing to the case of *Ashby and White*, because the reasons upon which that judgment was given are printed. He said, the bringing this action is said to be in high contempt of the jurisdiction of the House of Commons; but that, he said, could not be, because neither House of Parliament could hold plea in any action; and, besides, the defendants might waive their privilege. He said, he made no question of the power of the House of Commons to commit; they might commit any man for offering an affront to a Member, or for a breach of privilege; nay, they might commit for a crime, because they might impeach. He said, my *Lord Shaftesbury's* case differed from this, because the commitment there was for a contempt done in the House. He said, the cause of the prisoner's commitment being expressed in the warrant excluded any intentment, that they might be committed for any other cause than that expressed in the warrant. He said, both Houses of Parliament were bound by the law of the land, and in their actions were obliged to pursue it. He cited *Lord Banbury's* case (10 Lord Raym.), which was thus:—*Lord Banbury* was indicted for murder by the name of *Charles Knoll Esq.*, and he pleaded in abatement that by letters patent *King Charles I.* created his grandfather *Earl of Banbury*, and so shew the descent to him, and prayed judgment the indictment because he was not named *Earl*; the *Attorney-General* replied, that upon his petition to the House of Lords, he be tried by his peers, the Lords dismissed his petition, and disallowed his peers. And upon demurrer the replication was by

naught, and the plea good, and the indent was abated, and said, that case go a great way in this case. See 48, 150; *Hodges v. Moor*, *Stiles* 415; in *Streater's* case and *Stiles*, 90.

Other eleven judges were against the Justice, and the following entry was on the record:—*Et super natura delicti per curiam hic habita, pro eo quod curia hic, quod cognitio causae capite detentionis predicti Johannis Paty tinet ad curiam dictae domine reginae ipsa regina, ideo idem Johannes remittitur custodi goalae dictae domine de Newgate, remanere in statu quo pore emanationis brevis predicti.*

#### PROBLEM XVII. VOL. III.

##### BANKRUPTCY.

Who may be made a Bankrupt?

THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XXVI.

##### VOL. 2.

**SOCAGE TENURE.**—Describe what it is. (a)

Socage, in its most general and extensive signification, seems to denote a tenure by certain and determinate service, and is defined by Littleton (s. 117) to be where the tenant holds his tenement of the lord by any service, in lieu of all other services; they be not services of chivalry, or knight service. The service must therefore be certain, in order to denominate it socage; and it may be held by fealty and twenty shillings a year, or by homage, fealty, and 20 shillings a year, or by homage and fealty without rent; or by fealty and certain corporal services; or by holding the lord's land for three days a week; or by fealty only, without any other service: these are Tenures in Socage. (Litt. 118, 119.)

Socage Tenure was formerly of two sorts, viz. *free socage*, where the services were only certain but honourable; and

*villain socage*, where the services, though certain, were of a baser nature; but it is considered unnecessary to trouble the reader with a particular account of each of those tenures as the 12 Car. 2, c. 24, enacts,—“That all fines for alienation, tenures by homage, knight service, and escuage, and also aids for marrying the daughter, or knighting the son, and all tenures of the king in *capite* be likewise taken away. (b) And that all sorts of tenures held of the king or others, be turned into *free and common socage*; save only tenures in frankalmoigne, copyhold, and the honorary services (without the slavish part) of grand serjeanty.”

C. B.

#### Imperial Parliament.

##### HOUSE OF LORDS—ENGLAND.

Feb. 17.

##### FRIVOLOUS SUITS AT LAW—EVIDENCE.

Lord DENMAN introduced “a Bill to repeal so much of an Act of the 43 of Elizabeth, entitled ‘an Act to avoid trifling and frivolous suits in law in her Majesty's Courts in Westminster,’ and an Act of the 22d and 23d of Charles II., entitled ‘an Act for laying impositions on proceedings at law,’ as relates to costs in personal actions, and to make further provisions in lieu thereof;” and, “a Bill to remove doubts as to the competency of persons being rated inhabitants of any parish to give evidence in certain cases.” Both were read a first time, ordered to be printed, and to be read a second time on Monday next.

##### HOUSE OF COMMONS—ENGLAND.

February 17.

##### PRINTED PAPERS—PRIVILEGE.

Motion made, and Question put, “That John Joseph Stockdale, by commencing and prosecuting the action now depending at his suit against James Hansard, Luke Graves Hansard, and Luke James Hansard, and in which a notice has been given of executing a Writ of Inquiry on

(b) Mr. Maddox (Mad. Bar. Arg. 208.) and Mr. Hargrave (Co. Litt. 108, n. 6.) have taken notice of this inaccuracy, namely, of taking away tenures in *capite*; for tenures in *capite* signifies nothing more than that the king is the immediate lord of the land-owner; and the land might have been either of military or socage tenure.

See ante, pp. 148, 190, 236.

the 20th day of this instant February, such action being brought for acts done by the defendants as the officers and servants of this House, and under and pursuant to the authority of the orders and resolutions of this House made in exercise of the Privileges of Parliament, has been guilty of a contempt of this House, and a violation of the privileges thereof; and that all Sheriffs, Under-Sheriffs, agents, bailiffs, officers, clerks, and others, who shall act, aid, or assist in the continuing, furthering, and prosecuting the said action, will also be guilty of a contempt and violation of the privileges of this House, and subject themselves to the severe censure and displeasure of this House." The House divided—Ayes, 146; Noes, 75.

Feb. 18.

Motion made, and Question proposed,—“That T. Howard, jun. having been concerned in conducting the action of Stockdale against Messrs. Hansard, after the prosecution of the said action had been resolved by the House to be a breach of their Privileges, has been guilty of a contempt and a breach of the Privileges of this House :”—(Mr. Attorney-General).—Amendment proposed, to leave out the word “That,” to the end of the Question, in order to add the words “the Privileges of Parliament are intended solely for the benefit of the community at large, and as the power of publishing such of its Reports, Votes, and Proceedings, as shall be deemed necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament; it is expedient that a joint Committee of both Houses of Parliament should be appointed for the purpose of considering the best mode of securing to each branch of the Legislature the free exercise of a power so important to the public welfare,” instead thereof :—(Mr. Thomas Duncombe).—Question, “That the words proposed to be left out stand part of the Question,” put, and agreed to :—Main Question put :—The House divided—Ayes, 137; Noes, 37.—Majority for the original Motion 100.

Motion made, and Question put, “That Thomas Howard, jun., having been guilty of a contempt and a breach of the Privileges of this House, be for his said offence committed to the custody of the Sergeant-at-Arms attending this House; and that Mr. Speaker do issue his warrant accordingly :”—(Mr. Attorney-General).—The House divided—Ayes, 134; Noes 41.—Majority for the Motion, 93.

Motion made, and Question put, “That Thomas George Johnstone Pearse having been concerned in conducting the action of Stockdale against Messrs. Hansard, after the prosecution of the said Action had been resolved by this House to

be a breach of their privileges, has been guilty of a contempt and a breach of the Privileges of this House :”—(Mr. Solicitor-General).—The House divided—Ayes, 135; Noes, 53.—Majority for the Motion, 82.

Motion made, and question proposed, “That Thomas George Johnstone Pearse having been guilty of a contempt and a breach of the Privileges of this House, be for his said offence committed to the custody of the Sergeant-at-Arms attending this House, and that the Speaker do issue his warrant accordingly”—(Mr. Solicitor-General). Amendment proposed, to leave out from the word “Pearse” to the end of the question, in order to add the words “be called to the bar and reprimanded by Mr. Speaker, and discharged,” instead thereof—(Mr. W. Miles). Question proposed, “That the words proposed to be left out stand part of the question.”—Amendment, by leave, withdrawn. Main question put.—The House divided—Ayes 134; Noes 54.—Majority for the original Motion, 80.

Mr. GORING presented a petition from Mr. Thomas France, Under-Sheriff of the county of Middlesex, which, on the motion of the Hon. Member, was read at length by the Clerk at the table as follows :—

“The humble Petition of Thomas France, Under-Sheriff of the county of Middlesex.

“Showeth, that your petitioner has been served with a copy of the resolutions of your Hon. House, warning your petitioner and all others connected with the carrying on the proceedings of the office of Sheriff against acting in aid, furtherance, and prosecution of a certain action brought by John Joseph Stockdale against Messrs. Hansard and others, in breach of the privileges of your Hon. House.

“That your petitioner is anxious to pay the most respectful deference and obedience to your Hon. House and its privileges, but has great ground to fear, that in yielding such obedience the Sheriff of the said county may be exposed to great personal risk and loss; but, relying upon the protection of your Hon. House to the said Sheriff and his officers, your petitioner respectfully assures your Hon. House that all due respect will be paid to its privileges and resolutions under the protection of this Hon. House and your petitioner will ever pray.”

## Law Reports.

### COURT OF CHANCERY.—Jan. 17.

ANON.

BANKRUPTCY—PRACTICE—Place of working a *Fiat* other than that of the Bankrupt's residence.

Mr. ——— moved that the *fiat* be worked at Bristol instead of Swansea. The bankrupt

at a place about twenty miles from Swansea in the ordinary course the *fiat* would be made at Swansea; but in this case the debts on the estate within twenty miles of Swansea were of small amount, whilst the petitioning creditor, whose debt was upwards of £300, resided at Bristol, and the other creditors in England and Scotland lived nearer to Bristol than to Swansea. The inconvenience and expense to the petitioners would be great in proving the petitioners' and other debts at Swansea, the only expense that would be incurred in removal of the *fiat* to Bristol was that of the bankrupt travelling to that city. It was referred to the Court that the place of residence for more communication with Bristol than Swansea.

LORD CHANCELLOR granted the application.

#### QUEEN'S BENCH.—Jan. 27.

##### Sittings in Banco.

##### STOCKDALE v. HANSARD.

##### IN THE SHERIFF OF MIDDLESEX.

Sheriffs were this day brought up under writ of *habeas corpus* (a) by the Serjeant-at-law to the House of Commons. Sir William (the Serjeant-at-Arms), upon producing the writs, said, "I appear here, my Lords, to deliver up the bodies of William Stockdale and John Wheelton, Esqrs."

The return was then handed in and read by the Clerk of the Court. It was signed by the Clerk of the House of Commons, and stated that William Evans and John Wheelton, having breached a breach of the privileges of the House of Commons, it was resolved by the House that they be committed to the custody of the Serjeant-at-law and kept by him during the pleasure of the House, and that Mr. Speaker do issue his writ for the same.

The return having been read,

Richards said he appeared to move that the writ be filed, and that the Sheriffs be discharged out of custody.

DENMAN, in delivering the judgment of the Court, said—It appears to me to be necessary to state that the judgment delivered by this Court at Trinity Term, in the case of *Stockdale v. Hansard*, is, in all respects, perfectly correct. The Court there decided that there was no power and which was above being questioned in law. It decided that the manner in which privilege was claimed by the House of Commons as to the footing of unques-

tionable and unlimited power. The argument there was, that such *dicta* as appear adverse to those general and incontestable principles were, in many cases, hastily and ill considered, and not necessary for the decision. It was also contended that those *dicta* were encountered by the authority of judges equally eminent and distinguished, and by numerous precedents; and I, for one, endeavoured to establish the principle, that there can be no despotic power in this country similar to that which was claimed; and I laid it down that such a power could not be possibly recognized in any court of English law. It was also necessary to declare an opinion founded upon the careful examination of the evidence of documents, and in my judgment, as well as in that of my learned brothers, it appeared that the privilege of publication, as claimed upon the record by the defendants, is a privilege that has no legal existence. To all those opinions, then deliberately formed and expressed, I now still, after full and careful consideration, distinctly adhere, and all of them, in my conscience, I sincerely believe to be true. If they were not true, if there was any ground for disputing them, it seems to me that the defendants should have brought them before a court of error, where the opinions of all the other judges might have been taken on the subject, and, if it was not unworthy of the dignity of the House of Commons to refer the question of privilege to our decision, surely it would have lost nothing in dignity or just claim to public respect to submit the same question to the calm consideration of the other judges of England in the two other Courts. If, also, the judgment was erroneous, the defendants had the power of taking it before the House of Lords, the last resort in matters of law; and I will never suppose any man can believe it justifiable to deny the propriety of obeying the judgment of this last Court, merely because it was thought fit to cast reflection upon the body in which the law and the constitution vested the appeal. And besides, it was truly observed that they did not confine this claim to the House of Commons. They expressly said that the power existed in both Houses of Parliament, so that there was an acknowledged interest in the House of Lords, as in the House of Commons, in defending the privileges which the latter sought to establish. At the same time let me observe, that if our judgments had been adverse to Stockdale, it would have been impossible, had Stockdale so pleased, for Messrs. Hansard to avoid being taken into a court of error, so that the case would inevitably have gone to another tribunal, and had that confirmed our judgment, it must have gone up to the House of Lords. In that case the two jurisdictions, which had been most carefully avoided by the defendants, must have

(a) Ante, p. 207.



been resorted to. Nothing of this sort having been done, I regard so far the conscientious decision of my brethren, arrived at after a careful review of all the circumstances, and a most calm and deliberate, and dispassionate consideration of the arguments and authorities, that I feel it entitled to that degree of respect as to justify Messrs. Hansard in saying that the judgment in the most recent case passed against them by default; but if they felt that that judgment was not justifiable, why, I again emphatically ask, was not that judgment submitted to the consideration of a superior tribunal? I submitted my opinion then to the jurisdiction of such tribunals as the law afforded, and I submit it now to the still higher tribunal of public opinion, being fully satisfied that no candid mind can go through the judgment then delivered, with a wish to arrive at a just conclusion, without being convinced that that which was arrived at by us was that which the occasion justified. We decided that case on our view of what the law was, and which we were called on to administer. Our opinion of the law was our only safe and sufficient guide. The decisions of our predecessors were the only authorities we were justified in following, and, discarding arguments of expediency or necessity, we had to say what the law justified, and what the law required. On that occasion we took the law for our guide, and we shall resort to the same authority in deciding the case which is now before us on this writ of *habeas corpus* and the return. This is a writ of *habeas corpus*, calling on the Serjeant-at-Arms of the House of Commons to bring up the bodies of two gentlemen who have been imprisoned on the Speaker's warrant. That warrant is returned to us as the cause of their detention; and the only question for us now to consider is whether that warrant is, in point of law, a good cause for the detention? There are three objections made to the form of the warrant. The first is, that there was no direct adjudication of the contempt. The expression in the warrant is that the sheriffs being committed in contempt of the privileges of the House of Commons, it was resolved that they should be committed to the custody of the Serjeant-at-Arms. It was observed that this was not a direct statement of fact, and it was argued that the participle "having" could not be allowed to have that effect. It does so happen that in a recent case from an inferior court, we gave that effect to a similar expression; and allowed a statement, by way of recital, to be considered as a direct allegation of fact. Then the consequence is, that in doing the same thing here, we shall be merely adopting an enforcement of the ordinary law. It cannot be doubted that, if the House is stated to have resolved that a contempt having been committed, the statement is equivalent to saying that a contempt has been committed, and a resolution of that House to place in the custody of the Serjeant-at-Arms the individuals guilty of committing that contempt is an adjudication against them. The second observation is, that though the House of Commons adjudicated that the parties had committed a contempt, and therefore that they should be committed to the custody of the Serjeant-at-Arms, yet that there is no order on the Speaker to issue his warrant for that purpose, I must say I do not think that that is at all necessary. We must take notice that the Speaker is an officer of the House of Commons, and that when the House of Commons adjudges that a contempt has been committed, and decides that the parties committing the contempt are to be taken into custody, the Speaker will be authorized from that instant, and without any positively expressed directions, to issue his warrant to carry the resolution of the House into effect. The third objection is, that the warrant not being dated from the House of Commons, and the name of the House not being specified in the warrant, it does not appear that "this House" is the House of Commons, but may be some other house, such as the House of Lords. I do not think there is any force in this objection. The warrant recites the resolution of the House, refers to no other House, and speaks of "this House" throughout. I think, therefore, that there is enough to show that the House against which the contempt has been committed is the House by whose authority the warrant is issued and the parties are taken into custody. Then again we see that the Serjeant-at-Arms certifies to us this warrant, and returns to us that it was in obedience to this warrant that he took these parties into custody, and he now detains them; and certifies that he does all this under a warrant issued "under the hand of the Speaker of the said House." Now, there is only the House of Commons mentioned, and I cannot allow myself for a moment so to trifle with a plain, intelligible, and clear document, as to say that I can entertain any doubt upon the matter. The fourth objection taken is, that this is not said to be a contempt of the House, but only of the privileges of the House. To that I answer by referring to the case of the *King v. Burdett*, in which the same expression has been used, and in which that expression has been held good and sufficient. It seems to me, therefore, that all these verbal criticisms must fall to the ground, and that on the face of the warrant we cannot help seeing that this is a committal for contempt, and that it is made by the authority of the House of Commons. If that is so, then we come to the great objection, which is, that the facts out of which the committal arose are not fully set out, so as to enable us to judge whether

proper ground for that commitment. I admitted that words of this sort have appeared in cases of this sort, so that it is to say that the cases on which the facts been specified appear in number to be

I will mention, however, one case—*in Francis Pemberton and Sir Thomas Holt* were committed by the House of Commons in 1689, in consequence of a judgment they gave in their court—a judgment, as reasonable, as lawful, and as for honest men and good lawyers to stand upon record, but for which those two were confined under a warrant for contempt sent into custody by the House, and remained till the end of the session. That case chiefly in order to correct a mistake of no small importance, for I feel for the credit of this profession, and I believe that, after the example of society will be found to rest upon the value set upon personal character. This resolution of the House of Commons has been supposed, most erroneously, Lord Holt concurred. It is a mistake to

It is a mistake to suppose that the House committed these judges was adopted in that Parliament. The committal occurred in the year 1689. Lord Holt was made Justice in April of that year, and this was to commit these two judges was not till the July of the same year. It was therefore, for him to have concurred in setting right that mistake, I now see the cases of *Brasse Crosby*, of Sir F. and of Mr. *Hobhouse*, where, upon the authority of the *Shaftesbury* case, such a dissent of the causes was held to be unnecessary.

It was so expressly held in the *Shaftesbury* case. That case is correctly enough held open to observation upon various grounds but it is not open to observation upon any particular ground. Nor have I ever heard of any objection ever made upon it in this respect, any, except as to the extent to which the rule in that case was applied in the *Attorney*. In that case three judges said that commitment for contempt was not to be made, even if the cause of the commitment was not sufficient. Lord Rolle, who was in the other three judges in this opinion, the sufficiency of the cause of commitment in that case, did not question the validity, if the facts were not stated, the validity of the commitment was for contempt sufficient, and he declared that in such cases should not feel himself authorized to question and seek into the motives for which the trial had taken place. So that it seems that the fact on this doctrine that Lord Holt, stated the sufficiency of the facts in

that case, never once said the facts themselves required to be set out. Another authority is *Murray's case*, where the warrant was in the same form, and there the warrant was held good.

(To be continued.)

## COURT OF EXCHEQUER.—Jan. 13.

*Sittings in Banco.*

MARKS v. BENJAMIN.

**PRACTICE**—*Whether an ATTORNEY is entitled to carry on a Cause to Trial, after notice from his Client (the Plaintiff) not to do so. Whether he can be called upon to answer matter in an Affidavit which charges him with an offence for which he may be indicted.*

We have already fully reported the trial of this case, (a) in which a verdict passed for the defendant. A rule was subsequently obtained by the plaintiff's attorney for a new trial, and it being the opinion of the Court that the case ought to have been laid before the jury by Lord Abinger, a new trial was ordered, upon which the defendant then obtained the present rule, calling upon the plaintiff's attorney to show cause why all further proceedings should not be stayed in the cause, and why he should not pay the costs upon the affidavit of the plaintiff and his brother, who swore that the name of the former had been lent by him to the attorney in question to enable him to bring the action, but that having experienced some loss of countenance consequent upon that course of conduct, he had several times expressly ordered that the cause should not be proceeded with, but that in spite of such directions the cause had been taken down to trial, and the rule for a new trial obtained by his attorney, who was further charged with having attempted to induce the brother to perjure himself on the trial.

Mr. Kelly appeared on behalf of the attorney in the cause, and read several affidavits in opposition to the rule, showing that instead of Mr. Marks having countermanded his written retainer, he had constantly urged the prosecution of the suit, had found security for costs to enable it to be carried on, and had actually accompanied some of the clerks in the office to serve the various witnesses with subpoenas on the day before the cause was heard. The deponents went on then to deny the offer to the plaintiff's brother in positive terms, and to impute collusion between the attorney for the defendant, the plaintiff, his brother, and another person, in order to deprive the plaintiff's attorney of his costs, for the re-

(a) *Ante*, vol. ii. p. 153.

cozery of which it was contended that he was entitled to take the case before another jury, even though the plaintiff should not be a consenting party thereto. He had not, at all events, taken any steps to prevent his attorney from proceeding since his interposition at the trial, and if his had been a *bond fide* disinclination to follow up the case, he would have paid his attorney's bill of costs, as well as those of his opponent, and again interdicted any further proceedings. This he had not done, but the defendant now came forward to endeavour to stop the action.

Mr. *Jervis* replied, contending that the charges and allegations made in his affidavits were not answered, and that the plaintiff's attorney was not entitled to carry on the cause after his client had thus openly avowed his wishes on the subject; but

The COURT thought that the matters in the affidavits had been substantially answered, and that being so, that the plaintiff's attorney had a perfect right to carry the case before a second jury. It was not the custom of the Courts to call upon an attorney to answer the matters in an affidavit which charged him with any offence of so serious a nature as that he might be indicted for; but it was proper to say that that portion of the case had been substantially met and repudiated by the affidavit in reply. Besides this, the attorney for the plaintiff swears to facts which raise a grave suspicion that the plaintiff has been acting in collusion with the opposite party, and if that be not so, it is difficult to understand why he should oppose a new trial, which might release him from his present obligation to pay, not only his own costs, but those of the defendant too. Under these circumstances the rule must be discharged, and with costs.

January 18.

PETERS v. FLEMING.

NECESSARIES for an INFANT, an Under Graduate of Trinity College, Cambridge.—  
The term not to be confined to things absolutely necessary for life.

This action was brought by the plaintiff against the defendant, an Under Graduate of Trinity College, Cambridge, and son of a Member of the House of Commons, for articles of jewellery, consisting among others, of a watch-chain, signet-ring, and a breast-pin. The defendant pleaded infancy, the plaintiff replied that the articles furnished were necessities suitable to the condition in life of the defendant, and were therefore such articles for which he might by law enter into a contract. The jury gave a verdict for the full amount, £3. 12s.

A rule nisi was in the last term obtained for a nonsuit.

Mr. *Kelly* now shewed cause against the rule, and contended that it was not incumbent on the plaintiff to satisfy the Court that these articles were all of them necessities for which an infant might bind himself by law, but that it was enough if the Court should think any one of them came within that description. In order to decide this most important question the Court should bear in mind the facts in the case, which showed that the defendant, though a minor without any property of his own, was the son of a most wealthy gentleman, a member of the House of Commons, representing the county of Southampton; that he had been sent up to college by his father with a most liberal allowance; that during his residence there he kept the first company among the under-graduates, and that he had brought from home a watch, which he usually wore suspended by a silk chain round his neck. Under these circumstances it was for the Court to say whether an infant could not by law contract for some of these articles, such as the watch-chain, the seal-ring, and the breast-pin, all of which, though they might be ornamental, yet were actually useful to him, and befitting his condition in the world at large. The term of "necessaries" was not, in the eye of the law, confined to those things which were actually essential to the support of life, and must be construed, in a more liberal and reasonable spirit, to mean those things which in their use and nature were of service to the infant, and such as men in his rank and condition in life might reasonably be expected to possess. He had a watch; was it not even necessary to that that he should have a chain? His father may be presumed to have given him the one, and why might he not bind himself for the purpose of chain and seal, which latter might be so fashioned as to be worn as a ring? These were both necessities with reference to the situation of the infant, and so also was the breast-pin without which he could not wear his shirt and cravat as other men of his age and rank are accustomed to do. This being so it was a question for the jury at all events to say whether these things in particular were suitable to the infant's rank; and as the case had been presented to the jury subject to the offer of the plaintiff to give up one or two of the items which did not come within the proposition submitted to the Court, it was apprehended that the plaintiff was entitled to sustain the verdict which had been given in his favour.

Sir W. FOLLETT in support of the rule contended, that though there was no doubt that youth might have such things, yet that, in point of law, he could not bind himself for them by any implied or other contract. No case had come before so far as to say that jewellery were "neces-

or an infant: custom may render them almost unavoidable, but still they are ornaments of the person, and could not be held by the Court to be, in the eye of the law, necessities." The law is one which has for its object the protection of infants, and it is absolutely null and void all contracts made by such except for necessities suitable to the rank and condition in life, limiting even the quality of the supply of those articles as clothes, food, and lodging, which are in their very nature to be "necessaries." All the cases on this point were to be decided in *Burghart v. Hall, M. and W. Mee*

(a) 727, and if the Court were to hold that a plaintiff might recover for chains, pins, where is the principle to stop? and say that race-horses, champagne, cards, are necessities suitable to the rank of a nobleman, or man of letters, is at college? Such things may be only used by men of high rank, but the law says they were necessities for a man of rank who might contract, especially when he is to be supplied by his friends with an allowance commensurate with his state in

which he may happen to move. Having a watch, a chain and seal, might well be considered necessary appendages thereto, at the age and situation in which he was at the time he bought them; all things which are merely ornamental, and not calculated for actual use, are not necessities for any one at all, and the question in such cases is merely whether the particular things, being calculated for use, were bought by the infant to support him in that degree of life in which he moves. If it appears that such is the case, it then becomes a question for the jury to say whether their quality or quantity were proper and suitable to that degree.

Mr. Baron ALDERSON.—I entirely concur in this opinion. There are things which are necessities beyond the consideration of life only, for I conceive that an infant may bind himself for his education. The acquirement of the learned languages may be necessary for one infant and not so for another. The real definition then is, that the things should be such as a prudent and reasonable man, moving in a given sphere of life, would require for actual use; for instance, a watch may be necessary for a youth of eighteen, when it never could be so for a baby in arms.—Rule discharged.

Mr. Justice PARKE.—The case of *Burghart* decided that the income of the infant was an ingredient in the question, which was confined entirely to the consideration of the goods supplied. Does the restriction of these articles without which a man of rank and reason would lose caste in society? is a question for the jury to say whether the things were merely ornaments, or were not but also really useful and necessary to the infant?

Mr. Justice FOLLETT.—It is extremely desirable that a line should be drawn between those things which an infant may contract, and those things which it is impossible for him to bind himself to. The judges ought to decide upon the question of necessities or no necessities, and the jury may be asked whether the things being necessities, were suitable to the rank. Here it is conceded that these are ornaments, and if an infant wants such things ready money for them, but he cannot get it.

Mr. Justice PARKE.—I am of opinion that in this case could not have been pronounced to nonsuit the plaintiff, but that it was a question to go to the jury. Some articles are necessary to the degree and rank of the defendant; for it is clear that the law is to be confined to things absolutely necessary for life, but is to be extended so as to include such things as are fit and proper to maintain an infant in the degree and state of life in

(a) It was there proved that the defendant was an officer in the Guards, that uniforms were supplied to him, and that the supplies were made with the knowledge that he was in a high rank in life, and entitled to an ample fortune on coming of age. In *MacKarell v. Bachelour*, (a) which was an action for debt upon divers contracts, all for apparel; some for fustian suits, and some for velvet and satin suits laced with gold, amounting to £44., whereof the plaintiff was satisfied with £4.; the defendant pleaded infancy; the plaintiff replied, that he was one of the gentlemen of the chamber to the Earl of Essex, and so it was for his necessary apparel. On demurrer, the Court held, "that the suits of satin and velvet were not necessary for an infant, although he be a gentleman; but in regard he had acknowledged satisfaction for £4., parcel, &c., and they could not tell for what that was paid, the defendant could not have judgment for any part; otherwise he should have judgment for these contracts which were allowed of."

Then the question for the Jury was, whether any of these articles were suitable to the infant's estate and degree. In *Fothergill v. Fothergill*, Lord *Kenyon* held that the question of necessities was a relative fact to be governed by the fortune and circumstances of the infant, and that proof of those circumstances lay on the plaintiff. This requisition as to the station and degree of the party is not a modern invention, as appears by reference to the pleadings in the old entries: see *North v. Thompson* (b), and *Rainsford v. Fenwick* (c). The cases go to shew that the case of an infant is like that of an idiot, and that he is supposed to have an "invincible ignorance," which renders him incapable of contracting, except from necessity, for providing himself with food, clothing, and education, &c. Lord *Abinger*, in the case above stated observed, that an infant cannot be liable on an account stated, and the reason given is, that he cannot calculate, and is therefore incapable of stating an account.

It is laid down in Co. Litt. 172, that "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and like wise for the good teaching or instruction whereby he may profit himself afterwards."

#### SHERIFF'S COURT—MIDDLESEX.

Feb. 20.

STOCKDALE v. HANSARD.

The UNDER-SHERIFF said, that in this cause he had to inform any parties who might be in attendance, that one of the learned Judges had postponed the execution of the writ of inquiry until the 4th day of next term. Mr. *Chadwick Jones*, who had attended before the learned judge, had informed him of that fact, and therefore parties attending might now leave the court.

Mr. *Platt* afterwards came into court and intimated that he attended as counsel for the plaintiff.

The UNDER-SHERIFF said, the execution of the writ of inquiry had been stayed by a Judge's order until the 4th day of next term.

Mr. *Platt* said, he understood the order was merely for a postponement of the return of the

writ. He came there for the execution of the writ of inquiry, and he was ready to do his duty as Mr. *Stockdale*; he therefore called upon the Sheriff to execute the writ.

The UNDER-SHERIFF produced the Judge's order, which is as follows:—

"STOCKDALE v. HANSARD AND OTHERS.

"Upon hearing of Mr. R. V. *Richards*, counsel for the sheriff, and Mr. C. *Jones*, counsel for the plaintiff, and upon reading the affidavit of William *Burchell*, I do order that the return to the writ of inquiry in this cause be enlarged until the 4th day of next term, and that, in the meantime, all further proceedings be stayed.

(Signed) "J. WILLIAMS.

"Dated the 20th day of February, 1840.

Mr. *Platt* said, that when he just now called upon the sheriff to do his duty, he was not aware that a clause in the judge's order not only enlarged the time for the return of the writ, but stayed its execution. That being the case, would be a breach of his duty if the sheriff proceeded to execute the writ. His client was locked up in Newgate, his attorney was locked up in Newgate, the attorney's clerks were locked up, he knew not where. He, however, came here representing them; and if that which I have just been intimated to him had not taken place, he should have performed his duty as Mr. *Stockdale's* counsel, notwithstanding all that elsewhere had been done in the matter.

#### NEW POSTAGE ORDERS.

General Post-Office, 25th Jan. 1840.

##### NOTICE TO THE PUBLIC.

The Mail for India via Marseilles being patched from London at an earlier hour than ordinary French Mail on Tuesdays and Fridays, letters intended to be forwarded by that conveyance must be posted at the same hours, and under the same regulations, as the letters for the Land Mail.

By command,

W. L. MABERLY, Secy.

General Post-Office, Feb. 4th, 1840.

##### NOTICE TO THE PUBLIC.

Printed Votes and Proceedings of Parliament, and of the Colonial Legislatures.

The Lords of the Treasury having modified the Rates of Postage upon Printed Votes and Proceedings of the Imperial Parliament, and upon those of the Colonial Legislatures by warrant of the 31st ult.; on and after the 1st instant, all such Printed Votes and Proceedings transmitted by post between places in the United Kingdom and the Colonies (subject, however,

(b) Co. Entries, 125.

(c) Carter, 215.

ing regulations and restrictions), will  
the following rates of postage :—  
eight not exceeding four ounces . 1d  
eight exceeding four ounces and  
eight exceeding eight ounces - - - 2d  
eight exceeding eight ounces and  
eight exceeding twelve ounces - - - 3d  
eight exceeding twelve ounces  
exceeding sixteen ounces - - 4d  
proportion, viz., for every additional  
s in weight above the weight of six-  
s, an additional rate of one penny ; it  
rstood that any lesser weight than four  
ll be charged as four ounces.

tional charge shall be made upon the  
ed votes and proceedings when the  
not paid in advance.

ates and regulations, however, do not  
such votes and proceedings as shall be  
gh France, or which shall be trans-  
the East Indies, via Falmouth and

By command,

W. L. MABERLY, Sec.

*General Post-Office, Feb. 15, 1840.*

**NOTICE TO THE PUBLIC.**

Money Orders are issued and paid at all the  
undermentioned Post Towns and Places within the  
London District Post, comprising a circle of  
Twelves Miles from the General Post-office :—  
Barnet, Barking, Brentford, Bromley, Brompton,  
Camberwell, Clapham, Croydon, Edgeware, Ed-  
monton, Enfield, Footscray, Greenwich, Hack-  
ney, Hammersmith, Hampstead, Harrow, Houn-  
slow, Kensington, Kingston, Limehouse, Pad-  
dington, Putney, Richmond, Surrey, Romford,  
Shooter's Hill, Southall, Stanmore, Stratford,  
Tooting, Waltham Cross, Woodford, Wool-  
wich.

They are also issued and paid at every other  
Post Town in the United Kingdom.

Money Orders are likewise issued at the Branch  
Office in Lombard-street, Old Cavendish-street,  
Charing Cross, Borough.

By Command,

W. L. MABERLY, Sec.

**SITTINGS AFTER HILARY TERM, 1840.**

Before the VICE-CHANCELLOR, at Lincoln's-Inn.

	"	24	-	-	
	"	25	-	-	
y	"	26	-	-	
	"	27	-	-	
	"	28	-	-	
	"	29	-	-	
Mar.	2	-	-	-	
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ay	"	25	-	-	
	"	26	-	-	

Pleas, Demurrers, Exceptions, Causes, and  
Further Directions.

The Third Seal—Motions.

Pleas, Demurrers, Exceptions, Causes, and  
Further Directions.

The Fourth Seal—Motions,  
Petitions.

Vice-Chancellor will hear Short Causes and Unopposed Petitions previous to the General  
Friday during the Sittings.

Sittings will close on the 3rd day of April.

*Sittings after Hilary Term.*

		Before the MASTER OF THE ROLLS, at the Rolls.		
Saturday	Feb. 8	-	-	Motions.
Monday	" 10	-	-	}
Tuesday	" 11	-	-	
Wednesday	" 12	-	-	
Thursday	" 13	-	-	
Friday	" 14	-	-	
Saturday	" 15	-	-	}
Monday	" 17	-	-	
Tuesday	" 18	-	-	
Wednesday	" 19	-	-	
Thursday	" 20	-	-	
Friday	" 21	-	-	}
Saturday	" 22	-	-	
Monday	" 24	-	-	
Tuesday	" 25	-	-	
Wednesday	" 26	-	-	
Thursday	" 27	-	-	}
Friday	" 28	-	-	
Saturday	" 29	-	-	
Monday	March 2	-	-	
Tuesday	" 3	-	-	
Wednesday	" 4	-	-	}
Thursday	" 5	-	-	
Friday	" 6	-	-	
Saturday	" 7	-	-	
Monday	" 9	-	-	
Tuesday	" 10	-	-	}
Wednesday	" 11	-	-	
Thursday	" 12	-	-	
Friday	" 13	-	-	
Saturday	" 14	-	-	
Monday	" 16	-	-	}
Tuesday	" 17	-	-	
Wednesday	" 18	-	-	
Thursday	" 19	-	-	
Friday	" 20	-	-	
Saturday	" 21	-	-	}
Monday	" 23	-	-	
Tuesday	" 24	-	-	
Wednesday	" 25	-	-	
Thursday	" 26	-	-	

Short Causes, Consent Causes, and Consent Petitions, every Tuesday at the Sitting of the Court.

COURT OF EXCHEQUER.—Sittings in Equity in Serjeant's Inn Hall, after Hilary Term, 1844, before Mr. Baron ALDERSON.

Monday	Feb. 3	-	-	}
Tuesday	" 4	-	-	
Wednesday	" 5	-	-	
Thursday	" 6	-	-	
Friday	" 7	-	-	
Saturday	" 8	-	-	}
Tuesday	" 11	-	-	
Wednesday	" 12	-	-	
Thursday	" 13	-	-	
Friday	" 14	-	-	

Petitions and Motions.

Pleas, Demurrers, Exceptions, Further Directions, and Causes.

Lord ABINGER.

Petitions and Motions.

Pleas, Demurrers, Exceptions, Further Directions, and Causes.

Of Marquis of Waterford, by Order.

			Mr. Baron ALDERSON.
" 15	-	-	Causes.
" 24	-	-	Petitions and Motions.
" 25	-	-	{ Pleas, Demurrers, Exceptions, Further Directions, and Causes.
" 26	-	-	
" 27	-	-	Causes.
" 28	-	-	Causes.
" 29	-	-	Causes.
March 2	-	-	Petitions and Motions.
" 3	-	-	{ Pleas, Demurrers, Exceptions, Further Directions and Causes.
" 4	-	-	
" 5	-	-	Causes.
" 6	-	-	Petitions and Motions.
		{	Any matter standing over which may be specially appointed.

CLERKS WHO PASSED THEIR EXAMINATION AT THE HALL OF THE LAW SOCIETY, HILARY TERM, 1840.—(Continued from p. 254.)

<i>Names.</i>	<i>Name and Residence of Attorney, to whom articled or assigned.</i>
George Barbor	Wm. Lamb Hockin, Dartmouth; assigned to Edward Dunstervin Puddicombe, 64, Lincoln's-inn-fields
John Frederick	Henry Earl, Andover; assigned to Daniel Cunningham, 47, Craven Street, Strand
George	Wm. Duberly, Dursley
Walter Wren	Wm. Rowson, Prescott
James Armstrong	John Archbould, Thrapston
Francis	John Stanley, Newport
Rich. Chambers	Thomas Evans, Broad-street; assigned to John Burden, 27, Parliament-street
Charles	Thomas Bartlett, and Charles Oldfield Bartlett, Wareham; assigned to Barry Parr Squance, 29, Coleman-street
John, Henry the younger	Joseph Fisher, Bury-street, St. James; assigned to Thomas Hooper Law, Barnstaple, and assigned to Samuel Fisher, 25, Bucklersbury
Charles	Robert Fordsham, Liverpool
Frederick	L. Morris, Carmarthen
Wm.	Bryan Holme, New Inn
John	Wm. Nicholson Hodgson, Carlisle, Cumberland
Charles Mair	Robert Fordsham, Liverpool
John	Robert Bicknell, 38, Bloomsbury-square; assigned to Geo. Waugh, 5, Great James-street, Bedford-row
Philip Benjamin	Philip Goode, Howland-street
Montague the younger	Richard Roy, Liverpool-street
Charles	Charles Aikin Holland; Northwich and Runcorn
Edward Brydges	John Swaine Sculthorpe, 43, Great Marlborough-street
Robert	Wm. Duke, Arundel
John Geo.	John Bramwell, Durham
Geo. Fred.	John Atkinson, Leeds
John	Wm. Manby, Wolverhampton
John	John O. Hall, 1, Brunswick-row, Queen-square, Bloomsbury
John	Wm. Lackman, Lawrence-street, city of York
Thomas	Benjamin Hope, Wells; assigned to James Beavan Meredith, 1, Heathcote-street
Alfred	Wm. Blunt Fosbooke, Loughborough; assigned to Joseph Parker, Loughborough
George the younger	G. Teale Lister, Cleckheaton
John Penery	Robert Montague Hume, 8, Gt. Winchester-st.; assigned to Edmund Maude, 8, Gt. Winchester-st., and assigned to Wm. Willoughby Gunston, 8, Gt. Winchester-street

(To be continued.)



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The following extract from this work is  
peculiarly applicable at the present day :—

## " RIGHT OF RESISTANCE.

" But all those privileges of the people, considered  
in themselves, are but feeble defences against the real  
strength of those who govern. All those provisions,  
all those reciprocal rights, necessarily suppose that  
things remain in their legal and settled course : what  
would then be the resource of the people, if ever the  
prince, suddenly freeing himself from all restraint,  
and throwing himself, as it were, out of the constitu-  
tion, should no longer respect either the person or the  
property of the subject, and either should make no  
account of his conventions with the parliament, or  
attempt to force it implicitly to submit to his will ?—  
It would be resistance.

" Without entering here into the discussion of a  
doctrine, which would lead us to inquire into the first  
principles of civil government, and consequently  
engage us in a long disquisition, and with regard to  
which, besides, persons free from prejudices agree  
pretty much in their opinions, it is only necessary to  
observe here, that the question has been decided in  
favour of this doctrine by the laws of England, and  
that resistance is looked upon by them as the ultimate  
and lawful resource against the violence of power.

" It was resistance that gave birth to the Great  
Charter, that lasting foundation of English liberty,  
and the excesses of a power established by force were  
also restrained by force. It has been by the same  
means that, at different times, the people have pro-  
cured the confirmation of the same charter. Lastly,  
it has also been the resistance to a king who made no  
account of his own engagements, that has, in the issue,  
placed on the throne the illustrious family which is  
now in possession of it. This resource, which, till  
then, had only been an act of force opposed to other  
acts of force, was, at that era, expressly recognised  
by the law itself. The Lords and Commons, solemnly  
assembled, declared, that ' King James the Second,  
having endeavoured to subvert the constitution of the  
kingdom, by breaking the original contract between  
king and people, having violated the fundamental  
laws, and withdrawn himself, had abdicated the gov-  
ernment; and that the throne was thereby vacant.'

" And lest those principles, to which the revolution  
thus gave a sanction, should, in process of time, be-  
come mere *artiana* of state, exclusively appropriated,  
and only known to a certain class of subjects, the  
same act we have just mentioned, expressly inured  
to individuals the right of publicly preferring com-  
plaints against the abuses of government, and, more-  
over, of being provided with arms for their own de-  
fence. Judge Blackstone expresses himself in the  
following terms, in his Commentaries on the Laws of  
England :— ' To vindicate those rights when actually  
violated or attacked, the subjects of England are  
entitled, in the first place, to the regular administra-

tion and free course of justice in the courts of law  
next, to the right of petitioning the king and parli-  
ament for redress of grievances; and, lastly, to the  
right of having and using arms for self-preservation  
and defence.'

" Here, also, we must remark the error of those  
who, as they make the liberty of the people consist  
in their power, so make their power consist in their  
action.

" When the people are often called to act in their  
own persons, it is impossible for them to acquire an  
exact knowledge of the state of things. The event  
one day effaces the notions which they had begun  
adopt on the preceding day; and, amidst the con-  
tinual change of things, no settled principle, as  
above all, no plans of union, have time to be es-  
tablished among them. You wish to have the people  
love and defend their laws and liberty; leave them  
therefore, the necessary time to know what laws and  
liberty are, and to agree in their opinion concerning  
them. You wish an union, a *coalition*, which can  
be obtained but by a slow and peaceful process; and  
bear, therefore, continually to shake the vessel.

" Nay, farther, it is a contradiction, that the peo-  
ple should act, and at the same time retain any  
power. Have they, for instance, been forced by the  
weight of public oppression to throw off the restraint  
of the law, from which they no longer received pro-  
tection?—they presently find themselves suddenly  
become subject to the command of a few leaders, who  
are the more absolute in proportion as the nature of the  
power is less clearly ascertained; nay, perhaps they  
must even submit to the toils of war, and to military  
discipline.

" If it be in the common and legal sense of the  
word that the people are called to move, each individual  
obliged, for the success of the measures in which  
they are thus made to take a concern, to join himself  
to some party; nor can this party be without a leader.  
The citizens thus grow divided among themselves  
and contract the pernicious habit of submitting to  
leaders. They are, at length, no more than the  
clients of a certain number of patrons; and the  
latter, soon becoming able to command the arms  
of the citizens, in the same manner as they at first  
governed their votes, make little account of a people  
with one part of which they know how to curb  
the other.

" But when the moving springs of government  
placed entirely out of the body of the people, the  
action is thereby disengaged from all that can  
render it complicated, or hide it from the eye.  
The people thenceforward consider things speculative  
and are, if I may be allowed the expression, spec-  
tators of the game, they acquire just notions of  
things; and as these notions, amidst the general  
gain ground, and spread themselves far and wide,  
they at length entertain, on the subject of liberty,  
but one opinion.

" Forming thus, as it were, one body, the people  
every instant, have it in their power to strike a  
decisive blow, which is to level every thing. If  
those mechanical powers, the greatest efficiency  
which exists at the instant which precedes their en-  
tering into action, it has an immense force, just be-  
cause it does not yet exert any; and in this state of still-  
ness but of attention, consists its true momentum."

Printed by GEORGE NORMAN, at his Printing  
Office, 20, Maiden Lane, in the Parish of St. Paul, C.  
Garden, in the County of Middlesex; and Publish-  
ed by JOHN RICHARDS, Law Bookseller, 194,  
Street, in the Parish of St. Dunstons, in the  
City of London, Saturday, Feb. 22, 1841.

# The Legal Guide.

[I.] SATURDAY, FEBRUARY 29, 1840.

[No. 18.]

## LEGES OF THE HOUSE OF COMMONS.

In the preceding number we quoted Lord Holt's opinion upon these Privileges, and last week we noticed the opinion of Lord Chief Justice Holt, in *Regina v. Paty*. In the latter case the Lord Chief Justice held that the plaintiffs had a good cause of action, because the judgment of the Court of Exchequer in *White* had been reversed by the House of Lords; and consequently that a writ brings an action against another person, not a privileged person, is not to be stopped, especially if he has a cause of action, and that the bringing of the writ was no breach of the privilege of the House of Commons; inasmuch as the House of Commons could not make a law, and in parity of reason they could not stop an action at law. Upon this question of Privilege, Justice Pattison thus expressed himself upon the recent judgment of the House of Commons in *Stockdale v. Hansard* (May 31,

1840). He said that the House of Lords has ordered the printing and publishing of its proceedings, and that no action occurs of any action having been brought against the publisher. The same principles apply to such practice in that the House of Commons, except as to trials in the House of Lords.

III.

They are proceedings in an open court of justice, and may properly be considered under the second ground on which this power is supposed to exist, namely, the necessity for it.

"Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is done or said in either House should not be liable to examination elsewhere. Therefore no order of either House can itself be treated as a libel, as the Attorney-General supposed it might if his action would lie. No such consequence will follow. The power claimed is said to be necessary to the due performance both of the legislative and inquisitorial functions of the House. In all the cases and authorities from the earliest times hitherto, the powers which have been claimed by the House of Commons for itself and its Members, in relation to the rest of the community, have been either some privilege, properly so called, i.e. an exemption from some duty, burden, attendance, or liability to which others are subject; or the power of sending for and examining all persons and things, and the punishing all contempts committed against their authority. Both of these powers proceed on the same ground, viz. the necessity that the House of Commons and the Members thereof should in no way be obstructed in the performance of their high and important duties; and that if the House be so ob-

T

structed, either collectively or in the persons of the individual Members, the remedy should be in its own hands and immediate, without the delay of resorting to the ordinary tribunals of the country. Hence liberty of speech within the walls of the House, freedom from arrest, and from some other restraints and duties during the sitting of Parliament, and for a reasonable time before and after its sitting (with the exception of treason, felony, and breach of the peace), which, although the privileges properly so styled of the individual Members, are yet the privileges of the House. Hence the power of committing for contempt those who obstruct their proceedings, either directly by attacks upon the body or any of its Members, or indirectly by vilifying or otherwise opposing its lawful authority. Cases have frequently arisen in which the extent and exercise of these privileges and powers have come in question, and I believe that all such cases will be found to range themselves under one of the two heads I have mentioned. But this is, I believe, the first time in which a question has arisen as to the power of the House to authorize an act prejudicial to an individual, who has neither directly nor indirectly obstructed the proceedings of the House, and is in no way amenable to its authority. The decision of *Lake v. King*, which I mentioned before, proceeded on similar grounds of necessity. Every facility ought undoubtedly to be given to all persons applying to either House of Parliament, or to any Court of Justice, for the redress of any alleged grievance, and it would be most inconvenient to hold such persons liable to actions for any thing contained in such applications as libel; but when those who are applied to circulate generally by sale such defamatory matters, the case assumes a very different character. In the case of *Fairman v. Fox, & Barnwell & Anderson*, 642, a petition addressed by the creditor of an officer in the army to Lord

Palmerston, the Secretary at War, was held not to be actionable, although containing defamatory matter; but can it be doubted, that if Lord Palmerston had ordered it to be published, the publisher would have been liable to an action? or can it be contended that the Secretary of State, to whom the report and reply on which this action is brought, were by Act of Parliament directed to be sent, to be by him laid before the Parliament, would have been justified in publishing them? And, if not, why should the House of Commons be at liberty to do so. In the same manner, the protection of confidential communications extends no further than the necessity of each particular case requires. It is said, that if paper however defamatory, must needs be printed for the use of the Members, as it is plain they must, and the point is not disputed their further circulation cannot be avoided for what is to be done with the copies upon a dissolution of Parliament, or upon the death or retirement of a Member? The answer is obvious; the copy of such defamatory matter ought to be destroyed, as can no longer be used for the purpose for which it was intended; or, at all events, must not be communicated to others. But it is said that the constituents have a right to watch over the conduct of their representatives, and therefore to know what passes in the House. The House itself is of a different opinion, for it is only by sufferance that any one is allowed to be present at debates; it is only by sufferance that the debates are allowed to be published and it is only by the special permission of the House that its votes and proceedings and papers are communicated to the public and that in the manner in which they thus fit to order. If the constituents had a right to know all that passes, or if the House of Commons were an open Court, then, indeed there might be some colour for saying it was necessary to publish all its proceedings.

It is upon the ground, that courts of law are open to the public, that what there is public at the time, and that it is important, that all persons should be allowed to scrutinize what is there done, that the notion of every thing which there passes in the House of Commons being thought to be lawful. I for one do not think that length, but think, with some of great name who have gone before me, that the doctrine is, to be taken with limitation; but I feel sure that it can apply to a Court which is not open, proceedings in contemplation of law, and yet at the time they take place, and yet *ex parte* statements, often grossly false, are made, without the defamed person having any opportunity of being heard, and, indeed, often without the possibility of any inquiry being instituted; and it is impossible, if such indiscriminate publication and sale be continued by the House of Commons, that petitions containing serious libels against the most innocent persons may be purposely and maliciously introduced to that Honourable House by persons who seek to publish and sell them with impunity, and to make the House most unwisely the instrument of circulating and publishing them. It is the nature of the proceedings themselves which justifies, if at all, the publication of what passes in a court of law, and any person may therefore publish what is published at the proceedings of the House of Commons, as it cannot be published without the sanction of the House. The right to publish does not result from the nature of the proceedings, but from the leave obtained from the House; and this alone shows that it is a matter of necessity for the interest of the constituents. I do not say that it may not be conducive to the public interest to inform the world at large of what passes in the House, but I do say that it cannot be conducive to the public interest to circulate private slander; and the exercise of a due discrimination

as to what part of its proceedings shall be published, the House of Commons is bound to take care that such private slander be not circulated by its authority.

“But it is said to be necessary, in order to obtain the requisite information for the Members in any legislative or inquisitorial measure. This ground is still less tenable: the House is armed with ample powers to send for all persons who can give them information, either before a Committee, or at the bar of the House. It can never be necessary to sell indiscriminately to every body, in order to take the chance of some person volunteering information to the House. Will it be said, that any one ever did volunteer information in consequence of such publications by the House, or that the House ever waited and paused in its deliberations or its votes, in order to see whether any one would so volunteer? It is not pretended that such has been the fact. Whether any individual Member might or might not be justified in communicating to some persons out of the House defamatory matter printed for the use of the House, I cannot pretend to say. Probably, upon any such question arising, the decision will be with a jury; but I would by no means bind myself to any opinion on that subject. This is the case of an open sale to all who choose to buy, not justified by any peculiar circumstances attending this case above others.

“Where then is the necessity for this power? Privileges, that is, immunities and safeguards, are necessary for the protection of the House of Commons in the exercise of its high functions. All the subjects of this realm have desired, are desiring, and I trust will continue to desire, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due

exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing; it is to be regarded, not with tenderness, but with jealousy, and unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. The onus of showing the existence and legality of the power now claimed lies upon the defendants; it appears to me, after a full and anxious consideration of the reasons and authorities adduced by the Attorney-General in his learned argument, and after much reflection upon the subject, that they have entirely failed to do so, and I am therefore of opinion that the plaintiff is entitled to our judgment in his favour."

### PROBLEM XVIII. VOL. III.

#### CHANCERY.—PLEA TO A BILL.

What is its object? What constitutes a good Plea?

TO THE EDITOR OF THE LEGAL GUIDE.

### ANSWER TO PROBLEM XIV.

#### VOL. 3.

#### TITLE DEEDS.

In what cases will equity compel the owner of title deeds to produce them to other persons, and in what cases will their production be compelled in adverse suits and actions?

Sir J. Leach V. C. in the case of *Barclay v. Raine* (1) 1 Sim. and Stu. 449, thought the existence of a right in equity to compel the production of deeds very questionable, and the Real Property Commissioners adopted his opinion, but that His Honour did not intend to deny the general doctrine of such an equitable right, as I think, evident from his observations in a subsequent case of *Fain*

v. *Ayers*, 2 Sim. & Stu. 585: (2) and I find equity will compel the Heir at law to produce title deeds in favour of a Devisee, see 6 Cru. Dig. 10. And it is, I believe, a general rule in equity that a person is entitled to the production of a deed which sustains his title, *Sampson v. Snottenham*, 5 Mad. 16. And in adverse suits a plaintiff may compel the production of deeds and papers connected with the object of the suit, if they are stated in the Schedule to, or referred to by, the answer and therein admitted to be in defendant's custody or possession, but the plaintiff has no right to the production of a deed not connected with his title, and which gives adverse title to the defendant. *Croft v. Stee*, 4 Ves. 66.; *Bird v. Harrison*, 15 Ves. 408; *Evans v. Richards*, 1 Swan. 7.

#### A. COUNTRY ARTICLED CLERK.

(2) As to the equity of the purchaser, the decision of that learned judge in the case of *Fain v. Ayers*, establishes that the purchaser would have had a clear equity to compel the production of the deeds. In that case, which was subsequent to the case of *Barclay v. Raine*, he expressed a strong inclination of opinion upon which he acted, in overruling a demurrer that the purchaser of a part of a large estate who never had a covenant to produce the title deeds, had a right upon his reselling, to compel the first seller to produce them, to shew a marketable title, as the first seller's title deeds were the root of the first purchaser's title, and in the same sort of common property, and he stated that he was informed that the Lord Chancellor (Eldon) had expressed an opinion to that effect, and we shall see that in another important case, neither he, nor Lord Eldon considered it material to the binding nature of a covenant in equity that it should run with the land at law. It cannot be intended that a purchaser buying only a portion of the estate, held under the same

(1) The result of this case introduced no new rule either as to the law or equity upon this subject. — Ed.

can say he is not bound by a covenant entered into by the seller upon a pre-sale to another, to produce the deeds if he had not notice of it: the contents of the deeds afford notice that they relate as to other property as to his, and the rule of practice leads to the inference, that the seller has parted with a portion of the estate, and still has the deeds, he has been entitled to produce them, and the second purchaser is bound to enquire.

By the law, no doubt the expression in the report is, that *Thring's* covenant to produce did not run with the land: but it appears that Sir John Leach afterwards denied that he used the expression there imputed to him. He did not say that *Thring's* first covenant did not run with the land, for he said that it clearly did, but that the covenant was restricted to the period of his being mortgagee; of course this means that it ran with the lands sold to him; for it was not disputed that it did run with the other lands in the hands of the first seller and those claiming under him. In that respect it was the common law for the *Barclays* claimed through him, from A the original seller, with whom *Thring* entered into the covenant. This observation is not very distinct, for *Thring's* covenants ran with the land, the real objection was, the first was lost, the second was limited to the period of his being mortgagee. The explanation, however, believes the doctrine from the supposed facts of the case itself.

And, the title it may be thought ought to have been deemed a good one; for if a man sells all part of his estate, and delivers the deeds to the purchaser, and takes from him a covenant for their production, the same upon a sale of another part by him is the same as a sale by a purchaser with a covenant to produce the deeds, and no man in each case can make a title, if the deed of covenant itself had not been

delivered over to the second purchaser (*Barclay*), nor had he a covenant to produce it, and the copy was mutilated: this would have been an objection if the deed had been in existence, because the last purchaser was entitled to the custody of it, or to a covenant to produce it from the person holding it, but he was not entitled to have a covenant entered into with himself to produce the title deeds; if such were the law, few titles would be good. But as the deed was lost, and there was sufficient evidence of its having existed to support *Thring's* acknowledgment; and as he had the legal fee vested in him with the custody of the deeds, although only as mortgagee, his deed would bind the mortgagors at law when he reconveyed to them, and the equity as we have already seen was clear, so that perhaps upon the whole there should have been a decree for a specific performance, instead of the bill being dismissed with costs. It would seem, also, that there was sufficient equity to have compelled the persons claiming the deeds under *Thring* (the Mortgagee), to enter into a new covenant to produce the deeds to supply the place of the one that was lost. It was distinguishable from the case before referred to, where no covenant to produce deeds had ever been executed. See Sugd. Vend. & Pur. vol. ii. p. 126.—EDITOR.

TO THE EDITOR OF THE LEGAL GUIDE.  
ANSWER TO PROBLEM XV.—VOL. 3.

PLEA.—PUIS DARRIEN CONTINUANCE.

Describe this plea? When may it be resorted to as a matter of defence?

This plea is of a very peculiar nature, inasmuch as it belongs to no particular period of the suit, but may be resorted to at any stage of the pleadings. This will be evident from a consideration of the history of the plea, and the circumstances under which it is available. It may, therefore, be well in the first place, to learn how it first came to be used; and, in prosecuting our inquiries

on this point, we shall have to look back as far as to the times when the pleadings were conducted *in voce* in open court. At this early period, as also for several centuries after (and in short until very recently), when adjournments of the proceedings took place, an entry was made on the record, stating the ground of the adjournment, and fixing a day for the re-appearance of the parties in court. Such entries were called *Continuances*. Between the continuances and the day appointed, as the parties were out of court, they were not able to plead; and in the interval, during which they were so out of court, it was possible for a new matter of defence to arise which did not exist, and which the defendant was therefore unable to plead, before the last continuance; this sometimes occurred. And, although some other plea had been previously pleaded, it was deemed inequitable that he should be deprived of such ground of defence; he was, therefore, entitled to plead it, on the day fixed for the re-appearance of the parties in court, as a matter which had happened after the last continuance; hence the title, "*Puis darrien Continuance*," or, "Since the last Adjournment."

By a recent rule of court (a), altering the ancient practice with respect to continuances, it is provided, that in all cases where this plea was then by law pleadable, the same defence may still be pleaded. It must, however, be accompanied by an affidavit stating that the matter of defence arose within eight days before the time of pleading it, unless the court or a judge shall order otherwise. It is pleaded by way of substitution for the former plea (1), and is followed by a replication, and other pleadings, in the same manner as pleas in general. It may be either in bar or abatement (2). In modern practice, it is styled "Plea to the farther Maintenance of the Action" (3).

(a) 11th Geo. IV. c. 13, s. 1. (b) 11th Geo. IV. c. 13, s. 2. (c) Stephen's Pleading.

(1) But it cannot be pleaded after a demurrer (*Day v. Savage*, Moon 871; *Martin v. Wyvil*, 1 Str. 492), nor after verdict (*Stamp v. Parker*, Cro. Jac. 646; see *Loxell v. Eastaff*, 8 Term Rep. 554). The matter of defence must have arisen after the defendant has pleaded, and before the jury have actually delivered their verdict; see in case of reference to arbitration, *Alder v. Park*, 5 Dowl. 16.—Editor.

## Law Reports.

### QUEEN'S BENCH.—Dec. 23.

(Sittings at Nisi Prius, before Lord DENMAN.)

HARVEY v. NORTON.

Special Jury.

HUSBAND AND WIFE.—SEPARATION.—HUSBAND'S LIABILITIES.—Whether furniture falls under the description of necessaries to which the husband shall be made liable after separation, where he has turned his wife out of doors, and had made no settlement or had not paid it.

This was an action for goods sold and delivered.

The Attorney-General for the plaintiff, said the plaintiff was a draper and carpet manufacturer, carrying on business in the Westminster; the defendant was a gentleman of high character and station, one of the police magistrates of the metropolis. He should have very great pain in laying before the jury the circumstances of the case, and he should most cautiously abstain from saying anything at all calculated to wound the feelings of the defendant. The present action was brought to recover the sum of £49.1s.2d. for necessaries supplied to Mrs. Norton, the wife of the defendant. In the year 1822, Mr. Norton had married Miss Sheridan, one of the daughters of Mr. T. Sheridan, son of the celebrated Mr. Sheridan. They lived together very happily for a number of years, but it happened in the month of March, 1836, they separated. At that time, Mr. Norton had certain suspicions with respect to the conduct of his wife, which he had since acknowledged to the jury. He did not suppose that at this occasion there would be thrown out the slightest suspicion against the honour of Mrs. Norton. If there should be, he was in a situation to prove that she defendant had acquitted her of all imputations. The date in question was contracted in January, 1836. The defendant, living separate from his wife, was clearly liable for necessaries suitable to her station in life, she not disputing any maintenance to her

having settled upon and paid to her a maintenance. It had often been laid on such occasions as the present, that she who was not permitted to live with her husband, and that the husband had a credit for necessaries to be supplied by person who supplied them having a credit against the husband for the recovery due. In the beginning of the year 1838 Mrs. Norton, being separated from her husband, took apartments unfurnished, in a house in Bolton-street, Piccadilly. It was necessary that she should furnish those apartments, and she did so on a most moderate scale, and in the most judicious manner. She sent to the plaintiff in the month of that year, and asked to look at the terms of carpets and rugs. She selected such were the plainest and the cheapest. That and succeeding months, goods were sent to the house in Bolton-street, to the amount of £49. 11s. 2½d.

It turned out that part of those goods were ordered on behalf of Mrs. Norton's son, R. B. Sheridan, younger son of R. B. Sheridan, who occupied apartments in the same house.

That portion had been paid, but a balance remained unpaid of £49. 11s. 2½d. It was not to be disputed that those goods had been delivered, or that they had been used; the only question then that was left for the jury to try was, whether they were necessaries suitable to a person of Mrs. Norton's rank of life. It was possible that Mrs. Norton might contend that those goods were to be considered as necessaries, inasmuch as they were furniture for an unfurnished house. It could never be said that a wife must always go to a furnished lodging; on the contrary, any prudent person at the west end of London would take an unfurnished lodging in the country. It would surely not be contended that a lodging as Mrs. Norton had taken was good for the wife of a man who was heir to a fortune, who was in the receipt of a very liberal allowance as a police magistrate, and had succeeded to considerable property in the country. It would not be set up as a defence that a settlement had been made by Mr. Norton; for it might have been the case since the time when the present debt was contracted, and that had not been made in the month of January, 1838. He could not for a moment say that the jury would say that such furniture had then been bought was extravagant for the wife of such a man as Mr. Norton, highly educated, and moving in the first circles of society.

The question is, to what were those necessaries ordered entirely for the consideration of the husband, in order to arrive at a conclusion, the court will take into consideration the rank and condition of the parties. The whole claim

for this furniture amounted to £50. 6s. 2d. less of that sum £42. 15s. was, in respect of the furniture required for the use of her uncle, Mr. Sheridan, who lived in the house with her. Mr. Sheridan had paid that sum, and the amount now claimed was for goods for Mrs. Norton's own use. He understood this claim was resisted on the ground that the goods were not necessaries, and that a distinction was to be taken between the clothes furnished for the necessary and decent clothing of the wife, or the food she required for her sustenance, and the furniture to be placed in her apartment. That distinction, however, could not prevail for a moment. It never had been laid down that a wife should take furnished lodgings, and pay an extravagant sum for them. She must then take unfurnished apartments, and it was necessary to her occupation of them, that she should be provided with furniture suitable to her condition in life. In the case of "Hunt v. De Blaquier," 5 Bing. 550-3, M. and P. 108, it had been decided that furniture must be considered as necessaries. The law always presumed a husband's liability for debts contracted by his wife for necessaries, unless he had made a settlement, and could prove payment of it. No settlement had been made on Mrs. Norton when this debt was incurred, and therefore the defendant was clearly liable. He trusted that the jury would have no difficulty in pronouncing the defendant clearly in the wrong.

The following evidence was given.

Hugh Wilson—I am shopman to the plaintiffs, who are linendrapers and warehousemen, in the Westminster-road. I remember Mrs. Norton coming to the plaintiffs' shop in January, 1838. She requested to be shown some carpets, and I took, by her direction, some patterns to Bolton-street, Piccadilly. Mrs. Norton lived in Bolton-street. She purchased goods, and I made out an account of them. I afterwards saw those goods in the house in Bolton-street. The account was originally made out to Mrs. Norton, but it was subsequently divided at her request. One portion was made out to Mr. Sheridan, and the other to the Hon. G. C. Norton. The latter has not been paid. The goods for which Mr. Norton was debited consisted of carpets, floor-cloth, rugs, &c. They were put into Mrs. Norton's room and the maid's room. A Brussels carpet was put down in the drawing-room, the floor-cloth in the hall, and the Turkish rugs in the bed-room and dressing-room. The witness described other furniture, and the parts of the house in which it was placed. Our shop sell for ready-money. The charges are the lowest ready-money charges. Mrs. Norton was told so when she ordered the goods. I afterwards, by desire of Mrs. Norton, called on the defendant for the money. He refused to take the invoice of the



goods, and said he had paid more accounts than he was justified in paying, and would pay no more; that Mrs. Norton was living separate from him, had a separate maintenance, and she should never set foot in his house again.

Cross-examined.—Mrs. Norton did not say she was sitting up the house in Bolton-street when she first called. She gave her address there. She was a stranger to us, and came to the shop as a ready-money customer. When I went to the house in Bolton-street I saw painters and paper-hangers there, and it had the appearance of being fitted up. Mrs. Norton's butler gave me the money for Mr. Sheridan's bill on the 6th of June, 1838. I did not apply to Mr. Norton until September, as I learnt from his servant that he would not be in town until then. I knew he was a police magistrate. The house in Bolton-street is a moderately-sized house. It might require from £500. to £1,000. to furnish it. I saw Mr. Norton at his house in Wilton-crescent. It is a small house compared to that in Bolton-street. I had heard of Mrs. Norton, when the goods were supplied; but I was not acquainted with the fact that she was living separate from her husband.

J. Houghton, a person in the employment of the plaintiff, proved the delivery of the goods.

Mrs. Fire-Baton examined.—Was in the service of Mrs. Norton. Had lived with Mr. and Mrs. Norton since their marriage. Could not say she thought that they had lived in a very stylish manner; they had four-maid servants and one man servant in Green-street. They received fashionable people at their house, and visited fashionable people. A separation took place in March, 1836. After that she went once to the house with Mrs. Norton to see her children. Mrs. Norton remained there long enough to dress the children, and then took them out to walk. She went again in August, 1836, with Mrs. Norton, when Mrs. Norton was refused admittance. The door was kept closed; the chain being drawn, so that they could not see the servant. Mr. Sheridan lives with Mrs. Norton at the house in Bolton-street, and is in the exclusive occupation of apartments there.

Cross-examined.—There are three maid-servants and two men-servants at No. 24, Bolton-street. Mr. Sheridan lived there with Mrs. Norton till they went to the continent in September last. Mr. Sheridan used to sit sometimes in the drawing-room with Mrs. Norton, but generally sat in his own study. Will not swear that Mr. Sheridan did not sit in Mrs. Norton's rooms every day. They see company together. Heard Mr. Norton in Green-street give an order to the man-servant not to admit Mrs. Norton if she came to the door. Remembers their separation in March 1836. Remembers Mrs. Norton's going away early in the morning, about 8 o'clock.

It was not so early as 8 o'clock; it was quite light at the time. Mr. Norton had three children, all boys. Will not say that Mr. Sheridan has part of the house in Bolton-street to himself; has seen Mrs. Norton at tea in Mr. Sheridan's room.

Re-examined.—When Mrs. Norton quitted her husband's house in March, 1836, she went to the house of Lord Seymour, her brother-in-law.

Cross-examined.—The house in Bolton-street was now let to Sir Patrick Ross. When it was let witness was out of town with Mrs. Norton; was not present at any of the negotiations about letting it. Will swear that she did not hear Mr. Sheridan talk to Sir P. Ross about letting it.

Frederick Burton called.—Is in the service of Mrs. Norton. Had been hired by Mr. Sheridan, and was transferred by him in October, 1837, to the service of Mrs. Norton. His wages were £14. a-year. There was not so much furniture in the house in Bolton-street as there should have been in a house of such size. Never saw anything about Mrs. Norton's establishment that appeared unnecessary or extravagant for a lady of her rank.

Cross-examined.—When Mr. King, the landlord of the house, quitted it, witness took possession of it for Mr. Sheridan. Mr. Sheridan and Mrs. Norton used generally to sit together, and see company in the same drawing-room. The drawing-room curtains were of crimson moreen; those of the back drawing-room of chintz.

Colonel Leicester Stanhope examined.—Has been long acquainted with Mr. Norton, who lived in the first circles. Does not consider that Mrs. Norton's residence in Bolton-street was furnished in a manner more expensive than was necessary. Furnished lodgings at the west end are charged at a very extravagant rate.

Cross-examined.—Mrs. Norton's house at Storey's-gate was small; not above half the size of the house in Bolton-street. The situation was more expensive. Houses in that part of the town are dearer than in Piccadilly. Besides there was a public-house next door to the house at Storey's-gate. Should suppose the rent of the house in Bolton-street to be about £200. a-year. Believes the expenses of the house were shared between Mr. Sheridan and Mrs. Norton. Understood that it was a joint establishment. Was not present at any interview of Mr. Sheridan and Sir P. Ross respecting the letting of the house.

Mrs. Sheridan examined.—Is the mother of Mrs. Norton. Mr. and Mrs. Norton were married 30th July, 1827; they married in the first circles. Had visited her daughter at Bolton-street. Thought the expenses were particularly reasonable.

re-examined.—Has not observed if the room curtains are of rich crimson silk

(To be continued.)

Jan. 30.

STOCKDALE v. HANSARD.

It had been obtained in this case to show by a writ of attachment should not issue the Sheriff of Middlesex for not having paid the damages and costs awarded to the plaintiff in this action.

Kelly now showed cause against the rule, that he should best fulfil his duty upon every occasion by first reading the affidavit of the Sheriff, and then pointing out the situation in which those gentlemen would be placed in compliance with the present rule. He finally urged upon the Court the necessity of their Lordships being duly prepared for the performance of their duties.

COURT made the rule absolute.

Feb. 23.

The plaintiff obtained a summons to show cause why the order made in this cause on the 17th last, "for staying the return to the writ of inquiry in this cause until the fourth day of the next term next should not be rescinded," made by the Queen's Bench, between John Stockdale, plaintiff, and James Hansard, James Hansard, and Luke James Hauendante, Thomas Burton Howard, of Strand, Strand, in the county of Middlesex, but now a prisoner in the Newgate, the plaintiff's attorney in this action, and saith, that a notice in writing was duly served on the above-named defendants, purporting that a writ of inquiry would be executed before the Sheriff of Middlesex, at his office in Red Lion-square, on the 20th day of February instant, and he delivered briefs to counsel to attend on the part of the plaintiff, and necessitated very considerable expense thereon; the deponent further saith, that on the 18th of February instant, after the hour allowed for visitors in the above-named prison, he served with a summons, to show cause why the return of the said writ of inquiry should not be rescinded, until the fourth day of the next term, why all proceedings should not be in abeyance until the fourth day of the next term. That on the following day renewed summons to the same effect was served on the deponent, which came on to be argued on the 20th instant, when an order was made, and the deponent further saith, that the plaintiff and his attorneys, and clerks, have been for some time, and

now are, in custody by direction of the House of Commons, and he was thereby prevented from sufficiently instructing counsel to oppose the order being made, and that he never saw or knew the contents of the affidavit on which the application was grounded, until after the order had been made. And this deponent further saith, that the said order was not made in time to prevent the attendance of the leading counsel of the said plaintiff at the office of the said Sheriff of Middlesex, pursuant to the said notice for executing the said writ of inquiry, and he is informed, and believes, by such counsel, that the first knowledge which he, the said counsel, had of such order was upon the production of a copy of it by Mr. Burchell, the acting Under-Sheriff, after he, the said counsel, had appeared before the said Under-Sheriff for the purpose of advocating the plaintiff's claim to damages. And this deponent further saith, that on the 8th day of November last, he was served with a notice in a former cause between the above-named plaintiff and defendants, for another publication for the same libel for which this action is brought, from the Under-Sheriff of Middlesex, purporting that this honourable Court would be moved on the morrow, or as soon after as counsel could be heard on the part of the Sheriff of Middlesex, for a rule to show cause why the execution of the writ of inquiry in that case should not be stayed until the further order of this Court. And this deponent further saith, that the application was made, and the resolution of the House of Commons, relative to persons acting in any suit that might bring the privileges of the House into discussion, brought before the notice of the Judge, who refused to grant the rule, or in any manner to interfere to delay the execution of the writ of inquiry; and this deponent further saith, that upon another occasion, when the plaintiff, by rule of Court, called upon the Sheriff of Middlesex to show cause why he should not pay over the money received by him under the writ of *venditioni exponas*, in the said last-mentioned action, the said Sheriff showed for cause the said resolution of the said House of Commons, and the plaintiff said, as was the fact, that he was then in custody of the Sergeant-at-Arms for acting in opposition thereto, but it was declared by the full Court that such resolution offered no excuse, and they ordered that the said Sheriff should pay over the money to the plaintiff, which he did.

Sworn at the goal of Newgate, in the Old Bailey, in the city of London, this 23d day of February, 1840. Before me, J. B. HOWARD, Esq., a Commissioner, &c. Mr. Platt appeared upon the summons for the plaintiff, and observed, The state of the case

was that an action had been brought by Mr. Stockdale against Messrs. Happard for the publication of a false and malicious libel. The defendants had suffered judgment to go by default. A writ of inquiry to assess the damages had been issued, and was about to be executed, when the order against which he appeared had been made. He had to submit to his Lordship in the first place, that the sitting at chambers had no power to make such an order, the effect of which was to inhibit the execution of the Queen's writ. The effect of the order was most disastrous to the plaintiff, who would be thrown over from term to term, as he had been in the former action. A similar application to the present had been made on behalf of the Sheriff to Mr. Justice Littledale, who, after hearing counsel for two whole days, treated the application as it ought to be treated, and rejected almost with indignation the attempt made by the Sheriff to delay the execution of the law, which was the subject's right.

Mr. Justice WILLIAMS.—Have you any affidavit, Mr. Platt?

Mr. Platt.—Yes, my Lord. The learned counsel then read the affidavit of Mr. Howard, and proceeded to observe, that in the last action the Sheriff had taken no step, except on compulsory rules obtained from the Court of Queen's Bench at the instance of the plaintiff, and the course heretofore taken showed what might be expected in this cause. The proceedings here had been perfectly regular, and they had arrived at a certain stage, when it was sought to stay them, because the House of Commons had passed certain resolutions which were clearly illegal. The House of Commons had no more right than a parish vestry to interfere by its resolutions with the administration of justice and the law of the land. At this moment the Sheriff was in custody by a technical deception, by legal chicanery, for the warrant under which he was held did not state the cause of his detention in such a way as to enable the Court of Queen's Bench to give him its own officers, its protection, and no benefit would arise to any human being by the delay of the execution of this writ of inquiry. The Sheriff was bound to execute the writ and execute it he must some day, or the other; that it was merely a postponement of the day of trial, for that day must come. He could assure his Lordship that the plaintiff would not retain in his proceedings. The Sheriff was bound to do his duty, slowly and without flinching. He (Mr. Platt) therefore submitted that the order for staying proceedings ought to be rescinded—first, on the ground that a judge at chambers had no power to interfere with the Queen's writs; 2dly, that even if he had the power, he would not interfere after the proceedings had gone by

Mr. Justice Littledale; and, 3dly, because it was unreasonable to interfere to the delay of the plaintiff. On these grounds, he submitted that the order ought to be rescinded, and his client allowed to go before a jury to assess the damages he had sustained.

Mr. Richards, in support of the order, cited the case of "*Phillips v. Weyman*," 2d Chitty's Rep., to show that a motion to stay proceedings could not be rediscussed, unless new facts calculated to induce the Court to come to a different decision were brought forward. In this instance no new facts were alleged, and the arguments of to-day were only a repetition of those urged by Mr. Chadwick Jones when the order was obtained. He therefore felt confident his Lordship would not undo one day what he had done a few days before, except strong ground was shown, and new facts stated. He was much surprised to hear his learned friend doubt the authority of a Judge at chambers to make such an order. It was clear that sitting at chambers, the learned Judges had jurisdiction to enlarge the time for the return of all writs. The peculiar circumstances of the case had placed the Sheriff in a state of great difficulty, and therefore, being an officer of the Court, he ought to be protected. The High-Sheriff was at the present moment in custody; he was not able to act, and if the inquiry was proceeded with, the Under-Sheriff must also go to prison, and then the business of the Courts in Westminster Hall could not be executed. It was admitted by all that the Sheriff had acted in strict conformity with their duty, and therefore they had a right to demand protection. No injury could result to Mr. Stockdale from the delay, as he could not enforce the verdict, whatever it might be, until next term. He hoped that he should never see the day when the resolutions of the House of Commons were to be considered and acted upon as the law of the land. He trusted to live under a clear and defined law—not under the provision of resolutions which might be changed every day. He trusted his Lordship would afford the Sheriffs an opportunity of applying on the first day of next term for the advice of the Court of Queen's Bench as to how they were to act; and he thought, when the whole case was before the Court, their Lordships would protect the Sheriffs in the honest discharge of their duty. The only protection his Lordship could give was to enlarge the time for executing the writ of inquiry, which he had done, and nothing had taken place to alter the state of things; and as to the power of his Lordship to suspend the inquiry, he thought no doubt could exist on that head. He rested the case on the private protection which the Sheriff was entitled to, and he hoped never to see the day when that public officer was called upon to

twice over. He again said, that Mr. Stock could not be injured by delay, and he said this application to rescind the order postponement of the trial merely an attempt to popular excitement. This case was there were no few facts, and therefore his Lordship would confirm the order rescuing the writ of inquiry until the next term, and direct Mr. Stock to the Sheriff the expenses of what day.

Mr. WILKINS, in pronouncing his judgment, went at great length through the broken in this and the previous action. His Lordship said it was no part of his duty to hat might be the ulterior consequences or he had made; his duty was to as- rights of the Sheriff and Mr. Stock. To see whether the present application could not be supported. He had the advantage of consulting the other the exception of Mr. Justice Col- was on circuit, and they entirely him on the subject. The question to consider was, did the case em- new grounds? He thought not; he think there was any analogy be- present application and the one made Justice Littleale. In that case the only been served with a notice from as, a solicitor, not to proceed; in the stance they had been served with a re- the House of Commons, telling them, proceeded, they would be guilty of a empt of that House; and therefore, h circumstances, they ought to be al- opportunity of appealing to the Court's Bench for advice. The plaintiff be injured by the delay, as he could e any verdict which might be given in until next term, and the Sheriff being the Court, the Court was bound to in the discharge of their duty. The inconvenience was in favour of the and therefore he felt bound to give them- nity of appealing to the Court, and tly the order for postponing the execu- writ of inquiry must stand.

Mr. LUTT said, as the House of Commons plaintiff a fresh cause of action every just try another country.

# RT OF COMMON PLEAS

Mr. Justice BULLOCK, in the Matter of the Person of the Sheriff of the County of Middlesex, delivered the following judgment: A question has been raised before us

of the validity and legal effect of the warrant, under the sign manual of his late Majesty, ordering and directing that the right of practising and pleading and audience in the Common Pleas, during term time, should, from the first day of Trinity Term, 1834, cease to be exercised exclusively by the Sergeants-at-Law; and that upon and from that day the Barristers-at-Law might have and exercise equal rights and privilege of practising, pleading, and audience in the said Court with the Sergeants-at-Law. We (his Lordship) continually have been called on by the learned Sergeants, who have joined in the application, to declare our opinion on a question which affects so nearly their interests, and to assent on that opinion. At the time when this warrant from his Majesty was orally read in Court, in the presence of the learned Sergeants, if any one of our learned brothers had expressed any doubts as to its validity and legality, and had desired the opinion of the Court on that point, we should have felt it our duty to pause before we gave effect to that warrant, and have given our deliberate opinion on the question so presented to us. But no such doubt was suggested. The larger number of Sergeants accepted the grant, and in favour of the Crown in making their rank permanent, and those of our brothers who had previously obtained their rights from the Crown, who are the only parties to the application, allowed the matter to pass *sub silentio*. Under these circumstances, it cannot be wondered at that the Court did not, of its own authority, interpose any objection to the warrant; more especially as the object the warrant had in view—the opening of the Common Pleas—was that which the Common Law Commissioners had, by their report, previously recommended to be adopted for the benefit of the suitors; though certainly to a much more limited extent than the warrant itself directs. Still, however, notwithstanding the period of acquiescence under the operation of the warrant had been considerable, we see no legal ground on which the Sergeants can, by such acquiescence, be held to be barred of their right now to call for the opinion of the Court as to the validity of the warrant. And we think ourselves bound in the execution of our duty, in administering justice, not only to the suitors of the Court, but to the officers and ministers of the Court, to declare our judgment on the legality of the warrant. Now, we think the question before us turns generally on the point: whether the Sergeants-at-Law have, by the collocation of the Oath, and consequently by the law, held and enjoyed the sole and exclusive privilege by virtue of their office or degree of Sergeants, of practising, pleading, and audience in the Common Pleas; for if they were entitled, they cannot be deprived of their ancient privilege

by a warrant from the Crown under the sign manual, nor indeed by any power short of an act of the whole legislature. That the antiquity, and degree, and office of Sergeant-at-Law, is as high as the existence of the Court itself, is a fact proved from all the text writers or records upon the subject. They are mentioned in the "Mirror of Justices," a book of great learning, and of the earliest though uncertain antiquity. They are mentioned by Bracton, who wrote in the time of Henry III., and in the records to be found in the Tower of the time of Edward I. They are called to the estate and degree of Sergeants-at-Law by writ, which of itself is a strong argument as to the antiquity of the office. The form of such writ, besides, is found in the most ancient manuscript registers, in substance agreeing with the writ by which they are called to their degree at the present day. By the oath of office, which has existed from the earliest times—an oath by which no other barrister is bound—they bind themselves to give due attendance and service in the business of their clients. As early as any authentic records exist the Sergeants are found to be practising in the Common Pleas; and there is no mention of any other barrister being allowed to practise, or practising, in that Court. See the various authorities collected on the subject in the address of the Lord Commissioner White-locke, as to the newly-created sergeants, in his "Memorials," p. 256. We, therefore, think we are fully justified in saying that from time immemorial the Sergeants-at-Law have enjoyed the exclusive privilege of practising, pleading, and audience in the Common Pleas. Immemorial enjoyment is the most solid of all titles, and a warrant of the Crown can no more deprive the Sergeants of the benefit of that privilege belonging to them than it can alter the administration of the law in the Court itself. The right and privilege of the peers of the realm stand on the same foundation of immemorial enjoyment. We hold, therefore, the right of the Sergeants to the sole and exclusive privilege, and which they claim as still in existence, notwithstanding the King's warrant; and we hold ourselves bound, in the due course of administering justice, to let this right be still exercised. Extreme cases may certainly occur in the progress of time, in which the Court might be called on, for a time at least, to admit to audience, to plead and practise barristers not of the degree of the coif, until the circumstances which created such necessity had passed by, in order to prevent a failure in the due administration of justice to the Queen's subjects, for which object all the courts of justice were instituted. Justice Littleton, in the case of "Paston v. Sergeant Jenny," in the Year Books of the 11th Edward IV. says, "If all the Sergeants were dead, we could hear the ap-

prentices (a) plead, of necessity, in case of the people." To this Bryan answered, "Then according to you, no Sergeants shall be made of necessity." It appears to us (the Chief Justice continued to say) that as the Sergeants have their own voluntary acquiescence under the legality of the warrant which they now dispute, induced suitors of the Court to retain as counsel in this Court barristers not of the degree of the coif, it would be against justice that such suitors should not still have the benefit of their service. While, therefore, we declare our opinion to be that we ought to allow the sole right of the Sergeants in practising, pleading, and being heard in this Court, during term time, it is with this reservation, that all barristers, not of the degree of the coif, shall be heard in such business, so in progress, in which they are at present engaged until the same be brought to an end. I would wish to add, that my learned brother Maule was not present at the time this was mentioned and argued by my brother Wilde; but he does not dissent from the opinion we have given, and I have his authority for saying that he entirely agrees with that opinion.

(a) "Apprentices," was the title originally given barristers, and is derived from *apprendre*, to learn. They were (according to "Dugdale's *Orig. Jurid.*" 55; and "Sir Henry Spelman's *Glossary*," 37), first appointed in the 20th year of Edward the First's reign by an ordination in Parliament.

#### TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—Last week I sent a letter to the Legal Observer to know whether any and what answer was returned to the following question at the last examination:—"What offence is the advising a prisoner to stand mute, and how is it punishable?"

Having seen no notice of the letter, (1) any gentleman, who passed in Hilary Term answered this question, I should be obliged if he would favour the public, through "THE GUIDE," with the correct reply.

I am, Sir, your obedient servant,  
Law Soc. Hall. J. L.

(1) We think our correspondent (who we suspect not to be one of our subscribers) somewhat hasty in his implied censure on our contemporary—some of our notices and letters in this paper are of three weeks' date—some Answers to our Problems are still longer date, and we cannot find a remedy.—Ed.

circuits, 1840.	Lord Denman. J. Bosanquet.	Lord Abinger. J. Littledale.	B. Parke. B. Alderson.	J. Patteson. B. Gurney.	J. Coleridge. J. Esckine.	J. Colman. B. Rolfe.	J. Williams.	J. Maule.
Tues. Feb. 18	-	-	-	-	Appleby	-	-	-
Thursday 20	-	-	-	Reading	Carlisle	-	-	-
Saturday 22	-	-	-	-	Newsa. & town	-	-	-
Monday 24	-	-	-	-	-	Winchester	-	Swansea
Wednesday 26	-	Hertford	-	Oxford	-	-	-	-
Thursday 27	-	-	-	-	Durham	-	-	-
Saturday 29	-	-	-	-	-	-	-	-
Mon. March 2	Northampton	Chelmsford	-	-	-	-	-	-
Wednesday 4	-	-	-	Worce & city	York and city	Salisbury	-	-
Thursday 5	-	-	-	-	-	-	-	-
Friday 6	Oakham	-	-	-	-	-	-	-
Saturday 7	Lincoln & city	-	Aylesbury	-	-	-	Wexham	Haverfordwest [and town]
Monday 9	-	Maidstone	-	-	-	-	-	-
Tuesday 10	-	-	-	Stafford	-	-	-	-
Wednesday 11	-	-	-	-	-	-	-	-
Thursday 12	Notting. & town	-	Bedford	-	-	-	-	-
Friday 13	-	-	-	-	-	-	-	-
Saturday 14	-	-	-	-	-	-	-	-
Monday 16	-	Lewes	Huntingdon	-	-	-	-	-
Tuesday 17	Derby	-	-	-	-	-	-	-
Wednesday 18	-	-	-	-	-	-	-	-
Thursday 19	-	-	Cambridge	Shrewsbury	-	-	-	-
Friday 20	Leicester & B.	-	-	-	Lancaster	-	-	-
Saturday 21	-	-	-	-	-	-	-	-
Monday 23	-	Kingston	-	-	-	-	-	-
Tuesday 24	-	-	-	-	-	-	-	-
Wednesday 25	Covehit. & War.	-	-	Hereford	-	-	-	-
Thursday 26	-	-	-	-	-	-	-	-
Friday 27	-	-	Bury St. Edm.	Monmouth	-	-	-	-
Saturday 28	-	-	-	-	-	-	-	-
Monday 30	-	-	-	-	-	-	-	-
Tuesday 31	-	-	Norwich & city	Gloaces. & city	-	-	-	-
Wed. April 1	-	-	-	-	-	-	-	-
Thursday 2	-	-	-	-	-	-	-	-

ARTICLED CLERKS WHO PASSED THEIR EXAMINATION AT THE HALL OF THE LAW SOCIETY, HILARY TERM, 1840. (Continued from p. 271)

<i>Names</i>	<i>Name and Residence of Attorney, to whom articled or assigned</i>
Hull, Fred. Shepard	Wm. Thompson, Liverpool; assigned to John Buck Lloyd
Hunter, John	Liverpool, and assigned to Wm. Henry Cokerill, Thringmorton-st.
Iggulden, John the younger	John Anderson, Pybus, Newcastle-upon-Tyne
Jarvis, Lewis Whincop	John Menter, Dead
Johnson, James	Lewis Westcott Jarvis, King's Lynn
King, Paul, John	John Makinson, Manchester
	Edward Robert Porter, 1, New Court, Middle Temple; assigned to Thomas Wright, Nesh, 11, New Court, Middle Temple
Kingdon, Richard	Charles Kingdon, Holsworthy
Leach, Joseph	Wm. Stevens, 6, Frederick's-place, Old Jewry
Leonard, Robert	Winterbotham, Tewkesbury; assigned to E. Blackmore, 1, Mitre-court Chambers, Fleet-st.
Leitch, Thomas Curr	John Lowry, North Shields
Lowe, William the younger	Samuel Danks, Birmingham
Mayo, John Ryall	John Pyae, Somerton; assigned to John Slade, Yeovil
Mercer, George	John Mercer, the younger, Ramsgate
Merrick, William	Wm. Timbrell, Bradford
Monkman, Henry William	Thomas Walker, York
Moss, Wm. Henry the younger	Wm. H. Rosser, Gray's-Inn-Place; assigned to Charles Frost, Kingdon-upon-Hull
Mould, Ralph Allen	John Bridges, Red-lion-square
Mullens, Richard	Wm. Balton, Cresslock, 4, Regent-street, St. James's, Westminster
Newington, William John	Giles Miller, Goudhurst
Paget, William	Thomas Brown, Skipton
Palmer, William H.	Wm. Evans, Haverford West
Parkinson, Joshua Furness	James Stansfield, Halifax
Phene, Phineas	Henry Goddard Awdry, Milkham
Pierson, James H. G.	Clement Govett, Tiverton
Pitman, Harry Harris	John Geare the elder, Exeter; assigned to Wightwick Roberts, 57, Lincoln's-inn-fields
Pitt, James	Thomas Ledlard, Cirencester
Portmore, Charles Broadhurst	Edward Fisher, Ashby-de-la-Zouch; assigned to William Dewes, Ashby-de-la-Zouch
Pybus, Geo. Harrison	Wm. Pybus, Middleton Tys, York; assigned to Thomas Henry Dixon, 5, New Boswell-court
Rayer, Edward	Joseph Cooper Straford, Cheltenham
Rea, John	Wm. Dickson, Alnwick
Robinson, Thomas	Wm. Barker, Huddersfield
Robinson, Thomas	Wm. Rymer, Darlington
Sanders, John Thomas	George Saffery, Market Rasen, Lincoln
Scott, William Henry	Robert Bartlett, Chelmsstead
Smith, John Oliver	Timothy Surr, 80, Lombard-street
Sparks, John	Isaac Sparks, Crewkerne
Stephenson, McCarthy	John Stephenson, Newark-upon-Trent
Taddy, Charles	George Cook, Bristol
Thomas, George the younger	George Thomas the elder, Carmarthen; assigned to Samuel Walker, 29, Lincoln's-inn-fields
Tomlin, Ottiwell the younger	Ottiwell Tomlin the elder, Richmond; assigned to James Williamson, 4, Verulam-buildings
Towse, Robt. Beckwith	John Beckwith Towse, Fishmonger's Hall, London-bro.
Twynam, W. Edwin	Geo. Twynam, Winchester; assigned to Benl. Hope
Wake, William	Bernard John Wake, Sheffield
Walsley, Edward	Archibald Keightley, 43, Chancery-lane

cy, John Rich, Lambeth	Walter Fildes, Goldsmith's Hall
William Webb	Charles Hen. Webb, Stafford; assigned to James Gay
er, Edmund	Hiern, Stafford
Edward	Richard C. Wardroper the elder, Midhurst, Sussex; assigned
James Call	to Charles James Palmer, Bedford-row
Robert	George Saul, Carlisle; assigned to John Saul, Carlisle
iam. George	Robert Weddell, Berwick-upon-Tweed; assigned to Wm.
use, Joseph	Pringle, 2, King's-road, Bedford-row
ck, Thomas Nortman	John Whall, Worksop
ton, Geo. Bancroft	Cecil Proctor Wortham, Buntingford
r, Jeremiah	Peter Williams, Holywell, Flint
	Julius Garberrian, Shepherd. Feverham, Kent
	Wm. Casson, Manchester
	Wm. Butt, Ryde

ICE TO CORRESPONDENTS.

T.—A. L.—T. W.—G. L.—T. B.  
 subscriber—S. A. W.—W. M.—S. F.  
 —J. S.—R. D.—all under considera-

VER.—Consider your question.—Is it  
 one?

T.—Your industry shall have its re-  
 lue season.

LMUS.—*Hastings* why did you not  
 “*homo trium literarum*.” We should  
 ported you.

—We fully admit the justice of your  
 ons. Our paper differs from every  
 e strive not only at being correct in all  
 ls, but we aim also at being useful to  
 le practitioner as well as the student.  
 arrying out our object that we find our  
 confined for the information we desire  
 It would relieve us greatly, and be  
 to our Subscribers, could we issue a  
 umber every month. Several have ap-  
 it, but the majority are silent. We  
 have no alternative but to stand to our

P.—See the List in our Columns.

RD ROZ.—See our Vol. 1. p. 173—  
 work well read; and the references ap-  
 will go a great way to effect your wish.  
 for your P. S. When can we send for  
 rs?

r. Llanetty.—We are waiting your  
 communication.

RTICLED CLERK—a Subscriber from  
 umencement.—We believe 119 appli-  
 ended the last examination of Articled  
 at the Law Society. The list of those  
 sed will be found in our columns.

W.—Your industry deserves our com-  
 ons, and we think that in our limited  
 here every line is to us of the first im-  
 your communication would take the  
 others more valuable, inasmuch as our

Index shows every Problem, and whether so-  
 answered or no.

A Constant Reader and an Articled Clerk.—  
 No.

J. A. B.—We have not neglected your letter,  
 which shall be complied with. It was an  
 oversight.

ALPHA.—We do not, at this distance of  
 time, think that our taking notice of the work  
 you allude to would answer any good purpose.

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 We have this week, contrary to rule, but in  
 order to dispose of our accumulated correspon-  
 dence, inserted answers to two Problems.

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 with the principles, the machinery, movements, and  
 working of the British Constitution. Men may ad-  
 mire the regular motion of a watch on a clock; but  
 it is not until each separate portion has been taken  
 asunder, and subjected to close inspection, until its  
 various checks and springs, and wheels within wheels  
 have been pointed out, and their use in the economy  
 of the machine explained, that an adequate notion of  
 its complicated nature and harmonious working can  
 be obtained. The constitution of England presents a  
 strictly analogous case. We may admire its wise  
 provisions, excellent arrangements, and complete  
 adequacy; we may be struck with the substantial depen-  
 dencies of its various parts; with the mutual checks



which they impose one upon another, and with the regularity and harmony resulting from such counter-acting, and apparently opposite influences; but it is only by consulting such a work before us, where the constitution is, as it were, anatomically dissected, and each portion of it made the subject of a separate demonstration; where the uses, relations, properties, and functions of every part are clearly and fully elucidated, that we can arrive at a full and adequate comprehension of the whole. And for that purpose we know of no work at all comparable to Mr. Western's. The text of De Lolme, the best analytical commentator on the British Constitution, is incorporated with the work, to which several additions relating to recent Acts of Parliament have been made. The arrangement is good, the style is clear—every thing irrelevant is carefully excluded, and the result is a work containing a vast and valuable body of political *knowledge*. We repeat knowledge, because it is neither disfigured by the introduction of disquisitions on abstract principles, or of fanciful and untried theories. The course of demonstration pursued is two-fold—first, the salient points of the constitution are laid down, and reduced to general principles—the essential difference between these and the corresponding points in other constitutional monarchies is traced out and exhibited; and, next, the value and truth of these are demonstrated by the testimony of history and experience. A work so modelled, and executed with skill and ability, with no party bias to thwart the writer's judgment, or party prejudices to impart to his views their own jaundiced hue, we deem no inconsiderable acquisition to British legiflature. It is one that deserves, and will, we hope, obtain extensive popularity."—*Surrey Stand.* Feb. 21.

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See also *Windsor and Eton Journal*, Feb. 22.—*The Old England*, Feb. 22.

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the general, as well as the professional reader, for it treats of those constitutional topics which interest all classes of her Majesty's subjects. Mr. Western displays excellent judgment in regard to the arrangement of his book. His own remarks and additional matter are skilfully incorporated with, or appended to the text of De Lolme, as circumstances suggested. He has brought his information and facts down to the latest period; and in an Appendix which he has judiciously added, he has given the new code of law regulating real property and testamentary dispositions. This latter part of the work is exceedingly valuable. The work is very properly exempted from every thing of a political character. We are glad, however, to perceive that the author has not shrunk from the reserved expression of his opinions on several subjects bearing immediately on the great interests of justice, humanity, and religion, which naturally came in the way. We fully concur with him in all he has said in reprobation of imprisonment for debt, and in opposition to the infliction of capital punishments. Mr. Western, we repeat, has produced a work of great and permanent value. He is a man of sound judgment, and of extensive information on the topics treated, while he expresses himself with much clearness and precision. De Lolme's book, which had in a measure become obsolete, in consequence of the great alterations which have taken place in our laws since it was written, has now all the freshness of a work written within these last six months."—*Morning Advertiser*.

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# The Legal Guide.

II.]

SATURDAY, MARCH 7, 1840.

[No. 19.]

## LEGES OF THE HOUSE OF COMMONS.

ient times, so far from the House of Commons presuming to declare upon its privileges, or presuming to enact what be its own privileges, they do not nature to decide upon them. The case is *Lorke's case*; that was a matter affecting the privilege of Parliament the arrest of a Member. The House of Commons did not then claim it as an absolute right to deal with it as if it the authority themselves; but, on the contrary, they petitioned the King, and ever from the King is, "With the Lords Spiritual and Temporal," very much in the form of an Act of Parliament, as "*Le Roi le veut*," is the answer to the petition of the Commons. It has passed through several of the cases; and is important in another point of view, it shows that in the more ancient times of the constitution many things were done in the House of Commons which could hardly be distinguished whether they were measures legislative or judicial. Many cases have occurred in which the King, Lords, and Commons made a joint resolution, and that that explains what is the law of Parliament, because that is the law of Parliament is the law of the House of Commons; but if there are equal powers to both Houses, and they have each the same force as the law of the legislature, it is III.

there must be necessarily three concurrent legislatures at the same time, who may enact, nay, have enacted, three different sets of resolutions at the same time, and perhaps contradictory to each other; and who is to say which is the law of Parliament? By degrees the House of Commons claimed more privileges; in fact, as they gained power, they assumed to themselves the right of legislating; and whenever they legislated for themselves, with public opinion in their favour, though they might be a little irregular, yet they were supported and their resolutions acquiesced in. While they were determined to resist oppression, and followed the public opinion, and identified themselves with the people, they always had the public voice in their favour; their actions were not then too nicely scanned, and they frequently went beyond the just bounds of the law and the constitution with impunity; but whenever they thought it proper to set themselves up in opposition to public opinion, and trench upon public rights, they were always then ultimately defeated. There are several instances of that sort. The case of *Wilkes*, which was in a time of great excitement; there they came to a resolution which afterwards they were forced to abandon; "for," says *Lord Chatham*, "where law ends, tyranny begins;" and he says, in allusion to that case, "No man more than I respects the just authority of the House of Commons; no man would go further to defend."

it; but beyond the line of the constitution, like every exercise of arbitrary power, it becomes illegal: threatening tyranny to the people, destruction to the State; power without right, the most detestable object that can be offered to the human imagination. It is not only pernicious to those whom it subjects, but works its own destruction. *Res detestabilis et caduca*. Under pretence of declaring law, the Commons have made a law, a law of their own, and have united in the same persons the offices of legislator and party and judge." That was the opinion of that great statesman of the act of the House of Commons, going beyond their just privileges, depriving the subject of his legal right, and overturning, to a certain extent, the law of the land. That case is perfectly analogous to *Stockdale's* case; because the subject has a right to bring an action by law, and that is as much a part of the law of the land as the most important branch of it: and yet the House of Commons say, by their resolution, that they can deprive the subject of that right. Is not that legislating by themselves, without the concurrence of the other two branches of the legislature? With respect to that right of the subject, it has been decided by the House of Lords to be the law of the land, as that precise question arose in the case of *Ashby v. White*. There an action had been brought, and the House of Commons said that an action could not be brought to control their privileges. Lord Holt maintained that the action could be brought, three judges were of a contrary opinion, and the case ultimately went to the House of Lords, and the House of Lords decided that the action would lie; so that we would suppose an end was put to any question upon that subject. The opinion of Lord Holt is clear and distinct, both in that case and also in the case of the *Queen v. Paty* (a).

(a) See Mr. Curwood's reply to the argument of the Attorney-General in *Stockdale v. Hansard*, printed by order of the House of Commons with the proceedings, 4th June, 1839.

Mr. JUSTICE COLERIDGE in giving his opinion upon the judgment delivered by the Court of Queen's Bench in *Stockdale v. Hansard*, observed, "It is said that this and all other courts of law are inferior in dignity to the House of Commons, and that, therefore, it is impossible for us to review its decisions. This argument appears to me founded on a misunderstanding of several particulars: first, in what sense it is that this court is inferior to the House of Commons; next, in what sense the House is a court at all; and, lastly, in what sense we are now assuming to meddle with any of its decisions. Vastly inferior as this court is to the House of Commons considered as a body in the State, and amenable as its Members may be for ill-conduct in their office to its animadversions, and certainly are to its impeachment before the Lords, yet as a court of law we know no superior but those courts which may revise our judgments for error, and in this respect there is no common term of comparison between this court and the House. In truth, the House is not a court of law at all, in the sense in which that term can alone be properly applied here; neither originally nor by appeal can it decide a matter in litigation between two parties; it has no means of doing so, it claims no such power; powers of inquiry and accusation it has, but it decides nothing judicially, except where it is itself a party in the case of contempts. As to them no question of degree arises between courts, and in the only sense therefore in which this argument would be of weight, it does not apply. In any other sense the argument is of no force, considered merely as resolutions or acts. I have yet to learn that this court is to be restrained by the dignity or the power of any body, however exalted, from fearlessly, though respectfully, examining their reasonableness and justice, where the rights of third persons in litigation before us depend upon their validity; but I deny that this inquiry tends at

ersal of any decision of the House ;  
 eral resolution and the *res judicanda*  
 identical; the House of Commons  
 er upon the fact on which the plain-  
 ered an issue; that argument will be  
 y-and-bye to apply to the cases of  
 al for contempt, but it has no place  
 nsideration immediately before me.

It is said that the jurisdiction of  
 se must be exclusive, because it pro-  
 ot by the Common Law, of which  
 e are cognizant, but by a different  
 party law, of which we are wholly  
 I cannot think that this argu-  
 entitled to much weight. It is every  
 actice with us to decide cases which  
 on the laws of foreign countries, or  
 administered in courts of peculiar  
 ion in this country; of these we  
 judicial knowledge, but we acquire  
 ssary knowledge by evidence. And  
 denied that where in a cause the  
 of privilege arises incidentally, this  
 ust take notice of it and inquire into  
 ence and extent; what, therefore, it  
 in some cases where the same diffi-  
 ists, there can be no moral impossi-  
 that account of its doing in all.

objection, however, leads me to ob-  
 hat cases of privilege, so called,  
 en arise, where the question will not  
 ly whether the privilege does exist,  
 ther the claim made can be reduced  
 nder any true definition of privilege.  
 ge, if it be any thing but the mere  
 tion of the present will of the body  
 g it, must be capable of some general  
 efinition, however it may vary in  
 in different bodies. No lawyer, I  
 now supports the doctrine of Black-  
 hat the dignity of the Houses, and  
 ndependence, are in a great measure  
 ed by keeping their privileges inde-

But of privilege in the general,  
 st be competent to form some opinion,  
 e we have from time to time to deal  
 ur own privileges.

Let me suppose, by way of illustration, an  
 extreme case: the House of Commons re-  
 solves, that any one wearing a dress of a  
 particular manufacture is guilty of a breach  
 of privilege, and orders the arrest of such  
 persons by the constable of the parish; an  
 arrest is made, and action brought; to  
 which the order of the House is pleaded as  
 a justification. The Attorney-General has  
 said, that it is always a question of privilege  
 when it is a question whether the House has  
 power to order the act complained of to be  
 done, and that this question arises directly  
 whenever it appears by the record that the  
 action is for that which the House has or-  
 dered to be done. In such a case as the one  
 supposed, the plaintiff's counsel would insist  
 on the distinction between power and privi-  
 lege; and no lawyer can seriously doubt  
 that it exists; but the argument confounds  
 them, and forbids us to inquire in any parti-  
 cular case whether it ranges under the one  
 or the other. I can find no principle which  
 sanctions this.

His Lordship then proceeded to examine  
 a few of the very numerous authorities cited  
 on this question, and observed that it did  
 not appear to him at all necessary to go  
 through many; for whatever might be the  
 weight of instances of acquiescence by indi-  
 viduals in the acts of the House of Com-  
 mons, and, generally speaking, his Lordship  
 considered it to be little or none, it is not so  
 between the House of Commons and the  
 Courts of Judicature. The House has, for  
 centuries, been feelingly alive upon ques-  
 tions of privilege, and for centuries it has  
 been the most powerful body in the state; if,  
 therefore, he found, in several well-considered  
 causes, the courts disdaining to be  
 bound by the resolutions of the House as to  
 their privileges, and actually adjudicating  
 upon them without any or only with ineffec-  
 tual remonstrance, he could but think such in-  
 stances entitled to the greatest respect, and to  
 be of quite sufficient force to establish a propo-  
 sition which in itself is so consonant to reason.

His Lordship added, he knew it would be said, that in many of the cases alluded to, the question of privilege has arisen accidentally only, and that in such *ex necessitate*, the courts have interfered. In what sense "incidentally" is here used, has been often asked, and never as yet quite satisfactorily answered; in what sense a greater necessity exists in the one case than the other has not been made out. The cases of *habeas corpus* are generally put as instances, where the question arises directly; let me suppose the return to state a commitment by the Speaker under a resolution of the House, ordering the party to capital punishment for a larceny committed,—it will hardly be said, that a stronger case of necessity to interfere could be supposed, and yet it must be admitted, on the other hand, that the question of privilege or power, between which the argument for the defendants make no difference, would arise directly. A case, therefore, may be supposed, in which it would be necessary to interfere, even where the so doing would be a direct adjudication upon the act of the House. It would seem, then, that some other test must be applied to ascertain in what sense it is true that the House can alone declare and adjudicate upon its own privileges. With these observations his Lordship said—

"I venture with great diffidence to submit the view which I have taken on these embarrassing questions, not as claiming the suspicious merit of novelty, but as one which will, at least, remove all difficulties in theory, and be found, I believe, not inconsistent with the general course of the authorities. I say general course; for during so long a series, carried through times so differing in political bias, and between such parties as either House of Parliament on the one side, and the courts of law, individual judges, or litigant suitors on the other, it would be quite idle to expect that any one uniform principle should be found to have invariably

prevailed. In the first place, I apprehend that the question of privilege arises directly whenever the House has adjudicated upon the very fact between the parties, and there only; wherever this appears, and the case may be one of privilege, no Court ought to inquire whether the House has adjudicated properly or not; a court of Law, I conceive must take notice of the distinction between privilege and power; and where the act has not been done within the House (for of an act there done can any tribunal, in my opinion, take cognizance, but the House itself) and is clearly of a nature transcending the legal limits of privilege, it will proceed against the doer as a transgressor of the law."

#### PROBLEM XIX. VOL. III.

##### TERMS OF YEARS TO ATTEND THE INHERITANCE.

What is the nature of a Term to attend the Inheritance?

#### TO THE EDITOR OF THE LEGAL GUIDE. ANSWER TO PROBLEM IX. VOL. 3.

##### LEGACIES.

Under what circumstances is a legacy regarded as a satisfaction of a debt?

There are two principal circumstances under which the devise of a legacy is regarded as in satisfaction of a debt, but the intention of the testator is the principal criterion, and if this can be clearly ascertained no circumstances will be regarded in opposition to such intention.

Those two circumstances are,

First,—If a person bequeaths a legacy of money, being at the time of the bequest indebted to the legatee in a less sum than the legacy, the legacy is generally speaking satisfied, and unless circumstances, as before stated,

be shewn to prove a contrary intention of the testator, interpreted to be a satisfaction of the debt, and the legatee would not be led to be paid both. (3 Ves. 564.)

And, — If the legacy devised be only to the debt the same construction is to be put on it, namely, that it was a satisfaction of the debt. (a)

It may be taken as *general rules*, and judicially acknowledged to be law: yet Courts lean very much to create exceptions of it, and eagerly lay hold of any circumstances in a new case which at all different from those already and, in the least degree authorise depart from the established rules; saying, that though acknowledged as a policy of such rules, which often the generous acts of a testator be- happened to be indebted to the testator's bounty at the time of making the bequest, is somewhat doubted.

It is not, perhaps, be trespassing far out of the problem, by just here stating a few of circumstances which the Courts have laid hold of, to form exceptions to the general rule; thus, where there is an intention in the Will to pay debts; (b) the subject of the gift is land (2 P. W. the legacy given being on a continuing trust, not being supposed that the testator intended an uncertain recompense in lieu of a certain demand, (2 Salk. 508) the legacy made payable not at the testator's death but at a future day, (2 Atk. 300. 2 P. W. 20.) that the debt was upon an open running account, so that it might not be known to the testator whether he did owe

any money to the legatee or not, (*Rawlin's v. Powell*, 1 P. W. 297,) if the debt were contracted after the making of the Will in which the legacy is given (3 P. W. 353); nor is a legacy considered to be in satisfaction of a covenant unless it be equally beneficial in amount, certainty, and time of enjoyment with the thing contracted for. (2 P. W. 614.) These cases are now interwoven with, and form modifications of, the rules on the subject of this Problem above stated.

As to shewing the intentions of the testator, hinted at above as riding over all rules, parol declarations by him have been in some cases admitted in evidence to repel the presumption of the satisfaction of a debt by the bequest of a legacy of greater amount, even where such declarations were made after the making of the Will, and even where the expressions of the Will afforded an inference in favour of the presumption. (*Wallace v. Pomfret*, 11 Ves. p. 542.)

If the legacy be less than the debt it has been held not to go in discharge nor even in diminution of it. (c) But in all cases where there is a deficiency of assets, the legacy is to be taken, *pro tanto*, in satisfaction of the debt. (Tollers Exors. 337. 338. 4th Ed.)

W. M.

### Law Reports.

VICE-CHANCELLOR'S COURT—Feb. 27.

RATCLIFFE v. DICKENS.

PARTNERS.—*Right of a Partner under the Copartnership Deed to dissolve the Copartnership.*

Mr. Jacob moved to dissolve an injunction granted *ex parte* restraining the defendant from entering into any contract or negotiating any bills in the name of the partnership which formerly subsisted between the plaintiff and the defendant, from selling any of the partnership stock, or doing any act by which the firm might become liable. The partnership was entered

the correspondent has shewn what is the strict rule. (*Falbot v. Duke of Shrewsbury*, Prec. Cha. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 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2018

into in the year 1836, between John and Cleophas Ratcliffe and Thomas Dickens, to carry on the trade of manufacturers of broad silk for a term of ten years, and the business had ever since been conducted in Wood-street, up to the end of last year, when the unprosperous state of the concern induced the Messrs. Ratcliffe to give notice to the defendant to dissolve it. The defendant had, nevertheless, continued to act as though the partnership was still subsisting, and on allegations that he had, since the date of the notice, received monies on behalf of the partnership which he had applied to his own use, and sold goods belonging to the firm without rendering any account until long after it was discovered by the plaintiffs, and he was aware they were acquainted with the fact, the injunction now sought to be dissolved was granted. The articles of partnership contained a provision that a general account of the stock and affairs of the partnership should be taken every half-year, which was to be written in three books, and subscribed by each partner within a month after the time appointed for taking the accounts, and each partner was to be bound by such account. If it appeared that the gains of the partnership in respect of any successive half-year should be insufficient to pay the expenses and loss of the concern, then it was to be lawful for either of the partners to dissolve the partnership at the expiration of one month after giving notice for that purpose. On taking the midsummer account in 1839, a deficiency appeared of £83., and on the subsequent half-year a deficiency of £2,655. after paying all expenses; and the plaintiffs accordingly gave notice, on the 4th of January last, to the defendant to dissolve the partnership at the end of one month. The defendant now contended that the accounts had been improperly taken, that the month's notice had not transpired when the injunction was obtained, and that the charges of misconduct and misappropriation of the partnership property were untrue, and would not have been thought of but for the purpose of carrying into effect the object of the plaintiffs in dissolving the partnership.

The VICE-CHANCELLOR said, he was of opinion, on the substance of the case, the legal right to determine the partnership (setting motives aside, which had nothing to do with the case) did arise, and had been properly exercised; and that on the 4th of February the partnership ceased to exist. He also thought the defendant had not acted consistently with the duties of a partner, who had agreed, by the articles of partnership, to keep and render true and faithful accounts, and that therefore the motion to dissolve the injunction must be refused with costs.

# QUEEN'S BENCH.—Dec. 23.

HARVEY v. NORTON.

(Continued from page 281.)

Sir W. Follett addressed the jury for the defendant. He regretted, as much as his friend the Attorney-General could do, the necessity of this inquiry; but he thought the jury must have observed that it was not the sum of £49. 11s. that was now in question, but that they were now to decide whether Mr. Norton should be held liable for the claims of different tradesmen for any expenses that his wife might think proper to incur. They had heard the answer made by Mr. Norton when this account was presented to him, "It is quite impossible for me to pay it. I have already paid so many other accounts, and I cannot settle it; I must send it to my attorney, and ask him whether in point of law I am liable or not." It was upon the advice of counsel that he was not liable to this demand that Mr. Norton had determined to resist the present action. He did not wish to hurt the feelings of any one above all, those of the lady on whose account the present proceedings had been originated; but he must say that this case came before them under very extraordinary circumstances. A bill had been made out in the first instance to Mr. Norton for the whole amount of £92. Afterwards furniture for part of the rooms was taken out for Mr. Sheridan and paid by him; the other half was cut out and debited by Mrs. Norton. Upon the evidence before them, he had no hesitation in saying that Mr. Sheridan had most distinctly taken the house, occupied it with Mrs. Norton, and let it furnished. They were then to determine the very important question whether Mr. Norton was liable for debts incurred in furnishing a house taken, as far as appeared, by Mr. Sheridan, let by him, and the rent going into his pocket. There was the house let furnished, with the very furniture they were seeking to make him accountable for. Mrs. Norton was now living separate from her husband with his consent. Under these circumstances, if it had been proved that his wife had not received sufficient to supply her with the necessaries of life, Mr. Norton would be liable to the expense of those necessaries, by whomsoever supplied, while she might require during the time of her separation. But she had been living, first with her sister, subsequently with her uncle. The demand made to-day was not that which was usually made in a court of justice on a wife's behalf: it was for the furniture of a house occupied by Mr. Sheridan, in which he was living with Mrs. Norton. If the house were really in the occupation of Mrs. Norton, why was not Mr. Norton the landlord, who let it, or Sir P. Ross, at

in it, called before them; one to tell them it was not Mr. Sheridan who took the house, or to say that it was not Mr. Sheridan to whom the rent was paid? Why, nobody would give a house to a married lady under Mrs. Norton's circumstances, knowing that neither the husband nor the wife could be sued for the rent. It was said that this proceeding bore upon it of something like connivance between the parties, if he might use that term. Had it been proved that Mr. Sheridan was in the house and complete occupation of the whole of the house, and that Mrs. Norton was constantly sitting in it, and that what was called her exclusive use of part of the house made no difference whatever? It was not even pretended that the parties were not compact as to occupation had been between the parties. That being the case, it was said that Mr. Sheridan had no right to seek to live at Mr. Norton's expense, by taking a house, of which the furniture was paid for with Mr. Norton's money. Further, it would contend, that nothing was more reasonable than to hold the law strict upon the heads of husbands for goods supplied to their wives while living apart from each other. The law was to be allowed to charge the husband with those things which were absolutely necessary for her sustenance, and that no right in some degree depend on the rank of the parties. Now, there was no evidence that Mr. Norton possessed any income beyond his salary of £800. a-year as police magistrate. It was a demand which, if he was adjudged bankrupt, would in its consequences swallow up his means. If he were liable for the furniture, he was also liable for the rent, which they had stated at £200. Clearly Mrs. Norton could not charge her husband with anything more than a fair share of his income, payable day by day, or year by year. What right could he fit up a house on a scale which, if he were to do so, would cost £1,000.? At to its economical mode of proceeding to take possession of a furnished house, it might as well be pretended that it was an economical mode of proceeding to purchase the fee-simple of the property, inasmuch as it would cost less in the end than paying rent from year to year; so that, in any case, if that argument was to go for anything, Mr. Norton might be saddled with untold expenses. The law presumed that such a separation between the defendant and his wife was temporary; they might come together again at any time, and Mrs. Norton had it in her power to compel a renewal of their union, no separation being assigned. It was therefore, that a claim on account of the hire of a house for the wife could not be maintained. He would only add, with reference

to the appearance of his client before them to-day, that it was most unpleasant for Mr. Norton to be again dragged before the public in this way; but his client had only one alternative—he must defend this action, or he must be ruined. He had reluctantly said, “I will come into Court, and trust to a British jury to do me justice.”

Lord DENMAN said, in this case it was clearly proved that it was by the wish of the husband that his wife lived apart from him; there was no deed of settlement which might supersede the necessity of paying for the necessaries with which he was bound to supply his wife. But then came the question whether the goods which formed the subject-matter of this action could be regarded as necessaries. It was submitted that articles of furniture could not be necessaries, inasmuch as the separation was merely temporary, and might at any moment be terminated. Undoubtedly, separation of this kind must be viewed in that light, but it appeared to him that under the circumstances of this case, the defendant having desired his wife to leave the house, and refused her admittance when she came back, it would be unreasonable to suppose that she would be likely to return to her husband in a very short time, and there must be a reference to this probability by the jury when they determined whether the articles supplied in this case were to be looked upon as necessaries. A wife must clothed by her husband as well as fed, and that in a manner agreeable to their station in life, and there did not seem to be any reason why many articles of furniture ought not to be supplied by him to her in the same way; but whether articles of rich and splendid furniture, purchased for a house of such a kind as that of which they now heard, could be considered as necessaries, was matter for the jury to determine. As to the question of occupation, it was impossible not to see that Mr. Sheridan was the owner of the house. Articles were supplied to him for the purpose of furnishing it, and it appeared very probable that he was now receiving the rent of it. He did not see why a person in Mr. Sheridan's place might not put forward a fair claim on the husband, having received the wife, and given her comfortable apartments; but it would be for the jury to say, when a house was taken by the lady's near relation, who also received rent for it, whether it should be taken to be his, and the furniture to be supplied to him or Mrs. Norton. He would only add one more observation. They were left very much in the dark as to the means which Mr. Norton possessed of maintaining his wife, and as to what might be considered a reasonable scale of expenditure under the circumstance of the parties. This was a matter wholly for the consideration of the jury. Hav-



ing excluded his wife without assigning any reason, Mr. Norton was *prima facie* liable, but he was liable only for necessities furnished to her *bond fide*, for the purpose of maintaining her in a reasonable and decent manner, according to her station in life.

The Jury, without retiring, found a verdict for the defendant.

(Sittings in Banco.)

Mr. Swann moved for a rule for a new trial on the ground of misdirection by the Judge. He also contended there was no evidence that the goods were supplied on the credit of Mr. Sheridan, Mrs. Norton's uncle.

LITLEDALE, J.—There is no fault to be found with the direction; it was hardly possible to separate the other furniture in the house from the consideration of the question, whether the articles supplied to the defendant's wife were necessities; whether the goods were supplied to, or on the credit of, the uncle, was a question for the jury.

COLERIDGE, J.—Two points on which the verdict turned were left to the jury. The cardinal point was, whether the articles in question were necessities, and I think that was rightly left to the jury. Then there was very meagre evidence of the fortune of the defendant. The second point was, whether credit was given to Mr. Sheridan, the uncle. *Prima facie* the wife deals for her husband; but in this case of the wife living in a state of separation from him, the circumstances of her being in her uncle's house, and the payment of part of the original bill by him were evidence that she all along dealt for and as the agent of her uncle.

Lord DENMAN was of the same opinion.

Rule refused.

STOCKDALE v. HANSARD, IN-RE SHERIFF OF MIDDLESEX.

(Continued from page 285.)

Then comes the case of *Burdett v. Abbott*, in 1810. There is not any case which ever appeared on the books that is entitled to such great weight as that, whether in respect of the great learning of the judges, or of the counsel, or of the number and frequency of the discussions in and out of Parliament, and the extraordinary caution of the judges, and the great light which must have been thrown in all possible quarters on the subject, enabling them to avail themselves of the fullest information upon it. In that case there is a passage in Lord Ellenborough's speech which is most remarkable. He says, "I am pressed with an extreme case, and I am asked whether it is possible that the House of Commons, or the other House of Parliament, should be permitted to go such a length as was supposed at

the bar." His Lordship further says, "It is not decent to suppose such a case; but what occurs to me upon this subject is this—that if either House of Parliament commits for contempt without informing me upon what ground they proceeded I should not be justified in reversing that decision. If, on the other grounds, they stated such an authority as convinced me they had no right to complain of any contempt whatever, the Court will know how to do its duty." That is a plain doctrine. If they state a general contempt, this Court is bound by the statement; but if they enter into particulars, Lord Ellenborough clearly laid it down, and Mr. Justice Bayley followed him in the declaration that the judges could act on the principle which Lord Holt stated in *Patey's case*, that if particular facts were stated which were insufficient to support the commitment, they would order the release of the party committed. But then there is this doctrine most clearly declared, that in case of a statement in general terms, this Court is bound by it. The subsequent case of *Sir J. Hobhouse* was to the same effect. I feel bound to say, with respect to ourselves, that there is not one of us, who expressed our opinion on the last occasion of "*Stockdale v. Hansard*," who did not intimate the same opinion, though the state of that case did not require us fully to declare. Passages of my judgment in that case have been referred to in argument, as tending to show that if, on the committal for contempt, there should be shown to us some cause clearly insufficient and illegal, such as fishing in the pool of a member, or other things of that description, such statement would be open to revision. That doctrine I admit to have asserted, but that does not in the least contradict the general proposition. Reference has been made to the case of *Lord Shaftesbury* on this subject, but when it is said that that case is the foundation of all the rest, and that the judges in subsequent cases were controlled in their opinion by that case, I must say I think that statement is erroneous. Every court, of course, refers to the latest decision, but there is something in the nature of the Houses of Parliament which does not invest them with this power, and the *Shaftesbury* case happened to be the most recent instance in which it was exercised, and to that case, therefore, reference was frequently made. Instances have been proposed brought before us in argument of acts of illegality committed by the Crown which the judges were bound to set aside; and if they had not done so they would have committed a high offence towards the country, and would have most justly forfeited their reputation. But there are cases in which the Crown has rights where those rights cannot be enforced by law. The prerogative of the Crown is a part of the law, and the

has its recognized officers, who must its rights. Those rights are therefore ined by law. A deliberative assembly is in ent position. It must have the power to e its own privileges by its own means, annot exercise its own means but by hav- ource to the process for contempt. In v. Abbott, that privilege of committing empt was not pretended to be confined to Houses, but was said to belong to every n Westminster Hall, and was therefore ch the highest body in the land could ibly be deprived of. There is no doubt, such a power, they would be obstructed proceedings, and would be put down if ould not of themselves judge of the cir- ces which called it into exercise. With- ring into small discussions of a verbal whether the House of Commons is a I think that its right to commit is clear. wledge its authority, and am aware that use of Lords, when sitting on writs of om us, sit as and for the whole body, and that the functions of neither assembly n properly unless each is properly pro- n the exercise of them. There must be principles which no Court can question, re necessary for the protection of one the other. This was brought out in the gular manner by the test of the questions Lord Eldon to the judges in the House ls in the case of *Burdett v. Abbott*. his Lordship came to consider the case, as one where Sir Francis Burdett had e Speaker for sending him to prison on a committing him for contempt, his Lord- t the question as to the right of the of Common Pleas to make such a com- and supposing that no less reason was on the face of it, he asked whether this ould inquire into such a committal; and answer of all the judges was, that such a ould not be done; and Lord Eldon, with currence of Lord Erskine, and without a ent voice raised in the House of Lords, t case on the analogy between the House Court of Westminster Hall, and decided that analogy. We must presume that er any Court, and much more either of Parliament, takes on itself solemnly, der the responsibility of great local autho- declare to be a contempt, that that is con-

Some affidavits have been produced in se, and it has been intimated that they used because this is not a criminal case. ot think that that is the meaning of the eorge III. Any person complaining of imprisoned has always brought his case own whether he was lawfully or unlaw- nprisoned. If it is shown on the face of urn to be unlawful, there is an end of all

before us by affidavit: and the return to the writ argument in favour of the discharge. The pro- duction of a good warrant makes a complete end of this case. We are not at liberty to enter into the question whether there is a real ground of contempt, for that would give us the power which I have already denied that we possess. We are not justified in entering into the sup- posed motives, and speculating as to the proba- ble reasons of the House of Commons in com- ing to such a conclusion. We find such a con- clusion distinctly expressed, and we must be bound by it. Indeed, I thought that according to the language of the cases, and especially that of the judge, in *Burdett v. Abbott*, it would be unseemly and indecent to suspect the House of Commons of suppressing any facts, the statement of which would tend to show a Court of Law that a subject had been improperly deprived of his liberty, and if in violent times this should ever appear to be the course pursued by the House of Commons, I am sure that it would be a course which, upon reflection, that House would extremely regret, considering it both as unwise and unjust. It would be offensive to the House to think that merely for the sake of avoid- ing a disclosure such as would give a subject his freedom, the House had avoided stating the reasons of committal, desiring to take a poor advantage of a party, and wrongful to keep this Court in the dark. It would be monstrous to consider that such could be the case under the advice of men of great ability and learning; and I for one, will not readily presume such to be the case. I cannot suppose that injustice would first be committed, and then that the House would say—"We will make an insufficient state- ment of facts in order to keep the Court in the dark." I know that in *Bushell's case*, the Re- corder Jefferies might have had reason to adopt such a line of conduct, but I will not believe it has been or will be again adopted. This, how- ever, has been supposed in the course of the argument, but I cannot think that such will ever be the course of a great public body amena- ble to public opinion. In conclusion, I must say, that I do not see any ground on which these gentlemen should be released from their impris- onment. According to all these authorities, the return seems to me to be sufficient; and I am bound by the law, which alone I can look at, and by which I am required to declare that the return is sufficient, and the warrant set out on the face is good.

Mr. Justice LITLEDALE, Mr. Justice WIL- LIAMS, and Mr. Justice COLERIDGE, severally expressed a strong and positive opinion as to the propriety and correct decision which the bench had come to in the case of *Stockdale v. Han-*

The Sheriffs were remanded back into the custody of the Serjeant-at-arms.

*Sittings at Nisi Prius.*

Feb. 20.

**MUDDLE v. STRIDE AND ANOTHER.**

**STEAM BOAT COMPANIES—***Liability of the proprietors for damage done to goods shipped on board the boats.*

The plaintiff, a shop-keeper at Dover, brought this action against the defendants, who are proprietors of the *Royal Adelaide* steam vessel, to recover compensation for damages done to some goods sent by that vessel.

It appeared that a little previous to the fête given in August last to the Duke of Wellington, by the Cinqua Ports, the plaintiff shipped on board the defendants' steamer, the *Royal Adelaide*, a quantity of silk dresses, shawls, &c., and which were intended for sale at the Grand Pavilion Ball. The *Adelaide* proceeded to her destination, but on her arrival in the harbour of Dover the usual flag was up, intimating that it would be dangerous to land. Accordingly, the *Royal Adelaide* put back to Margate, and left the goods intended for Dover there, which were in a few days subsequently transmitted to Dover by the *Royal George* steamer, of which the defendants are owners. On opening the case it was found that the goods were greatly damaged, and the colours in the silk dresses, as well as those in the shawls, were quite faded, and were altogether unsaleable, with the exception of one shawl, which was sold in its damaged state for £12. to the Duchess of Cannizzaro, but £20. would have been obtained for it had it been perfect. It was admitted that the case which contained the goods, to all appearance, was uninjured; but when it was opened a most obnoxious odour came from the goods. The loss on the whole was estimated at £20., and also the loss of not having the goods for the Pavilion Ball.

For the defendants it was contended that, if the goods were injured, they were so by the visitation of Providence; and, in point of law, being carriers, the defendants were not accountable for the perils of the seas, or the assaults of the enemies of the country.

Verdict for the plaintiff—Damages £20., but no damages for the probable profit on the sale of the goods at the Pavilion Ball.

**COURT OF COMMON PLEAS.—Feb. 28.**

*Sittings at Nisi Prius.*

**CONTRACTS by AGENTS—CUSTOM of MERCHANTS—***Whether an Agent is justified in rescinding a Contract.*

This action was brought by the plaintiffs, Messrs. Anton and Mitchell, merchants of

London, to recover damages from the defendant, merchant at Hull, for a breach of contract.

The plaintiff, it appeared, being at Hull on the 15th of October, 1839, entered into a contract with the broker of the defendant for the purchase of 230 quarters of old tares, at 25s. per quarter, and it was then agreed that he should give his acceptance at two months' date for the amount, and the tares were accordingly shipped to the port of London, but no invoice or bill of lading was sent, until it first was ascertained that the plaintiff, who was a stranger at Hull, and wholly unknown to the defendant, was a responsible person. The defendant caused inquiries to be made to that effect in London, and the result was that he declined to accept the plaintiff's bill for the amount of the goods, but offered to let him have them at two and a half per cent. for cash payment. The plaintiff refused to accede to this proposal, on the ground that the defendant was bound to comply with the contract entered into by the broker on his behalf, but he consented to cancel the agreement if the defendant would allow him 1s. per quarter on the tares, which, being refused, the action was brought for the breach of contract.

Evidence for plaintiff proved that had the agreement been fulfilled, he would have derived a profit from his bargain, inasmuch as tares had risen in the corn market, in proof of which it was shown that the tares in question were sold, on account of the defendant, for 31s. per quarter, three days after the alleged contract was broken.

Evidence for the defendant proved that, according to a practice existing at Hull, merchants who carried on business there were not bound to agree to any contract which brokers might make on their behalf, unless their principals were satisfied that the parties to whom their goods were sold for credit were respectable and trustworthy; and, in this instance, without at all impugning the solvency of the plaintiff, it was deemed advisable not to accept his bill, but to deal with him for cash only.

TINDAL, C. J. left it to the jury to say, first, whether, although the contract was made by the agent of the defendant, the latter was justified in rescinding it, according to the custom of merchants at Hull; and, secondly, whether the defendant had, within a fair and reasonable time, declared his intention not to abide by the act of his agent. But if the jury should think that the defendant had no right to break the contract, the plaintiff would in that case be entitled to a verdict, with such amount of damages as they should consider he had sustained by the rescinding of the agreement.

Verdict for the defendant.

COURT OF EXCHEQUER.—Jan. 22.

*Sittings in Banco.*

MASON v. KIDDLE.

IT.—As to the due execution of a writ under the 1 & 2 Vict. c. 110.

necessary in all cases that the party at be some one NOT the PLAINTIFF'S ATTORNEY, and to be expressly named by the writ. (a)

is case the defendant had proposed to plaintiff a *Cognovit* for the debt and an action brought against him, and had the Plaintiff's Attorney as his (the defendant's) Attorney to satisfy the Statute 1 & 2 Vict. c. 110. The defendant then signed the writ, and the Plaintiff's Attorney witnessed, describing himself as the Defendant's Attorney.

Busby had obtained a Rule to set aside the writ.

Godson now shewed cause against the writ and contended, that as the attorney had previously been employed for, and paid by, the defendant, to act for him, and named at the time the *Cognovit* on his behalf, the provisions of the statute had been fully complied with.

ABINGER, C. B. said, It is clear that the defendant at Shaftesbury, charged in his bill of exchange with all that was done by the defendant in the transaction. It certainly was his duty to have informed the defendant that in order to satisfy the statute, the presence of some other person would be requisite.

MASON, B.—The original rule on this subject required the Warrant of Attorney to be signed in the presence of an Attorney, was sufficiently complied with by executing in the presence of the Attorney for the plaintiff. Afterwards, however, another rule was requiring the attesting Attorney to be expressly named by the defendant. Then the Act of Parliament which embodies the provisions of both the rules in a law, and conclusively rendering it necessary in all cases the party attesting be some one not the Plaintiff's Attorney, and to be expressly named defendant. Were we not to adhere to the instruction, a wide door would be open to the defendant.

An Attorney attesting a *Cognovit* under circumstances here detailed is not the person contemplated by the statute, and this rule must be made absolute.

(a) See ante Vol. 1. pp. 151. 234.

Feb. 20.

*Sittings at Nisi Prius.*

SAMUEL v. PILE.

ATTORNEYS' LIABILITIES FOR NEGLIGENCE.

*Writ of Summons—Improper Service.*

The defendant is an attorney, and the action was brought against him by his client the plaintiff, to recover the amount of certain costs, which it was alleged the plaintiff had been obliged to pay in consequence of the wrong service of a writ of summons.

Mr. Gray, for the plaintiff, stated that the defendant, had been employed by the plaintiff to commence an action at his suit against a person, in pursuance of which he sued out a writ of summons directed to the Sheriff of Middlesex, but which was served upon the defendant in the action in Bishopsgate-street, in the City. This service being incorrect, the writ of summons was set aside by a judge's order, with costs to be paid by the plaintiff. The plaintiff having, however, neglected to pay the costs, an attachment was issued against him, the costs of which, together with those of the writ of summons, amounted to £10. 14s. 8d., which the plaintiff paid, and it was to recover this sum that the present action was brought.

Lord ABINGER told the jury the plaintiff was entitled to recover the costs of the writ of summons where it had been served beyond the proper limits. The law allowed it to be served within 100 yards from the bounds of the county into which it was directed, but not beyond that distance. The plaintiff was, however, not entitled to recover the costs of the attachment, because, when he found that the costs of the writ of summons had not been paid by the attorney, he ought to have paid them himself.

Verdict for the plaintiff—£2. 14s.

*Sittings in Banco.*

Special Paper.

Feb. 22.

GALWAY v. ROSE.

BILLS OF EXCHANGE—PRACTICE—PLEADING.

—Whether a refusal to accept, and a refusal to pay, are distinct causes of action, and as such can be included in one count.

This action was against the drawer of a bill of exchange, wherein the declaration alleged that the defendant made his bill of exchange, and directed it to Messrs. —, by whom it was dishonoured on being presented for acceptance, whereupon it was presented for non-acceptance, of which premises the defendant had notice. The declaration then went on to say further, that the said bill being still unpaid, was afterwards,

when it became due, presented to Messrs. — for payment, but that they wholly declined to pay it, of which premises the said defendant then had due notice. Besides this there was the usual count on an account stated, with a general allegation that the defendant in consideration of the premises respectively promised the plaintiff to pay him the said several monies respectively on request, with a general breach and special damage.

To this the defendant demurred, assigning for cause that the declaration was double, inasmuch as it alleged two distinct dishonourers of the bill, either of which would alone give him a good cause of action.

Mr. *Mellor*, in support of the demurrer, argued that the refusal to accept, and the refusal to pay, both of which were alleged in the declaration, were distinct causes of action, and as such could not be included in one count, as a declaration must not allege a distinct demand by two several and perfect causes of action, either of which, if proved, would be enough for his purpose. When a bill is once dishonoured, it is so for all purposes, and the plaintiff had a right of action in the event of either taking place. This declaration is bad therefore for duplicity, and if not, it would be difficult to say what is duplicity in pleading.

Mr. *Butt*, for the plaintiff, contended that the precedents were in exact conformity with the form of this declaration, and cited "*Chitty on Pleading*" in support of his position. The fact was, these were not distinct causes of action, but distinct considerations for the promise of the defendant, any number of which might be included in one count. If, however, the Court should be of opinion that this objection was a good one to the declaration on the bill, treated as one count only, then the plaintiff would submit that there were two counts, each containing a distinct consideration or cause of action, in which case the plaintiff must succeed, as the demurrer was not pointed at such a state of things. There was no necessity to begin a new count with the word "whereas," and though informal, yet it was apprehended that the use of the words "several" and "respectively" in the general promise and breach would fully bear out the position that the declaration might be taken to contain two counts.

The COURT said, it might either be that this was one single count, or two counts, though informally pleaded. In either view the declaration is good. If it be only one count, then it is good, as alleging two distinct but executed considerations for one cause of action, whereas if it be divisible into two counts, in that case the demurrer does not touch their defects.

Judgment for the plaintiff.

## COPYHOLD ENFRANCHISEMENT BILL.

We have been favoured by Lord BROUGHAM and VAUX with a copy of his Lordship's Bill for the ENFRANCHISEMENT OF LANDS OF COPYHOLD AND CUSTOMARY TENURE, AND OTHER LANDS SUBJECT TO MANORIAL RIGHTS, by which we are enabled to present to our readers the following ANALYSIS.

### *Preamble, and Appointment of Commissioners.*

Sect. 1. After reciting that it is expedient to provide for the gradual and entire enfranchisement of lands of copyhold and customary tenure, and other lands subject to manorial rights, on such a basis as shall be equitable towards the interest of all parties effected, it is enacted, That "the Tithe Commissioners for England and Wales" for the time being, shall be the commissioners for carrying the act into execution; and that should the act not be carried into execution before tithe commissioners cease to act, or if they shall decline to act, other commissioners may be appointed, &c. with power to supply vacancies.

### *2. Style of Commissioners, Seal, &c.*

Enacts that the commissioners shall be styled "The Copyhold Enfranchisement Commissioners," and shall have their office and seal, and that instruments sealed are to be received in evidence, &c.

### *3. Report to Secretary of State, &c.*

Commissioners to report to Secretary of State, and annual report to be laid before Parliament.

### *4. Assistant Commissioners, &c.*

Power to appoint and remove assistant commissioners, secretary, &c.

### *5. No Commissioners to sit in House of Commons.*

### *6. Operation of Act limited to Ten Years.*

### *7. Salaries and Allowances of Commissioners.*

### *8. To be paid out of Consolidated Fund.*

### *9. Declaration.*

Commissioners and assistant commissioners to make declaration before acting.

### *10. Commissioners may delegate Powers.*

### *11. Manors and Lands vested in Crown.*

Provision is made for cases in which manor or lands are vested in the Crown generally or in right of Duchies of Lancaster or Cornwall.

### *12. Disabilities of Lords or Tenants provided for.*

### *13. Power to appoint Attorney.*

An attorney may be appointed, and at the first

g the power, or a copy, shall be delivered to the Chairman.

*Power to call a Meeting, &c.*

one or more of the lords or tenants, whose interest shall not be less than one-fourth of the annual value of manor or lands, may call a meeting of the lords and tenants (by notice to be given at least twenty-one days before the meeting on the outer door of church of parish within which the manor or greater part in interest extends, or on door or conspicuous part of house or building where courts are usually held and twice advertised in some newspaper, or in each of two newspapers generally circulating in the county), for the purpose of making an agreement for the general enfranchisement of the lands holden of such manor; and every lord or tenant present at such meeting shall bear his share of the expense of attendance; and the lords and tenants present at such meeting whose interest in the manor and lands shall not be less than a majority of the tenants in number, and whose interest in the manor and lands shall not be less than two-thirds of the annual value thereof, may make and execute an agreement for the enfranchisement of the lands holden of the manor, and charge thereof from all manorial rights, to which the lands are subject; and if so agreed between such lords and tenants, enfranchisement may be made to extend to mines and minerals but otherwise shall not affect such rights.

*Terms on which Agreement may be entered into.*

an agreement may be entered into for the enfranchisement from the Lord's rights on payment of a sum certain for such entire enfranchisement, or a sum certain for enfranchisement of the lands, or a sum certain for all heriots, a sum certain for a certain number of years purchase for other rents, a sum certain for rights in and other manorial rights as aforesaid; or the lands for enfranchisement may be subject to a rent or increase to such an amount *per acre* as shall be agreed on; and such agreement shall fix the amount of the steward's fees to be awarded by the commissioners: every tenant for any species of manorial right shall concur in the concurrence of two thirds in a majority in interest and two thirds in interest of persons

*A provisional Agreement may be made. Proportional Interest how to be computed.*

*Power to adjourn Meetings,* but notice of meeting must be once advertised.

*Agreement to bear date* the day on which the agreement is made, or minutes of meeting, and to be in such form as the commissioners shall from time to time direct.

*20. Commissioners to frame and circulate Forms.*

*21. Commissioners or Assistant Commissioners may attend Meetings, and advise Terms of Agreement.*

*22. Suits and Differences may be referred to Arbitration.*

*23. Commissioners to require Consents of Ecclesiastical Corporations, or other Bodies, whose Interests appear to be affected, to be obtained by Agreement.*

*24. Agreement to be confirmed by Commissioners.*

*25. Appointment of Valuers.*

At meeting, or adjourned meeting valuers, to be appointed to ascertain annual value of lands to be enfranchised, as follows: (i. e.) if enfranchisement is in consideration of aggregate fixed sum payable to the lord, the tenants to appoint; and if majority in number and value do not agree, then two or other even number to be appointed, half by number and half by value; and when enfranchisement not in consideration of fixed sum, half the valuers to be appointed by the lord, and half by the tenants.

*26. Valuers to apply to the Commissioner for Instructions, and are then to proceed to ascertain value of lands, and make out and send to office of commissioners such valuation, with power to appoint umpires.*

*27. Power to enter Lands, &c.* Valuers and umpires to make declaration before acting.

*28. Steward to furnish Information,* for the purpose of enabling valuers to make valuation, and otherwise to facilitate enfranchisements under the Act; the steward shall, on request by valuers or chairman of meeting, make a correct statement in writing of—

The tenants on the manor:

Description of their lands:

The amount of assessment to poor rate:

Amount received for heriots in respect of each tenant, for three times previous:

And any other information which the commissioners shall direct:

Shall produce same for inspection at the meetings, and allow extracts to be taken, and upon request by valuers, deliver to them a copy of such schedule, or the parts which they may require for such statements and extracts; the steward to receive such sum as shall be agreed on, and four-pence for seventy-two words, for copies or extracts.

The steward shall also within three calendar months, or such time as the commissioners shall fix, make out and send to them a schedule of—

The names of the several tenants of the manor:

To which class belonging:

(To be continued.)

## TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—Being parties greatly interested in the query which we take the liberty of proposing to your consideration, we earnestly hope you will forgive the liberty we take in stating our case for the opinion of yourself or some of your learned correspondents.

"We are twins, and were born on the 15th day of June, 1819. Our Father, a widower, is possessed of some real property, and being now far advanced in years, and incapable from mental imbecility of making a Will, we, his only children, are anxious under our peculiar circumstances, to know 1st. On the death of our parent to what interest in the real property we shall respectively be entitled? and 2nd. Supposing the one who is considered the elder (which is *disputed*), to take possession of the said real property, what remedy will the other possess to bar him from so doing?"

Knowing from the constant perusal of your valuable work, your extreme affability to *all* your correspondents, we are emboldened to take the liberty of thus troubling you,

Remaining Sir,

Your obedient servants,

Δίδυμοι.

It has been greatly disputed which of two twins is to be esteemed the elder? The faculty of *Montpelier* gave it, that the *latter born* is to be reputed the elder, because first conceived: but by all the laws which now obtain, the *first born* enjoys the privilege of seniority; and the custom is confirmed by the Scripture instance of *Esau* and *Jacob*. But if two twins be born so *intermixed*, that one cannot distinguish which of the two appeared first, it should seem that neither the one, nor the other, can pretend to the right of *primogeniture*, which ought to remain in *suspense* by reason of their mutual concurrence.—EDITOR.

## HILARY TERM, 1840.

Barristers admitted to the dignity of the *Coi*  
as SERGEANTS-AT-LAW—

W. F. Channell.

J. Halcomb.

James Manning.

William Shee.

D. C. Wrangham.

They gave rings with the motto—

"*Hoc nomenque manebant.*"

Barristers appointed QUEEN'S COUNSEL—

Turner.

R. Bethell.

Gentlemen called to the BAR—

## LINCOLN'S INN.

Henry Vaughan.

Edward Richard Golightly.

Timothy Coleman Johnson.

Frederick Prideaux.

William Adam Loch.

Travers Twiss.

Charles Jasper Selwyn.

Frederic Hill.

John Lucena Ross Kittle.

Gordon Whitbread.

Thomas Plumptre Methuen.

William Stevens Richardson.

Edward Thornton.

## INNER TEMPLE.

George Alexander Hoskins.

John Kirkpatrick.

James Gordon Hay.

John Coke Fowler.

## MIDDLE TEMPLE.

Frederick Albert Winsor.

James Little.

William Frederic Lewis.

George Whitlock Nicholl.

William Faulknor Browell.

Charles Swaine Wright.

Richard Thomas Maddison.

George Arthur Lister.

George John Holmes.

Samuel Barrow.

Edmund Sawyer.

Charles Zachary Macaulay.

## GRAY'S INN.

George Tyler.

## ERRATA.

Vol. 3, p. 287, Notice to Correspondents, *Rich*  
*RBH*, for "*when can we send for the papers,*"  
"*where.*"

Vol. 2, p. 122, Reports, for "*Tubbick v.*  
*McMorris*," read "*Hebbelwhite v. McMorris.*"

**CIRCUITS**

OF THE

**COMMISSIONERS FOR THE RELIEF OF INSOLVENT DEBTORS.**

340.	Home Circuit.	Southern Circuit.	Northern Circuit.	Midland Circuit.
Circuits.	H. B. Reynolds, Esq., Chief Commissioner.	J. G. Harris, Esq. Commissioner.	T. B. Bowen, Esq. Commissioner.	W. J. Law, Esq. Commissioner.
Feb. 12	.	.	Oakham . .	
. 14	.	.	Sheffield . .	
. 17	.	.	Wakefield . .	
. 22	.	.	Kingston-upon- Hull . .	
. 24	.	.	York and City	
. 25	.	Reading		
. 27	.	Oxford . .	Richmond . .	
. 28	.		Durham . .	
. 29	.	Worcester & City		
Mar. 2	.	Presteigne .	Newcastle-upon- Tyne and Town	
. 3	.	Hereford		
. 5	.	Monmouth .	Carlisle . .	Chelmsford
. 6	Horsham . .			Colchester
. 7	.	Brecon . .	Appleby . .	Ipswich
. 9	.		Kendal . .	Yarmouth
. 10	.	Cardigan	Lancaster . .	Norwich & City
. 12	.	Haverfordwest and Town .		Lynn
. 13	Canterbury .	Carmarthen and Borough		Bury St. Edmunds
. 14	Dover . . .			Cambridge
. 16	.	Swansea . .		Huntingdon
Monday 17	Maidstone . .		Preston . .	Peterborough
ay . 18	.	Cardiff . .	Liverpool . .	Warwick
. 20	.	Gloucester & City	Chester and City	Birmingham
. 21	.			Coventry
. 23	.	Bristol . .	Mold . . .	Derby
. 24	.		Ruthin . . .	Nottingh. & Town
ay . 25	.	Bath . . .		
. 26	.		Beaumaris . .	Lincoln & City
. 27	.	Wells . . .	Carnarvon . .	
. 28	.			Leicester
. 30	.	Exeter and City	Dolgelly . .	Lichfield
. 31	.			Stafford
l. Apr. 1	.	Plymouth .	Welch Pool .	
. 2	.			Shrewsbury
. 3	Hertford . .	Bodmin . .		
. 4	.			Oldbury
. 6	.	Dorchester		
. 7	.			Bedford
ay . 8	.	Southampton		Northampton
. 9	.	Salisbury		Aylesbury
. 10	.	Winchester		



## TO THE SUBSCRIBERS TO THE LEGAL OUIDE.

In consequence of the great mass of correspondence which the Editor of this paper now has on hand for which he has not room, and the daily increase of correspondence, it has been requested by several subscribers as well as myself that, in order to work up all such arrears and to give room to other correspondents, the Editor should publish a double number once a month, but as in consequence of the pledge he made at the commencement of the work he will not do so unless requested by a *majority of the subscribers*, I therefore earnestly request that you will, one and all, send a requisition to the Editor on the subject. Your early attention will oblige

*Devizes,*  
March 4, 1840.

Your humble servant,  
R. J. T.

## NOTICE TO CORRESPONDENTS.

E. A.—See the *Errata*.

N. R.—We are very sorry that your regard for *Sixpence* is so great as to wish us in the hands of her Majesty's Attorney-General—you had better go to another shop and get better served. *This is a newspaper.*

R. F.—We think that you incur a risk.—How can your master make the requisite affidavit of service with a clear conscience?

GULIELMUS.—We have your letter—its contents do you much credit—persevere.

SCRUTATOR.—Lord Brougham has favoured us with a copy of the Bill, or you must have been aware that in its present early stage it was not otherwise to be had. We have pleasure, therefore, in complying with your wish, which was not singular.

R. J. T.—G. A. W.—J. S.—O. L.—T. M.—H. D.—R. S.—W. T.—A Subscriber, *York*—S. L. F.—A Student—S. T.—all under consideration.

## NOTICE TO SUBSCRIBERS.

We have before us very many letters which we must answer by one notice. Some complain of the Clerk's lists—others thank us for their insertion. Some complain of the Questions—others require them. Some fancy the sheet of paper can be lengthened as a piece of steel wire, and consequently be made to contain an extra pennyworth. Some are liberal enough—some exclusive enough—some sufficiently thoughtless—some extremely courteous—*quot homines tot sententia*—and here we are in the midst of them all. We quite agree with those, who, for the sake of a better meal, abominate *Master Slender* in the shape of lean lists of any sort. We detest them as not suiting our taste. We wish

this paper to be something superior to a *law list*, although the latter contributes in a much more substantial manner to the personal comfort of its Editor, by reason of *its being a law list*; than our columns of jurisprudence give to us, and so long as our publishers inform us that the general wish *appears* to be *for the lists*, we must continue to publish them. Let each subscriber write us on the subject, and we shall then *know* what to do. The majority *shall* have their wishes complied with.

We also direct attention to the letter of our subscriber, R. J. T. (one of a great number to the same effect). We are not much disposed to increase our editorial duties. We find them already sufficiently onerous and heavy. Nevertheless, let also in this case each subscriber write his wish, (in these days of cheap postage the penny is of no great importance), and if we find the majority desirous of a double number once a month, at the price of 1s. in London, or 1s. 2d. post free in the country, we will make arrangements for its production.

*Just Published, price 4s. to be continued Monthly.*  
Vol. IV. Part II.

**PRECEDENTS IN CONVEYANCING**  
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*This Work will be completed in Four Vols.*

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookeller, 104, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, March 7, 1840

# The Legal Guide.

[II.]

SATURDAY, MARCH 14, 1840.

[No. 20.]

## PRIVILEGES OF THE HOUSE OF COMMONS.

In another part of this Journal we have seen a copy of the Bill brought into the House of Commons by Lord JOHN RUSSELL on this all-exciting question, with Sir EDWARD SUGDEN's suggestions. The title is "to give summary protection to persons employed in the publication of Parliamentary Papers." A contemporary writes the title ought to be, "a Bill for shutting out Courts of Justice against persons injured by libel, contained in the publications of the House of Commons, and the printers of the House," and adds,

ATTORNEY-GENERAL, who has grieved in his attempts to sustain the privilege of the House—we hope intentionally in the shame of the duty he was put upon to think he had answered all arguments by this blunt and almost unmeaning—"Has the House, then, no privilege?"

We answer, yes. It has the privilege of meeting to assist the other two Houses of the Legislature in making laws; that purpose it has all the privilege of going to and returning to its seat of legislation without let or hindrance—security before, during, and after meeting—protection from all responsibility for what the members may say or do in the House which the people have provided for and their deliberations—the privilege

of calling for all previous information necessary to the making of laws, by sending for persons and papers, as have our august Courts of Justice, and, like them, the power or privilege of imprisoning those who refuse to give, or give false information, at their bar. This is all the privilege necessary to a House of Commons for making their part of the laws, or passing them when sent from the Upper House of Legislation. And it is for this sole purpose of making laws that a House of Commons is chosen. What more privilege does it want, or can be necessary for, the complete discharge of its duty, which we again assert is simply and exclusively that of passing laws (a)?"

We think that the observations made by Sir Edward Sugden in the House upon this Bill, render any further comment from us superfluous in its present stage. We are glad to find that the Attornies of London have had a meeting upon the question, although at the eleventh hour. We have given their resolutions, and we shall be as happy to promote their views, as we at all times are ready to promote their advantage.

## PROBLEM XX. VOL. III.

### BANKRUPTCY.

What are the different ACTS of BANKRUPTCY?

(a) Times, March 12.

TO THE EDITOR OF THE LEGAL GUIDE.

## ANSWER TO PROBLEM IV.—VOL. 3.

## Distress for Rent—Who may distrain?

If a person seized in fee grants out a lesser estate, saving the reversion of rent or other services, the law gives him, without any express provision, remedy for such rent or services by distress. 2 Bac. Abr. 106. But for a rent issuing out of an incorporeal inheritance the reversioner cannot (unless it be the KING or QUEEN) distrain. A *devisee* may distrain for rent of the lands devised to him, if the lands be charged with distress, but not otherwise. Shep. Fouch. 439. For a rent granted for equality of partition by one *coparcener* to another, or, for rent granted to a widow out of lands whereof she is dowerable in lieu of dower, or for a rent granted in lieu of lands upon an *exchange*, the grantee may distrain without any provision of the parties though he have no reversion. Co. Lit. 169. A *mortgagee* after giving notice to the tenant in possession under a lease prior to the mortgagee, may distrain for rent in arrear at the time of notice, although not in the actual seizin or receipt of the rents of the premises at the time it became due, as well as for rent accruing due after the notice. *Moss v. Gallimore*, Doug. 278. A *receiver* appointed by the Court of Chancery may distrain for rent, and need not apply to that Court first for a particular order for the purpose. *Pitt v. Snordon*, 1 Atk. 750.; *Hughes v. Hughes*, 3 Bro. Chau. Cas. 87. One joint tenant may distrain alone, but he must avow in his own right and as Bailiff to the other. *Pullen v. Palmer*, 2 Mod. 72 et 150, S. C. 3, Salk. 207. One *tenant in common* may distrain for his share of the rent upon a *terre tenant* holding under him, and another tenant in common, where such *terre tenant* has paid the whole rent to the other tenant in common after notice not so to do. *Harrison v. Bamby*, 5 T. R. 248.; *Powis v.*

*Smith*, 5 Barn. & Ald. 850.; 1 Dowl. & Ry. 490. S. C. One of several *co-heirs* in gavelkind may distrain for rent due to him and his companions without an actual authority from his companions. *Leigh v. Shepherd*, 2 B. & B. 465.; 5 Moore, 297. S. C. And it is enacted by Stat. 32 Hen. 8. c. 37. s. 1. That the *executors* or *administrators* of tenants in fee, fee tail, or for term of life for rent services, rent charges, rent seck, and fee farms, may distrain upon lands chargeable with the payment thereof so long as they remain in possession of the tenant who ought to have paid rent, &c. or any person claiming under him. Sec. 3. That if a man in right of his *wife* have any estate in fee simple, fee tail, or for life, or of or in fee rent or fee farms, and the same rent or fee farms be due and unpaid at the death of his wife, such husband may distrain for the same. And Sec. 4. If any person have such rents or fee farms for term of life or lives of other persons, he, his *executors* or *administrators* may distrain for arrearage of such rent incurred at the death of the *Cestui que vie*, in the manner as if said *Cestui que vie* had been still living.

R. J. T.

A landlord has no right to distrain unless there be an *actual demise* to the tenant at a *fixed rent*, as for instance, a tenant in possession under an agreement, by which the landlord agrees to *grant* a lease only at rent certain to enter at any time on or before a particular day, this being only an agreement for a future lease, and no lease having been executed, or not subsequently paid, the landlord is *not entitled to distrain*, there being no existing demise. See *Dunk v. Hunter*, 5 Barn. & Ald. 322. The law upon the subject, as to what agreements will support a distress, will be found collected in WESTERN'S CONVEYANCING—tit. AGREEMENTS, Vol. 3. p. 113. et seq.—EDITOR.

THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XIII.

VOL. 3.

WRIT OF SUMMONS.

What is this writ? What are the requisites of this process and the proceedings to an appearance where the defendant is not served?

The first two points raised by this Problem have been completely disposed of in the elaborate answers of your correspondent to Problem 13, Vol. 1, I shall confine my attention exclusively to the last point, namely, the proceedings to compel an appearance where the defendant *can* be served, first asking that by the word *can* you imply the possibility of such service being effected although the defendant may studiously

avoid such cases where the defendant, residing in England and or Wales, cannot be served with the writ as it is usual to issue out of one of the courts at Westminster, a writ of *habeas corpus* (into the nature of which I shall not enter), to compel such appearance, the manner of procuring such writ is as follows.

After the expiration of eight days from the last attempt at service, an affidavit must be made, stating that all possible diligence has been used to serve the deponent personally with a copy of the writ of *habeas corpus*, and that to the best of the deponent's belief the defendant carefully avoids service, and to prove this it must be shown that three several distinct applications have been made by calling at the real or supposed residence of the defendant on three different days and occasions (1). (*Gale v. Wilmshurst*, N.C. 294.) (*Johnson v. Rouse*, M. 26) It must be also shown that one of the first two of those visits the deponent apprised the person whom he saw of the nature of his business, and said that he would call on some future day, taking

care to have named some particular hour in order to see the defendant; that on the last of such visits an exact copy of the writ of summons was left with the person seen, together with an injunction that it was to be delivered to the defendant. (*Johnson v. Rouse*, ante.) (*Cross v. Wilkins*, 4 Dowl. 279.) (*Johnson v. Disney*, 2 Dowl. 400.) (*Hill v. Maule*, 1 C. & M. 617.)

Especial care must be taken that the deponent's affidavit show reasonable ground for his belief that the defendant wilfully absents himself from home to avoid service. The mere circumstance of the defendant's being away from home at the different periods of deponent's visits, not being in themselves sufficient to induce a Judge in general to order a *Distringas* to be issued, and in a recent case of *Williams v. Beresford*, BARON ALDERSON held, that though the affidavits of the deponent showed five separate applications at the house of the defendant, on each of which he received for answer that the defendant was "from home;" yet that it was quite consistent with defendant's being actually absent from home on business, and did not raise a necessary presumption that the defendant kept out of the way to avoid service.

It may be as well to remark that all these attendances need not be made by one and the same person. (*Smith v. Good*, 2 Dowl. 398.)

If you make your application in term, instruct your counsel, armed with the necessary affidavit, to move in Court for the *Distringas*(2). If in vacation, take the affidavit to the Judge's chambers, who will make an order accordingly, if he approve of the contents of such affidavit.

R. H.

(1) The affidavit should also state that the defendant is, or that the deponent believes him to be in England. It is *insufficient* to allege that inquiries have been made at the defendant's last *supposed* place of abode.

(*Bislaile v. Marshall*), 6 Dowl. 400. see *Norman v. Winter*, 4 Bing. N. C. 637. and the real or supposed place of residence must be stated (*Pitt v. Eldred*) 1 Cro. & I. 147. *Bowser v. Austin*, 2 id. 45. It must also set forth the tenor of the summons (*Hill v. Wilkinson*), 4 Taunt. 619. *in hæc verba*. (*Hannam v. Dietrichsen*.) 5 Taunt. 853. and that the defendant has not appeared to the action (*Hocker v. Townsend*, 1 Hodges, 204).

(2) This writ may issue for the purpose of proceeding to outlawry after a writ of summons that has been continued by *alias* and *pluries* writs issued to save the Statute of Limitations, *Reade v. Youde*, 2 Mee. & Wels. 183. *Ray v. Don*, 5 Dowl. 340.

EDITOR.

## Imperial Parliament.

### HOUSE OF COMMONS—ENGLAND.

March 6.

#### PRIVILEGE.

Printed Papers.—Motion made and Question put,—“That leave be given to bring in a Bill to give summary protection to persons employed in the publication of Parliamentary Papers.” The House divided—Ayes, 203; Noes, 54.

Supply.—Motion made, and Question proposed, “That the order of the day for the committee of supply be now read:”—Amendment proposed, to leave out from the word “That” to the end of the Question, in order to add the words “on consideration of the evidence of Mr. Freeman and Dr. Chambers, given at the bar of this House with respect to the state of health of Mr. Sheriff Evans, who is now in custody, he be discharged, for the present, out of the custody of the Sergeant-at-Arms attending this house; and that he be directed to attend at the bar of this house on Monday, the 6th day of April next,” instead thereof (Sir James Graham). Amendment proposed to the proposed Amendment, to leave out the words “on consideration of the evidence of Mr. Freeman and Dr. Chambers, given at the bar of this house, with respect to the state of the health of” (Mr. Hume.) Question put, “That the words proposed to be left out stand part of the proposed Amendment.” The House divided—Ayes, 129; Noes, 47.

The Sheriff was accordingly almost immediately after discharged.

March 9.

#### PRIVILEGE—PRINTED PAPERS BILL. (a)

Lord J. RUSSELL moved the order of the day for the second reading of this bill.

Sir E. SUGDEN said he had taken some trouble to consider what regulations might be adopted by the house, in order, concurrently with the bill, to prevent the danger which had hitherto arisen from the publication of their papers, as he would now state what checks he thought there were to prevent papers being sold, which contained, either from carelessness or otherwise, defamatory matter. First, there were the votes without the appendix. Those had been always sold; no objection to that course had been made and even the judges had admitted the right of doing so. The question involved in the case of *Stockdale v. Hansard* arose on an entirely different ground. Now, in all their resolutions, since their first general resolution in 1680, there were inserted directions that the votes and proceedings of the house should be first perused and signed by the Speaker. He should, therefore, propose no change upon that point. The appendix to the votes and proceedings stood upon different grounds, but he should not suggest any alteration in that particular, because the Public Petitions Committee ought to peruse every thing contained in that appendix. It was true that, in 1836, an instance did occur in which libellous matter was allowed to be published in the appendix, but he trusted that more care might be in the future observed, though he, for one, held that if it were necessary for the public good to publish some papers which might contain matter criminal against certain individuals, the rights of those individuals must give way to the public good. All he contended for was, that where no such necessity existed, they could not publish papers injurious to the character of any individual, and there might be a simple check of this nature, either that a petition should be printed in the supplement to the votes unless it had been read at the table of the House, or was perused and signed by the Speaker. As regarded bills, he thought no change was necessary. The next head was accounts and papers. These he thought required no other care than the general attention which would be paid to them by the proper officers, as a guard against the introduction of defamatory matter. With regard to reports, they were of two kinds, those proceeding from their own committees, and those laid before the house by commissioners of inquiry. These both seemed to require some further check than existed at present. He should suggest, when reports of either kind were made to the House, the committee or commissioners from whom they proceeded should at the

(a) See Post.

ate whether there were any reasons for not  
ing any part of the reports. In addition  
checks he begged leave also to suggest  
ediency of appointing a committee of pub-  
; there existed at present a committee of  
y, but it was not considered a part of the  
if that committee to consider which of the  
papers were proper to be sold, for by a  
on of the House all printed papers were  
to be sold indiscriminately. He did not  
o the sale of Parliamentary papers gene-  
n the contrary, he considered that the  
de of communicating them to those who  
terested in their contents. He would  
ther not interfere himself with this bill,  
d prefer that the Noble Lord opposite  
move for a committee to consider what  
t was expedient to place upon the sale of  
rinted papers, or that the Noble Lord  
ake into consideration the suggestions  
e had taken the liberty of offering, and  
dd to his bill such suggestions as the  
ord might think best adapted for carry-  
effect those suggestions, or any others  
might appear to the Noble Lord more  
accomplish the object in view. If such  
as were introduced into the bill, he should  
at pleasure in giving it his support, but  
easure were not accompanied with some  
ecks as he had mentioned he should be  
lly compelled to oppose it on the third

He could not conclude, without saying  
upon the last clause in the bill as it now  
e meant that the clause providing that all  
heretofore brought or prosecuted, or which  
hereafter be brought or prosecuted for  
ged trespass under or in execution  
warrant granted by the Speaker of  
use of Commons, by authority of the  
since the commencement of the present  
of Parliament, should be put an end to,  
ally determined, discharged, and made  
He thought it impossible to maintain  
use, and he had no conception that it  
pass elsewhere. The House had no offi-  
nowledge that any such proceedings had  
en or were in contemplation. The title  
bill did not warrant the introduction of  
clause, and, on general principles, it was  
questionable, for if the officers of the House  
exceed their duty the privileges of the  
would protect them, and if any excess  
mitted, the injured party ought not to  
ved of redress.

J. RUSSELL said that he should take into  
ious consideration the suggestions of the  
n. member for Ripon.

bill was then read a second time, and or-  
be committed on Friday.

## PRIVILEGES OF THE HOUSE OF COMMONS.

### PRINTED PAPERS.

#### *A Bill to give Summary Protection to Persons employed in the Publication of Parliamentary Papers.*

Whereas, it is essential to the due and effec-  
tual exercise and discharge of the functions and  
duties of Parliament, and to the promotion of  
wise legislation, that no obstructions or impedi-  
ments should exist to the publication of such of  
its reports, votes, and proceedings, as either  
House of Parliament may deem fit and necessary  
to be published :

And whereas obstructions or impediments to  
such publications have arisen, and hereafter may  
arise, by means of civil or criminal proceedings  
being taken against persons employed or acting  
by the authority of the Houses of Parliament,  
or one of them, in making or causing such pub-  
lications : by reason and for remedy whereof, it  
is expedient that more speedy protection should  
be afforded to all persons acting under the au-  
thority aforesaid, and that, all such civil or cri-  
minal proceedings should be summarily put an  
end to and determined in manner hereinafter  
mentioned :

Be it therefore enacted by the Queen's Most  
Excellent Majesty, by and with the advice and  
consent of the Lords Spiritual and Temporal, and  
Commons, in this present Parliament assembled,  
and by the authority of the same, that it shall  
and may be lawful for any defendant or defend-  
ants heretofore, now, or hereafter sued or prose-  
cuted, civilly or criminally, in any manner how-  
soever, for or on account, or in respect of the  
publication of any such reports, votes, or pro-  
ceedings by or under the authority of either  
House of Parliament, to deliver or cause to be  
delivered and left at the office of the court or  
jurisdiction wherein any such suit, prosecution,  
or proceeding may be commenced, depending,  
or prosecuted, in which the judgment in such  
matters is signed or entered, or with the officer,  
clerk, or person whose duty it may be to sign or  
to enter such judgment, or to make up, prepare,  
or receive, or file the rolls or records of such  
judgment, with an affidavit verifying the same,  
a certificate under the hand of the Lord High  
Chancellor of Great Britain, or the Lord Keeper,  
or the Speaker of the House of Lords for the  
time being, or the Clerk of the Parliament, or  
of the Speaker of the House of Commons, or of  
the Chief Clerk of the same House, that such  
civil or criminal proceeding is commenced  
and prosecuted for and in respect of the publi-  
cation of reports, votes, or proceedings, in the  
case may be, by authority of the House of Lords  
or of the House of Commons.

be; and from and after the delivery of such certificate and affidavit no proceeding, writ, or process whatever shall be had, taken, executed, or prosecuted in such civil or criminal proceeding; but the same civil or criminal proceeding, writ, and process, whether heretofore commenced, prosecuted, or issued, or hereafter to be commenced, prosecuted, or issued, shall thenceforth be, and shall be deemed and taken to be finally concluded, put an end to, determined, and superseded by authority of this Act.

And whereas, during the present session of Parliament certain warrants have been granted by the Speaker of the House of Commons, under the authority of the said House, in relation to the matters aforesaid; and a certain action or actions have been, or may be, brought for certain alleged trespasses in the execution of the said warrants; and it is expedient that such action or actions should be put an end to, and finally determined, discharged, and made void by virtue of this Act: be it enacted, that all and every action or actions heretofore brought or prosecuted, or which may hereafter be brought or prosecuted, by any person or persons, for or in respect of any alleged trespass or trespasses under or in execution of any warrant or warrants granted by the Speaker of the House of Commons, by authority of the said House, since the commencement of the present session of Parliament, shall be put an end to, and finally determined, discharged, and made void by virtue of this Act.

Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

### Law Reports.

BAIL COURT.—Jan. 31.

(Before PATTESON, J.)

RISING v. DOLPHIN.

**WARRANT OF ATTORNEY**—*As to the due execution of a Warrant of Attorney under 1 and 2 Vict. c. 110. (a)*—**ATTORNIES' LIEN for Costs over Mortgage Securities in their hands—Whether the Court has a summary Jurisdiction over ATTORNIES so as to compel them to deliver up such Securities when improperly or irregularly obtained.**

A rule *Nisi* had been obtained in this case, calling upon the plaintiff and Messrs. *Hughes* and *Rising*, attorneys at Worcester, to show

(a) As to the due execution of a *COGNOVIT* under the same statute see *Mason v. Kiddle*, ante, p. 290.  
ED.

cause why a warrant of attorney for £5,000. should not be set aside, partly on the ground that no attorney had been present for the defendant at the time of its execution, and partly that it had been obtained in an usurious transaction. Other parts of the same rule called upon the plaintiff and the said attorneys to deliver up certain mortgage deeds which had been placed in their hands by the defendant as securities for the above-mentioned sum of £5,000. and an additional sum of £2,000., the latter having been advanced by the said attorneys. The rule further directed that the attorneys should deliver in their bills of costs, in order that the same might be referred to the Master of the Court.

Sir W. *Follett* showed cause against this rule on the part of Messrs. *Hughes* and *Rising*, and argued that the Court could not exercise a jurisdiction in regard to the mortgage securities mentioned in the rule, which should rather be made the subject of inquiry and decision in the Court of Chancery, and that his clients were entitled to hold these securities until their costs had been paid. In one of the affidavits made by the attorneys, it was specifically denied that any sum had been received by them as commission for obtaining the loan of £5,000. for the defendant.

Mr. B. *Andrews*, for the plaintiff *William Rising*, contended that it was established by the affidavits in the case, that Mr. *Rising*, the attorney, had, at the time when the loan had been advanced by his brother, the plaintiff, been in the habit of acting for Mr. *Dolphin*, and that he had, on that occasion, recommended that person to call in another professional adviser, but that he had declined to do so, upon the ground that he did not wish to have his private affairs exposed to another party.

Mr. *Cresswell*, for the defendant *Dolphin*, urged that the transaction had been extortionate, that *William Rising* had made no affidavit that he had advanced the £5,000., and that *Robert Rising*, the attorney, had been the only individual with whom he, the defendant, had had any communication in regard to the loan; that, according to the statute 1 and 2 Vict. c. 110. it was necessary that Mr. *Dolphin* should have had another attorney present at his execution of the warrant of attorney; that Mr. *Robert Rising* should have been aware of that circumstance, and have acted accordingly. From this omission there could be no doubt that the warrant was wholly void. With respect to the other matters contained in the rule, although it had been alleged that they should be referred to the Court of Chancery, yet this Court, exercising a summary jurisdiction over attorneys, as its own officers, could compel them to deliver up or account for any mortgage securities that might have im-

come into their possession. The same was also held good in regard to any lien which the mortgagees might claim over any deeds or mortgages in respect to these costs.

PERSON, J. said, that whatever might have been Mr. Dolphin's feelings in regard to exposing the mortgage to a third party, it was the duty of Mr. Riving, the attorney, to explain to the plaintiff that he could not pay over the money of the mortgage unless an attorney was present on his behalf, Mr. Riving's behalf. There were facts in the case which rendered it a matter beyond doubt that Mr. Riving was virtually acting for his principal—such were the facts of his having gone to the place where the money was to be paid, the mortgage deed ready prepared and endorsed for the £5,000., and also the warrant of attorney given as a collateral security. As far as the law was concerned, as the warrant of attorney was conclusive, the court should decide that it *should be set aside* and the rule made absolute. But in regard to the question of delivering up the mortgage securities, that Court had no power to do so; their validity would be inquired into in the Court of Equity. Neither could this Court decide in this case with the alleged lien for the mortgage.

The rule, therefore, should be discharged as directed Messrs. Hughes and Riving. The Lordship considered, had asked for too much and he should, therefore, not give any costs either side.

#### COURT OF EXCHEQUER—Jan. 14.

##### Sittings in Banco.

##### MORTIMER v. M'ALLAN.

**BROKERS and JOBBERS—Liability of a principal for Stock transferred to him by Broker, which the latter had obtained fraud.**

In our report of this case (a), we stated that the learned BARON (GURNEY) who tried the case had reserved a point of law for the consideration of the Court as to the right of the plaintiff to maintain his form of action (*indebitatus assumpsit*) for the value of the stock in reference to the Stat. 7 Geo. 2. c. 8. by which it is enacted that all sales and transfers of stock by persons not actually licensed of the same shall be illegal and void in law. The point was raised by Sir Follett.

W. Follett now moved for a rule for a trial, and stated the following grounds:—Because evidence had been both rejected

and received improperly by the learned Baron. 2nd. That the credit had been given to the broker, and not to his client, by the plaintiff. 3rd. That the plaintiff could not sue in the form adopted by him, that being *indebitatus assumpsit* for stock which the evidence showed he had not possession of at the time; and, 4th, because the evidence in the case proved one of the pleas of the defendant, which was, that he had not accepted any stock from the plaintiff; and, 5th, because the question in the cause had been erroneously left to the jury by the judge. The learned gentleman having been heard at length upon all these points,

The COURT.—The question in the cause was, whether the plaintiff meant to take Taylor's responsibility or his principal's; and it was entirely for the jury to say how that was. The learned judge was quite correct in leaving the case to the jury to say whether Mortimer had trusted to Taylor solely, or had meant to look to his principal. Though the rules of the Stock Exchange may bind its members *inter se*, yet they do not affect the community at large, and its members must be governed by the general law of the realm. There was evidence of a strong nature to show that credit was not given to Taylor, and as they had decided that he did not by their verdict, we cannot disturb it. The objections raised by the learned counsel to the reception and rejection of certain portions of evidence in the cause are without any sound foundation; and as to the points raised on the pleadings, it is too late now to say, after the recent decision in this court of *Habblewhite v. McMorine* (a) that a man may not sell that which he has not the actual possession of at the time of the contract. The statute relied on applies to fictitious sales of stock, and not to *bond fide* transactions, such as this was; and whether the stock was Ward's or Mortimer's was of no importance at all, for the plaintiff had induced Ward to lend it to him, and the issue raised by the plea was in fact and honesty whether the defendant had accepted the stock at all, not a mere quibble whether he accepted it from one or the other.

Rule refused.

#### PREROGATIVE COURT.—Feb. 14.

##### REEVE v. KENT.

**NEW WILL ACT, 1 Vict. c. 26.—Whether a Will made and duly executed BEFORE this Act came into operation with UNATTESTED OBLIGATIONS made SINCE shall be considered as wholly unaltered or wholly revoked as to the subject of the Alterations. (b)**

William Brooks, of Great Walsingham, Nor-

(a) *Ante* Vol. 2, p. 122. See *Errata*, *ante* p. 302.

(b) See *Hobbs v. Knight*, *ante*, vol. 1. p. 6. *Hobbs and Wife v. Munnings*, *ante*, p. 88.

(a) See *Ante* p. 249.



folk, by his will dated 15th July, 1837, duly executed in the manner by law required previous to the new Will Act, empowered each of the tenants for life to whom he had devised his real estates, to charge them with an annual jointure or rent-charge not exceeding £200. for any woman he might marry, but so that the estates should not be subject to greater annual jointures than £400. On the 26th June, 1838, the testator with a knife erased the amount of £200. annual jointure, and with his own hand altered the same to £100., and also erased the £400. to which the jointures were limited, and altered it to £200. Under the attestation at the end of the will, the testator wrote: "The erasures in the 23d line of the sixth sheet, the word 'two' taken out, and the word 'one' put in its place; and in the first line of the seventh, the word 'four' taken out, and the word 'two' put in its place;—by me, William Brooke, June the twenty-sixth, one thousand eight hundred and thirty-eight." These alterations were made after the New Will Act, 1 Vict. c. 26, came into operation, and were not attested as required by that statute. One of the executors prayed probate of the paper, as it originally stood; the other opposed such grant, and prayed that it might issue as altered.

The Queen's Advocate submitted that the requisites of sec. 21 of the Act were satisfied if the words or effect of the will, before the alteration, be apparent on the face of the will itself, although not apparent on the face of the alterations.

Sir H. JENNER.—In one or two instances, I have already expressed an opinion as to this question. In one case, (b) a legacy had been left to a maid-servant, and the deceased, out of regard for her, increased the amount of the legacy to £50. by an alteration in his own hand-writing; but he had not caused it to be attested according to the Act of Parliament, and the Court did not pronounce for the £50., and he had so completely obliterated the original legacy, that only the word "pounds" could be read. The Court was satisfied that the word was not apparent; and declined to receive any explanation, and, consequently, the servant lost both sums.

In this case, nothing can be more clear than the intention of the deceased expressed in his own hand-writing. Having originally directed that each of the tenants for life might charge his estate with £200., he altered this sum to £100. after the will was executed, and after the late Act came into operation; and he has stated in the will what the sums originally were, and that he had erased them and substituted other sums; and he has signed his name to this statement;

and in support of the facts the draft will is exhibited, which contains the sums as they originally stood: so that nothing can be more clear than that the intention of the deceased was to give a power of charging his estate to the extent of £100. each person, and not £200., and that he died in that intention. But, unfortunately the alteration, not having been executed in the presence of two witnesses, is of no effect as to the charge of £100.; and the question is, whether the Court can pronounce for the will as it originally stood, and decree probate of it with the word "two," in the face of the Act of Parliament, which enacts "that no obliteration, interlineation, or other alteration, made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will."

The alteration is not so attested, and the words or effect of the will before the alteration are not apparent. I feel myself, therefore, bound to what appears on the will itself, and I decline probate of the will with this part in blank. I cannot pronounce for the £100.; as the alteration is not attested according to the statute, and I cannot pronounce for the £200., as the sum is not apparent, and the Court is not at liberty to admit other evidence than appears on the face of the will itself. (c)

#### CENTRAL CRIMINAL COURT.—March 6.

##### CASE OF JOHN JOSEPH STOCKDALE.

The following Memorial was submitted to the Court by Mr. Cope the Governor of Newgate.

"TO THE HON. THE JUDGES OF THE CENTRAL CRIMINAL COURT.

"May it please your Lordships,—I have long been illegally detained in her Majesty's gaol of Newgate, under an order, contrary to the laws of this realm, that the keeper of the said gaol should safely keep my body during certain pleasure; and I feel it my duty to apprise your Lordships of the fact, and to represent, that were such monstrous commitments against law, and transfers from one gaol to another, to be tolerated, the most innocent, say praiseworthy and useful individuals may, by the exercise of a despotic and irresponsible usurpation, be, for sinister purposes, by committals and transfers from one prison to another conveyed to the uttermost confines of the world, and be finally lost and destroyed by

(c) See *Ayling's case*, ante, vol. I. p. 48. *Newman case*, id. 110. *Woodington's case*, id. p. 362. *Allan case*, ante, vol. II. p. 89.

(b) *Zerett's case*, 2 Monthly Law Mag. 291.

the power of human discovery: I therefore pray your Lordships, before you adjourn, to send gaol delivery of her Majesty's prisoner Newgate, to inquire into the case, and to be heard in person by your Hon. applying the words of Jesus Christ to the most humble, and unworthy, and persecuted but faithful, of his followers:—'If I have spoken evil, bear witness of the evil; well, why smitest thou me?' Should your Lordships not order my discharge on this point, I beg permission to receive my wife and family on Sundays, at seasonable intervals, not interfering with the divine service performed here on that day.

"I have the honour to be, &c.

"JOHN JOSEPH STOCKDALE.  
1840."

COMMON-SERJEANT.—I presume, Mr. Stockdale, that the writer of this memorial has been committed to your custody under some writ.

He has, my Lord.

COMMON-SERJEANT.—Have you the writ?

Yes.—This is the warrant.

It has then been handed to the Bench, and was returned.

"Veneris, 7mo die Februarii, 1840. Whereas the House of Commons have this day resolved that John Joseph Stockdale, being guilty of a high contempt and breach of the privileges of the said House, be for his offence committed to her Majesty's gaol of Newgate.

And whereas we are, therefore, to require you, the Keeper of her Majesty's gaol of Newgate, to deliver into your custody John Joseph Stockdale, and to keep him safely during the pleasure of the said House, for which this shall be sufficient warrant.

Given under my hand this 7th day of February, 1840.

"CHARLES SHAW LEFEVRE.  
Keeper of her Majesty's gaol of Newgate."

COMMON-SERJEANT said—We have no objection in this case, unless you bring an objection to the bar before us, and you have authority to do so. It does not appear, however, on the face of this warrant that any person is charged with any offence. It is termed a *general warrant* for a writ of *habeas corpus*, and of the privilege of the House of Commons, and we have no jurisdiction in the matter as to the latter part of the petition, which says that the party may be allowed to receive his wife and family on Sundays, the visiting days of the prison are the persons to whom it is granted.

## NEW FORMS OF WRITS.

ORDER OF THE JUDGES, PURSUANT TO THE STATUTE 1 & 2 VICTORIA, Cap. 110.

HILARY TERM—3rd VICTORIA, 1840.

It is ordered, that the following forms of writs, framed by the Judges, pursuant to the statute 1 & 2 Victoria, c. 110, s. 20, be used from and after the first day of next Easter Term in the cases to which they are applicable, with such alterations as the nature of the action, the description of the Court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; and that in all cases in which the judgment is for a penalty, and the plaintiff seeks to obtain interest, there shall be a memorandum on the back, or at the foot of the writ, directing the Sheriff to levy the amount of the sum of money really due and secured by the penalty, and of the damages and costs recovered and interest thereon, at the rate of four pounds per centum per annum from the time when the judgment was entered up, or if it was entered up before the first of October, 1838, then from that day; and, that in the cases in which the amount for which the judgment has been given is less than the amount of the sum of money really due and secured by the penalty and the damages and costs recovered, and the interest thereon calculated as aforesaid, it shall be stated in the body of the writ, that the Sheriff is to levy interest at the rate of four pounds per centum per annum from the — day of —, and on the back, or at the foot of the writ, there shall be a memorandum as above directed; and, that in the case of an assessment of further damages under a writ of *scire facias* pursuant to the statute of 8 & 9 William III., it shall be stated in the body of the writ of execution, that the Sheriff is to levy interest on the damages assessed and costs taxed in that behalf at the rate of four pounds per centum per annum from the day on which execution was awarded, unless execution was awarded before the first of October, 1838, and in that case from that day:—But it is further ordered, that any variance not being in matter of substance, shall not affect the validity of the writs sued out.

### No. I.

*Writ of Capias ad Satisfaciendum*, on a Judgment in the Court of Queen's Bench, in an Action of Assumpsit.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith;—To the Sheriff of —, greeting. We command you

that you take C. D. if he shall be found in your bailiwick and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £ — which the said A. B. lately in our Court before us at Westminster, recovered against the said C. D. for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended; whereof the said C. D. is convicted, as appears to us of record, together with interest upon the said sum of £ —, at the rate of four pounds per centum per annum, from the — day of —, in the year of our Lord —, (a) on which day the judgment aforesaid was entered up, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

NOTE.—This and all other writs of execution may be made returnable on a day certain in Term.

#### No. II,

*Writ of Copias ad Satisfaciendum*, on an order of the Court of Queen's Bench, for payment of money.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith;—To the Sheriff of —, greeting We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £ —, which lately in our Court before us at Westminster, by a rule of our said Court, entitled, &c. [as the case may be], were by the said Court ordered to be paid by the said C. D. to the said A. B., and further to satisfy the said A. B. interest upon the said sum of £ —, at the rate of four pounds per centum per annum from the — day of —, in the year of our Lord —, (b) on which day the said rule was made, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —. (To be continued.)

(a) The day on which the judgment was entered up, or if entered up prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838, omitting the words on which day the judgment aforesaid was entered up.

(b) The day on which the rule was made, or if it were made prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838, omitting the words on which day the said rule was made.

### PRIVILEGE OF THE HOUSE OF COMMONS.

*IMPRISONMENT of Mr. HOWARD, Mr. Stockdale's Attorney, by order of the House of Commons.*

A meeting of attorneys and solicitors was held on Monday last, at the Freemasons' Tavern, Great Queen-street, to consider what any and what steps should be taken in consequence of the proceedings adopted against Mr. Howard, by order of the House of Commons in reference to the case of "Stockdale, & Hansard."

Mr. CHARLES SHADWELL in the chair.

The following resolutions were almost unanimously agreed to, viz.—

Moved by Mr. Frere, seconded by Mr. Teale;

That the members of this profession be observed with much alarm the proceedings of the House of Commons in imprisoning an attorney of the Court of Queen's Bench, &c. having acted as attorney of a party in an action in which it was supposed that a privilege claimed by that Honourable House might be called in question

Moved by Mr. Adlington, seconded by Mr. Kinderley;

That it is the undoubted right of all his Majesty's subjects, who consider themselves aggrieved by the act of any person whomsoever to seek for redress in her Majesty's courts. That the law has pointed out the proper remedy for an erroneous judgment of the Courts, and the constitution has vested in the Legislature the power of altering the law as may be necessary; but that the constitution does not recognize in any person or body in the state a right to control the administration of the law in her Majesty's courts.

Moved by Mr. William Lowe, seconded by Mr. George Law;

That all suitors in her Majesty's courts are entitled to the assistance of their attorneys to conduct their cases, and that it is essential to the enjoyment of that right that the attorney should be protected in the lawful discharge of his professional duty, and that this meeting without expressing an opinion on any privilege claimed by the House of Commons, or on the conduct of any of the parties who have incurred the displeasure of the House, is of opinion that the imprisonment of an attorney for acting in his professional capacity in accordance with the decisions of the Courts of Law is most dangerous to the rights and independence of the profession and to the true administration of justice.

Moved by Mr. Anderson, seconded by Mr. Robert B. Follett;

a petition embodying these resolutions presented to the House of Commons; that the Incorporated Law Society be requested to have the petition to lie in the hall of the Society for signature; and that James William Ald, Esq., M.P., be requested to present the petition to the House.

It was moved by Mr. Beaumont, seconded by Mr. Stansfeld, and carried unanimously;

and the thanks of this meeting be cordially given to Mr. Charles Shadwell for his conduct in the hall this day.

The petition embodying these resolutions for signature in the Hall of the Incorporated Law Society.

# **COPYHOLD ENFRANCHISEMENT BILL.—(Continued from p. 301.)**

residences:  
descriptions:  
ages, as nearly as he can ascertain the

more than one tenant, whether admitted tenants, or how otherwise:

description of the lands:  
whether copyhold, customaryhold, subject to customary freehold:

at what parish situated:  
what amount assessed, or assumed proportioned, with other lands [as in previous Bill]:

rent of quit or free rents:  
whether held at fines arbitrary on death and return; at fines certain, or how otherwise:

whether subject to heriots, and how:  
rent received for each of three last heriots tenement:

whether subject to rights in timber, and what; return to each tenement:

number of changes of tenants on each tenement, subject to fines payable on death or return, during the last seventy, or such other number of years [as fixed on]:

number of changes of tenants during the last thirty, on each tenement, subject to fines on death or return:

add such other information as commissioners may direct; and insert, at the foot of each schedule, the amount of his claim for compensation, and the grounds upon which the same is founded.

power to make inquiries by post as to ages of tenants, and enactment that tenant refusing to furnish information shall not afterwards be allowed to set up age stated, and penalty on giving false statement.

power to give from time to time such other directions to Commissioners as they may require, with penalty on default.

29. *Valuers to take particular Circumstances of each Case into consideration.*

30. *Schedules of Valuation to be deposited for inspection, and Meeting to determine objections.*

Copies of schedules by valuers to be lodged with steward, for inspection by all interested parties, without charge, and notice to be given as Commissioners may direct, with penalty on disallowing inspection.

Notice to fix time for hearing objections, and at such meetings objections to be heard and determined by assistant commissioner, with power to adjourn when requisite, and direct any further valuation, &c. to be made.

No person to be allowed to object without giving five days notice of intention to object; such notice to be left with steward, and inspected by other parties with schedules; forms of notices to be supplied to steward, and by him delivered to party applying.

After hearing and determining objections, assistant commissioner to amend schedules, and power to him or commissioners to amend such valuations or schedule as to alterations by death, change in ages, &c. on satisfactory proof, by affidavit or otherwise, that such alterations are requisite.

31. *Expences of Proceedings under the Act* (except where from special circumstances, the commissioners shall direct otherwise) shall be payable as follows: where the valuers shall be appointed by the tenants, the costs of valuation and schedules shall be paid by the tenants rateably according to their interest; but where the valuers shall be appointed by the lord and tenants, then, if only two appointed, the lord shall pay one-half and the tenants one-half; and where more than two shall be appointed, the lord shall pay one-third, and the tenants two-thirds; and in case of dispute as to costs the commissioners shall have power to decide the same.

32. *Schedule to be made by the Commissioners.* Forthwith, after receipt of the schedules settled and amended, the commissioners shall either agree to apportionment made by valuers, or cause a schedule to be made of the apportionment to be made of the sums to be paid by each tenant, taking all the circumstances of each case into consideration.

33. *Schedule of Apportionment to be inspected; Errors pointed out and rectified, and then confirmed.*

The commissioners shall forthwith, after making such schedule, cause a copy to be deposited with the steward for inspection by all parties interested; notice is to be given, of such deposit, and steward to allow inspection under a penalty for default; parties interested may give notice of

objections by parties entitled in reversion, and other interested parties, as in sect. 36.

46. *Apportionment not to be questioned after Confirmation*, except with consent.

47. *Commissioners may hear and determine Disputes and settle Boundaries*.

If any action or suit shall be depending touching the right to or amount of any fines, other manorial payments or incidents, or any question shall arise thereon, or as to the boundary of any lands holden of the manor, or precise situation of such lands as shall be intermixed with other lands, or the exact quantity of the lands so holden, or any difference shall arise whereby the proceedings to effect any enfranchisement, whether voluntary or compulsory, as aforesaid, shall be hindered, the commissioners or assistant commissioner may appoint a time and place in or near the manor for hearing and determining the same, and inquire into, hear, and determine such right or amount, or such question; and their or his decision shall be binding and conclusive on all persons to whom twenty days' notice of the time, place, and intent of such meeting shall have been given or left at his abode, or with the occupying tenant, with a penalty on the occupying tenant for omitting to send the notice to his landlord, or party for whom same left, and shall be liable to make good to such party all damage which he may sustain by such defaults.

48. *Subject to Appeal by Issue at Law, or on Case stated*.

Appeal, &c. given where matter in dispute shall exceed the sum of twenty pounds value.

49. *Proceedings not to abate by Death of Parties*.

50. *In case of Death, Actions to be brought, &c.*

51. *Statute of Limitations not to be affected*. Nothing in act contained to revive any right to fines or other manorial claims now or hereafter barred by any law in force for limitation of actions or suits.

52. *Power to summon Witnesses, &c.* Power to summon witnesses, call for returns, production of deeds, &c.

53. *Expences of Witnesses, &c.* Commissioners, or assistant commissioners, may order expences of witnesses and of production of books, deeds, court rolls, &c. and all other expences (except salaries or allowance to commissioners or assistant commissioners) incurred in settlement of any suit or difference, or in hearing or determining any objections, &c. to be paid by such interested parties, and to such parties as they or he may think fit and reasonable.

54. *General Expences and Recovery*. Expences attending enfranchisements (except otherwise provided for) shall be paid as commissioners may in apportionment or otherwise under their

hands and seals direct; and if any difference shall arise as to amount to be paid by or to any person, the commissioners or assistant commissioners may, under their or his hand, certify amount; and in default of payment the same may, on production of certificate, or of a deposited copy of apportionment, be recovered before two justices of peace, by distress and sale, with costs of application and proceedings.

55. *Action for Expences*. If expences not levied within two months after warrant of distress granted, the person entitled (if amount including costs of distress shall equal forty shillings), his executors, &c. may recover same, with costs of suit, in any court of law at Westminster, against party named in certificate of apportionment, his executors, &c. in which action such certificate or copy of apportionment shall be satisfactory evidence of the amount of such expences, and of the same being due from and to the parties therein named; and the certificate of two justices under their hands, which they are required to give in such cases, shall be satisfactory evidence of non-recovery of such expences and costs under the distress.

56. *Expences of Trustees*. Every tenant of the manor being a trustee (save as against an unadmitted mortgagee) shall be entitled to recover in like manner by distress or action respectively all expences, costs, and charges which he may have to pay under any such certificate, apportionment, distress, or action, from the person beneficially interested at the date of such apportionment in the lands, his executors, &c. or by like distress on the lands, and the occupier thereof shall be entitled to deduct any such payments from any rent then or subsequently due, and should any dispute arise as to any trust or right to recover, the same shall be determined by the commissioners or assistant commissioners, as in the case of causes of difference before-mentioned; the like evidence of certificate, &c. to be admitted in any such proceedings or action.

57. *Copyholders, &c. having limited Interests, may charge Costs in certain Cases*.

Tenants having limited interests may, with consent of commissioners, by a simple entry on court rolls, charge the lands with the costs and interest, the principal being however reduced one twentieth each year; the steward to charge only thirteen shillings and sixpence for such entry and copy, which is not to be liable to stamp.

58. *Expenses payable by Lords of Manors*.

Expenses payable by Lords having partial interests, or being trustees, shall, with the expenses they may reasonably incur in employing agents to protect their interests or otherwise (the amount of such expenses being subject to approval of commissioners or assistant commissioner,) be paid

rors to the steward, who must send them the copy apportionment to the commissioners at the expiration of the time appointed for inspection; the commissioners shall then rectify such errors, and cause the apportionment to be engrossed, and annex any schedules thereto required for elucidation, and confirm the same under their hands and seals.

*Copies of confirmed Apportionment to be deposited with Steward and Clerk of the Peace.*

Copies of every confirmed apportionment, and documents annexed, to be made and sealed by the commissioners; one copy to be deposited with the steward, and kept with the court rolls, the other with the clerk of the peace for the manor or jurisdiction within which the manor or part in value, computed as aforesaid, is situated, to be kept by him and his successors; and all persons interested therein may have access to the said copies respectively, and may take copies or extracts thereof on giving reasonable notice and paying two shillings and sixpence for inspection, and three-pence for every two words in such copies or extracts: and the same to be taken as evidence; and deposit to be notified to the commissioners as they may direct.

*Notice to Parties.*

The commissioners, before confirming any valuation, assessment, schedule or apportionment, may require notice thereof to be given in such manner as they shall direct, to the person next in remainder, reversion, or expectancy of an estate of inheritance in any manor or lands, or any other person to whom they may think notice ought to be given, and by themselves or assistant commissioners hear and determine any objection made to such confirmation by any person so interested, and may direct any proceedings accordingly.

*Commissioners may correct Errors with reference to the Court Rolls.*

The Lord, and a majority of tenants in number, two-thirds in value, may request that this Act shall not apply to them.

*Compulsory Enfranchisement; Commissioners to ascertain Value.*

Power to commissioners after 1st day of August 1842, by themselves or assistant commissioners, to ascertain value of enfranchisement in any case where no agreement, with power to defer doing so, has been made, and proceedings commenced.

*Commissioners to require Information from the Steward.*

The commissioners may require the steward, or where no steward, to furnish them with a schedule as or to the effect before required to be furnished in the case of voluntary enfranchisement.

for the purpose of apportionment, and which shall contain a statement of the steward's claim for compensation, and such further information relative to the manor as commissioners shall require, with like powers in obtaining information, &c.; and a duplicate of such schedule shall be kept for inspection as commissioners shall direct; and the commissioners shall furnish the steward with forms of notice of objection to be delivered to party applying for same.

*42. Notice of Inspection; Meeting to hear Objections and appoint Valuers, &c.*

Forthwith after receipt of schedule and information the commissioners are to cause notice of duplicate remaining for inspection, and shall appoint a meeting for hearing objections to the schedule by any persons interested giving five days notice to steward, and to appoint valuers; the commissioners or assistant commissioners shall at such meeting hear and determine objections or adjourn meeting, and then hear objections and amend schedule accordingly, and according to deaths, &c. happening since making out the schedule, and determine amount of compensation to steward; and valuers are to be appointed as at voluntary meetings, when one-half in number to be appointed by the lord and the other half by the tenants; and which valuers or their umpires are to be appointed as in voluntary enfranchisements, shall make the like declaration, and act in like manner and with the like powers, &c., as if appointed under voluntary enfranchisements.

*41. Power to Commissioners to appoint Valuers and Umpires.*

If within six months after first meeting, to appoint valuers in compulsory enfranchisements, or if like period from confirmation of voluntary agreement, no valuers shall have been appointed, or valuation not made and sent to the commissioners, the commissioners may appoint valuers.

*42. Inspection of Schedules, Objections, &c.*

A copy of the schedules of valuers to be deposited with steward for inspection, as in cases of voluntary enfranchisement; notice to be given of such deposit and proceedings for hearing objections and making amendments, as in case of voluntary enfranchisements, and to make amendments in steward's schedule, becoming requisite from deaths, &c.

*43. Expenses.* Like provisions as in voluntary enfranchisements (see sect. 32).

*44. Apportionment.* The commissioners to make apportionment, cause schedule to be deposited for inspection, and proceed to confirmation and deposit of copies with Clerk of Peace, as in voluntary enfranchisements.

*45. Notice to interested Parties.* Commissioners may have notice given to, and hear

out of the first monies to be received out of the enfranchisements to be effected under the Act.

**59. Lands to be charged with Enfranchisement Considerations as on Mortgage in Fee.**

From and immediately after date of final confirmation of apportionment the several and respective lands holden of the manor shall stand chargeable with the respective sums mentioned in the apportionment as payable to the lord and steward respectively, with lawful interest from that day until payment; and the person or persons for the time being seised of the manor shall be deemed to be seised of the said lands as mortgagee in fee thereof for the benefit of the lord as to the sums payable to him, and of the steward as to the sums payable to him; and that (subject to the power of continuing the charge at the option of the tenant as herein-after provided,) it shall be lawful for the person so seised, or the lord or steward respectively in his name, from time to time to adopt such means and proceedings as a mortgagee in fee of freehold lands is entitled to, for the enforcing payment of such principal sums and interest, and with the right to obtain payment of all attendant and incident costs.

**60. To be first Charges.**

Such sums shall be first charges, and have priority over all mortgages, charges, and incumbrances, &c.

**Power to Mortgage.** Any tenant whose lands shall be enfranchised may charge the same (or any of them, if he holds all under same right and for same estate,) with payment of such sums and costs of such charge and lawful interest, to any person advancing same and his executors, administrators, and assigns, and for securing payment thereof to demise lands by way of mortgage, for any term of years to such person, his executors, &c., or to such other person as he shall appoint; such demise to be made with a proviso or condition, declaring the term to be void on payment to the amount thereby secured, with interest, at a time to be therein appointed, and such charge shall have the like priority, &c., with powers and rights of first mortgagee.

**62. Power to tenants for life, and tenants whose lands are not of more than the annual value of 20*l.*, to defer payment of consideration for enfranchisement until the next event at which fine would be payable.**

**63. Power to Tenant to defer payment of Consideration for Enfranchisement.** For purpose of freeing tenants of manors from the inconvenience to which, in certain cases, they might be subject, by an immediate liability to payment of the sums to be awarded to the lord of the manor under the act, it shall be lawful for any tenant, at any reasonable time before final apportionment as aforesaid, (to be fixed by the commissioners, or, in default of their fixing any at any other time or until within ten days

next previous to such apportionment,) to declare, by notice under his hand, to be delivered to the lord or steward, as in case of other notices, his desire that such compensation shall remain a charge on the lands affected thereby for any number of years not exceeding Fourteen, or as to tenants for lives for the whole period of his life, and one year longer; and which notices the said steward shall forthwith, or with the schedule of apportionment, send to the commissioners; and thereupon the said commissioners shall insert, in a column of the apportionment to be appropriated to that purpose, the number of years or period for which such charge is to be continued, and thereupon (subject as after mentioned) no proceedings shall be instituted during such term or period to enforce payment of the principal money so apportioned; provided nevertheless, that lawful interest shall be payable, and paid half-yearly on the days to be mentioned in such apportionment, or, if not mentioned therein, at the expiration of each half year, computed from the date thereof, and that such proceedings may be instituted, and nothing in the Act contained shall extend to protect any tenant or other person from such proceedings, in case one and a half year's interest shall remain due on the said principal sum apportioned, or on any part thereof, to the extent of one half; provided also, that during the term or period so fixed, the lord shall not be compellable to receive payment of the principal money without receiving twelve calendar months notice of intention to pay off the same, and that in case the interest on such principal sum, or any part thereof, shall at any time or times be in arrear thirty days, it shall be lawful for the lord or party for the time being entitled to receive such interest money, to levy the same by distress and sale of the goods on the lands and tenements enfranchised and affected by such enfranchisement money, or any of them, in like manner as for rent in arrear and subject to recovery by distress.

**64. To whom Monies for Enfranchisement from Lord's Rights to be paid.**

Monies to be received for enfranchisement from lord's rights to be paid to lord, his heirs, or assigns, when absolute owner, for limited estate or interest, or under legal disability, to be paid as follows:—If it amounts to two hundred pounds, to be paid into the Bank of England under the 1 Geo. 4. c. 35.

**65. When less than two hundred pounds, and more than twenty pounds, to be paid into the Bank of England, or to trustees, at the option of the parties.**

Where twenty pounds, to be paid to the person entitled to the rents and profits.

When payments are deferred by tenants, provision as to lords being tenants for life.

(To be continued.)

## COURT OF QUEEN'S BENCH.

is appointed to be held in Middlesex and London, before the Right Honourable THOMAS DENMAN, Lord Chief Justice of the Court of Queen's Bench, in and after Easter Term, 1836:—

## IN TERM.

<i>Middlesex.</i>		<i>London.</i>	
Monday . . . . .	April 22	-	-
Tuesday . . . . .	April 25	-	-
Wednesday . . . . .	May 11	Tuesday . . . . .	May 12

## AFTER TERM.

Monday . . . . . May 14 | Friday . . . . . May 15  
 Court will sit at eleven o'clock in Term, in Middlesex; at twelve in London; and in both past nine after Term.

—Long causes will probably be postponed from the 22nd and 25th of April to the 14th of May, and all other causes on the lists for the 22nd and 25th of April, will be taken from day to day as they are tried.

Defended causes only will be taken on the 11th of May.

Causes defended as well as undefended causes entered for the Sitting on May 12th, will be tried day, if the Plaintiffs wish it, unless there be a satisfactory affidavit of merits.

## EXCHEQUER OF PLEAS.

is appointed to be held at Nisi Prius in Middlesex and London before the Right Honourable JAMES Lord DENMAN, Chief Baron of Her Majesty's Court of Exchequer, in and after Easter Term, 1836:—

## IN TERM.

<i>Middlesex.</i>		<i>London.</i>	
Monday . . . . .	Wednesday . . . . . April 22	1st Sitting . . . . .	Wednesday . . . . . April 29
Tuesday . . . . .	Thursday . . . . . April 23	By adjournment . . . . .	Thursday . . . . . April 30
Wednesday . . . . .	Friday . . . . . April 24		
Thursday . . . . .	Saturday . . . . . April 25		
Friday . . . . .	Monday . . . . . May 4	2nd Sitting . . . . .	Monday . . . . . May 11
Saturday . . . . .	Tuesday . . . . . May 6	By adjournment . . . . .	Tuesday . . . . . May 12
Sunday . . . . .	Wednesday . . . . . May 7		
	Thursday . . . . . May 8		
	Friday . . . . . May 8		

## AFTER TERM.

<i>Middlesex.</i>		<i>London.</i>	
Monday . . . . .	April 14	Friday . . . . .	April 15
		(to adjourn only)	

The Court will sit during Term at ten o'clock.

## ENGLISH AND FRENCH POSTAGE.

## REDUCTION OF FRENCH POSTAGE.

ENGLISH POSTAGE.—The Director-General of the Post-office has published a notice, announcing that the postage charged over and above the amount of Postage on all letters sent from France to any part of England, Scotland, or Ireland, for whatever distance they may be, within the United Kingdom, will henceforth be reduced to the uniform rate of 10 deniers, or 1 franc, for any letter not exceeding in weight half an ounce English, or 14 grammes. Certain towns in the counties of Kent and Essex, the postage charge to which is under

1 franc for such letters, according to a scale determined by the convention of the 30th of March, 1836, will continue to enjoy the same privilege. No alteration is made in the charges of letters coming from, or going to, countries beyond sea, and conveyed either by the regular packets or merchant ships of England. Charges of all kinds received in France upon letters for the English part of the postage remain subjected to the following English tariff; viz. for any letter not exceeding in weight half an ounce English or 14 grammes French, single postage; exceeding half an ounce, and not exceeding one ounce or 28 grammes, double postage; exceeding one ounce, and not exceeding two ounces, or 56 grammes, quadruple postage; and so on for



every additional ounce or 28 grammes an additional double postage will be charged. The French charge upon letters for the French part of the postage remains as follows :—For every letter not exceeding  $7\frac{1}{2}$  grammes, 1 franc ; not exceeding 10 grammes, 1f. 50c ; not exceeding 15 grammes, 2f. ; and so on, 50c. being added for every additional 5 grammes.—*Galignani's Messenger*.

#### NOTICE TO CORRESPONDENTS.

R. F.—Every article clerk must continue to be *actually employed* by the Attorney or Solicitor to whom he is bound, or by his agent, *in the proper business, practice, or employment of an Attorney or Solicitor* during the entire period of service specified in the Articles. Any person may take the advantage.—See *Taylor's Case*, 5 Barn. & Ald. 538, see also 10 Barn. & Cress. 511.

R. E. I.—S. A. W.—I. G.—O. L.—I. L.—C. W.—W. D.—I. T. G.—P. H.—T. A. S.—all under consideration.

We have this week again contrived to insert the Answers to two Problems.—We have many in arrear.

#### NOTICE TO SUBSCRIBERS.

The applicants (very many) for a *double number* are at present in the *minority*.

We direct attention to the letter signed "*Amicus*."

#### TO THE EDITOR OF THE LEGAL GUIDE.

*Wycombe, Mar. 9, 1840.*

SIR,—By your Notice to Subscribers, in your number of the 7th inst. you propose issuing a double number monthly, which I hope will be carried into effect as early as convenient. I hope you will still continue the insertion of the Questions and List of those who pass.

You will perhaps allow me once more to mention a digested index. If there are any of your subscribers averse to it, then let those who wish it each subscribe a sum ; then it can be done without the malcontents. I shall be most happy to subscribe any sum you think necessary. When the volume is finished, the index to that and the two previous ones can be published together. Trusting you will excuse the length of my remarks, I remain your humble servant,

AMICUS.

#### (FROM A CORRESPONDENT.)

The African Institution of Paris have recently elected Owen Flintoff, Esq. A.M. : Vice-President, as a mark of their approbation of his work on the Rise and Progress of the Laws of England and Wales.

#### (FROM A CORRESPONDENT.)

HENRY VILLIERS DE BILLINGHURST TAYLOR was called to the Bar by the Honorable Society of the MIDDLE TEMPLE, Jan. 18.

#### ERRATUM.

P. 298, Court of Common Pleas—the name of the case in the title is omitted, read *Aston and another, v. Hensell*.

*Just Published, price 4s, to be continued Monthly, Vol. IV. Part II.*

**P**RECEDENTS IN CONVEYANCING, adapted to the Present State of the Law. Illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple ; Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen, &c. in continuation of the PRECEDENTS by S. VALLIS BONE, Esq.

This work, independent of the Precedents, which are all drafts of *actual practice*, abounds with valuable practical information to TOWN and COUNTRY SOLICITORS. The NOTES are to *every purpose only*. Among these, the term "*CUSTOM OF THE COUNTRY*," is fully explained, and Tables are given, shewing those Customs in the SEVERAL COUNTIES OF ENGLAND for granting LEASES as to the Term—time of entry—rent—days—rotation of crops—restrictions on tenants—repairs—draining—manuring—also the law relating to MINING LEASES.—Almost every Number contains a NEW FORM of Instrument to meet the *existing state* of the laws.

Vol. III. was published December 1, Table of Contents, price 17s. Price of Vols. I. and II. £1. 10s.

London: JOHN RICHARDS and Co., Law Bookellers, 194, Fleet-street.

*This Work will be completed in Four Vols.*

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Cornhill, in the County of Middlesex ; and Published by JOHN RICHARDS, Law Bookeller, 194, Fleet-street, in the Parish of St. Dunstan-in-the-Fields, in the City of London.—Saturday, March 14, 1840.

# The Legal Guide.

[II.]

SATURDAY, MARCH 21, 1840.

[No. 21.]

## V LAWS OF REAL PROPERTY.

### ESSAY II.

3 & 4 Wm. IV. cap. 74.

*for the Abolition of Fines and Recoveries, and for the Substitution of more effectual Modes of Assurance.*

(Continued from page 179.)

### PROTECTOR OF A SETTLEMENT. STATUTES TO SUPPORT CONTINGENT REMAINDERS.

### CONTINGENT REMAINDER, AND A RIGHT OF ENTRY DEFINED.

As to the second principal question, whether the limitations to the first and sons of *Bacche*, were well barred by the Statute, and recovery, without the joining of trustees? It was insisted upon, to shew they were barred, *first*, that no estate at all was given to the trustees; *secondly*, if any estate was given, it was a contingent estate, or a right of entry only; and, *thirdly*, that whatever estate was given, it was effectually barred by the Statute, and recovery.

As to the first, we are of opinion, that an estate was commenced in the trustees immediately after the determination of the term for which the estate was to last, by effluxion of time, forfeiture, or otherwise.

As to the second, whether the estate to be given to the trustees was a vested or contingent estate, and as to the great difficulty in the

case; the doctrine of contingent remainders is very nice and intricate, and if we were to cite all the cases in the books, I fear we should rather puzzle than explain the difficulty. The definition of a contingent remainder laid down by the counsel for the plaintiff, that a remainder was contingent when it was uncertain, whether it would take effect or not, is, by no means, the legal notion of a contingent remainder; it is not the uncertainty of taking effect in possession that makes it contingent: if an estate is limited to A. for life, remainder to B. and the heirs of his body, every one will allow that this is a vested remainder; and yet, it must be allowed, that it is uncertain, whether B. may not die without heirs of his body before the death of A., and consequently the remainder may never take effect in possession.

We have considered this point a good deal, and are of opinion, that all contingent remainders may be reduced to these two heads: *first*, where a remainder is limited to a person not in being, and who may possibly never exist; and, *secondly*, where a remainder depends upon a contingency collateral to the continuance of the particular estate. I will give an instance of each: if an estate is limited to A. for life, the remainder to his first son before he has any child, this is a contingent remainder of the first kind, for it is uncertain whether he will have any son. If an estate is limited to A.

for life, and after the death of I. S. to B. in fee, or after I. S. shall come from *Rome*; this is a contingent remainder of the second kind, for it is uncertain what time I. S. shall die, or shall come from *Rome*. For as the law, for many good reasons, will not permit the freehold to be in abeyance, it expects the contingent remainder to take place when the particular estate determines, and it cannot immediately vest in those cases, when it is uncertain whether the contingency will happen.

The present case comes under neither of these heads, the trustees are in being and capable of taking. The estate does not depend upon any contingency collateral to the continuance of the particular estate; we, therefore, are of opinion that, subject to the term of 99 years, a good estate of freehold vested in the trustees during the life of *Robert Dormer*. I will put one case:—Supposing a person grants an estate to A. for 99 years, if A. should so long live, and after the death of A. to another; supposing A. should outlive the term, or commit a forfeiture, is not the freehold vested in the grantor during the life of A., and has not he a power to enter, and if he has an estate in this case, may he not grant it away upon the same terms, and would not his grantee have the same estate? But consider what would be the consequence, if the trustees do not take but upon a contingency, their heirs cannot take; and if the trustees die before the contingency happen, the limitation to their heirs fail, and if the estate limited here to the trustees is contingent, so are the limitations to trustees in all settlements, and consequently all the settlements for these 200 years, ever since the statute of uses, may be questioned. But, can we conceive, my Lords, that every one has been mistaken for these 200 years, and that this new light is just now arisen to us? Surely it is a much less evil to make a construction, even contrary to the common rules of law, (though I think this is not so,) than

to overthrow, I may say, 100,000 settlements; for it is a maxim in law, as well as reason, *communis error facit jus*.

As to the RIGHT OF ENTRY, I should scarce have thought it deserved an answer, but that some weight has been laid upon it: we are of opinion that a right of entry always supposes an estate; for what is a right of entry without a right to hold and receive the profits; therefore I have always thought, that if an estate is granted to a man, reserving rent, and in default of payment, a right of entry was granted to a stranger, it was void. A case was cited to endeavour to shew that a right of entry might subsist without an estate; but I am inclined to think some material circumstances in that case are omitted, and are agreed in our judgment, that the law is otherwise; and for these reasons are of opinion, that not a mere right of entry or a contingent estate, but an estate of freehold, was vested in the trustees during the life of *Robert Dormer*. (To be continued.)

### PROBLEM XXI. VOL. III.

#### POWERS.

In what cases will a defective execution of a Power be supported?

TO THE EDITOR OF THE LEGAL GUIDE.  
ANSWER TO PROBLEM XI.—VOL. 2

Heirs special or general. What is the present state of the law with regard to limitations to heirs special or general?

A recent Statute has materially altered the law with regard to limitations to heirs general or special, by abolishing that perplexing rule of law commonly known as the rule in *Shelley's Case*, and the numerous decisions following that memorable case. But as there is a saving clause in the Act to limitations made before the 1st January 1834, to the heirs of a person then living, it is absolutely necessary to understand the effect of such limitations under the old law.

Let us then divide our subject as follows,

1. The effect of limitations to heirs specifically. The effect of such limitations since passing of this Act.

2. *First*.—It was affirmed in *Shelley's Case*, where by the same instrument by which

Estate was given, the remainder was given to the heir or heirs of the body of the tenant for life, whether immediate or contingent, to other Estates, the life estate and remainder united, and the intended tenant became entitled to an estate in fee-simple or fee-tail, but so as not to prejudice intervening interests. 1 Co. 104 a. *Mean Estate* was conveyed to A. for life, and then to the heir or heirs of the body of A. if the construction had been according to the strict meaning of the words, A. would have taken an estate for life only, and then to the heirs, &c. of A. would have taken a contingent remainder, thereby making the heirs take as purchasers: but such a construction would have been attended with great inconveniences.

The Lord of the fee would have been deprived of those claims to which he would have been entitled in case the heirs had been to take by descent, such as wardship and marriage.

3. *Secondly*. The remainder being contingent, the heir would have been in abeyance.

4. *Thirdly*. No alienation could have taken place in the lifetime of the ancestor.

It was therefore decided, that in all such cases of legal estates, Cart. 170. De. of trust estates, *Fearne Cont. Rem.* surrenders of copyholds, *Gilb. Ten.* 270. assignments of terms of years, *Fearne*, the heirs should take by descent, and immaterial whether the ancestor took express limitation or by implication of

There are, however, many exceptions to this rule, *ex. gr.* Where the ancestor takes an estate for years only. Sir William Tip-

pin's case cited 1 P. Wms. 359. where the limitations to the ancestor and his heirs are made by different conveyances. *Cranmer's Case*, 2 Leon. 57. Where the word heirs is clearly explained to mean sons, or children, or issue, or where words are added to show that the limitation is intended to apply to the heir apparent as a gift to the heirs male now living; or the word "heir" in the singular number is used, if coupled with other words of explanation. *Lewis Bowles' Case*, 11. Co. 30. *Walker v. Snow*, Palm. 359.

The rule was held not to apply in executory contracts, such as articles made in contemplation of marriage, 1 Bro. C. C. 222.

Where an Estate for life is limited to the parents, and the subsequent limitation is to the heirs of both their bodies, 1 Rol. Rep. 238. Where the limitation to the heirs proves an intention that they are to take differently from the usual course of descent, as where a remainder is given to the heirs, and heirs female, of the bodies of their ancestors.

Mr. Hargrave in his masterly observations on the rule in *Shelley's Case* observes, that when it is once settled that the donor or testator has used words of Inheritance according to their legal import; has applied them intentionally to comprise the whole line of heirs to the tenant for life, and has really made him the terminus or ancestor by reference to whom the succession is to be regulated, then it will appear that being considered according to those rules of policy from which it originated, it is perfectly immaterial whether the testator meant to avoid the rule or not; and that to apply it, and declare the words of inheritance to be words of limitation, vesting an inheritance in the tenant for life, as the ancestor and terminus to his heirs is a mere matter of course. That on the other hand, if it be decided that the testator or donor did not mean by the words of inheritance after the estate for life, to use such words in their full and proper sense; nor to involve the whole line of heirs to th-

tenant for life, and include the whole of his inheritable blood, and make him the ancestor or terminus for the heirs; but intended to use the word "heirs" in a limited, restrictive, and untechnical sense, and to point at such individual person, as should be the heir, &c. of the tenant for life at his decease, and to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs, and constitute him or her the ancestor terminus and stock for the succession to take its course from; in every one of these cases the premises are wanting, upon which only the rule in Shelley's Case interposes its authority, and that rule becomes quite extraneous matter. The previous enquiry, therefore, will be, whether, by a remainder to the heirs either general or special of a preceding tenant for life, it is the meaning of the instrument to include the whole of his inheritable blood, the whole line of his heirs; or to design only certain individual persons answering to the description of heirs at his death. If the former is the sense the rule always applies, and by vesting the remainder in the tenant for life, forces it to operate by limitation, even though the instrument should contradictorily and inconsistently add in express terms that the remainder should operate as a contingent one, and enure so as to make the heirs purchasers. If the latter sense is adopted, the rule is as invariably foreign to the case, and the remainder consequently is contingent till the death of the tenant for life, upon which event the heir takes by purchase, 1 Hargr. Law Tracts, 755, 577.

Lord Thurlow is reported to have said, in *Jones v. Morgan*, 1 Bro. C. C. 206, that all possible heirs must take as heirs, and not as purchasers: that in all cases where the limitation is of an estate in freehold to a man, and afterwards to his heirs, &c. (whether general or special) so as to give it to the heirs as a denomination or class, the

heirs shall take it by descent, and not as purchasers: and that the case stated by Anderson, in Shelley's case, of a limitation to the use of A. for life, remainder to the use of his heirs, and of their heirs-female, was the only one to the contrary; and in that case the word "heirs" must be a description of the persons, in order to let in the limitation to the heirs-female.

*Secondly.* This rule, the source of so much litigation, and the death-blow to the intentions of so many testators, has at last come under the consideration of the Legislature, chiefly owing to the suggestions of Mr. Tyrrell; and is now abolished as to cases of conveyances, &c. arising after 31st December, 1833.

The 3rd section of the aforesaid Act declares, that after the 31st December, 1833, an heir shall be entitled under a devise to him in a will to take as a devisee; and that a limitation to a grantor and his heirs in any assurance executed after the same time shall create an estate by purchase.

Where heirs take by purchase under limitations to the heirs of their ancestors, the land shall descend as if the ancestor had been the purchaser.—Sec. 4.

Limitations made before the 1st January, 1834, to the heirs of a person then living, are to take effect as if the Act had not been made.—Sec. 12. J. A. M.

### Imperial Parliament.

#### HOUSE OF LORDS—ENGLAND.

March 17.

#### THE LORD CHANCELLOR'S NEW BILL.

The LORD CHANCELLOR brought in a Bill facilitating the *Administration of Justice*, of which the following is an analysis.

The preamble sets forth that, "Whereas the administration of justice by her Majesty in council would be greatly facilitated by the appointment of a judge to preside in the judicial committee of the privy council; be it therefore enacted by the Queen's Most Excellent Majesty," &c.

Clause 1 provides, that the Master of the Rolls be appointed Vice-President of the Privy Council.

ause 2 empowers her Majesty to appoint a member of the judicial committee temporary Vice-President of the Privy Council, &c.

ause 3 provides, that no matter be heard by a judicial committee unless in the presence of four members of judicial committee, of whom Vice-President, &c., to be one. Proviso, her Majesty direct any matter, &c., to be heard by three members of judicial committee.

ause 4 enacts, that judges not being members of judicial committee, &c., to be assistants to the committee.

ause 5 enacts, that the ordinary duties of judges attending judicial committee to be performed by other judges during their absence.

ause 6 declares, that the business of the Plea of her Majesty's Court of Exchequer at Westminster has of late years greatly increased, and transfer to the Court of Chancery of the jurisdiction of the said Court of Exchequer, as a court of equity, would relieve the judges of the Court of Exchequer, and would otherwise promote the public advantage; and it enacts, that the jurisdiction of the Court of Exchequer, as a court of equity, &c., be abolished, and transferred to the Court of Chancery.

ause 7 provides, that suits depending, and proceedings transferred to Court of Chancery, be done according to the practice of that court,

ause 8, gives power to Court of Chancery, by summary way, to restrain Bank of England, from permitting transfer of stock.

auses 9, 10, 11, 12, 13 and 14, make provision, that the stocks, &c. in the name of Account-General of Court of Exchequer, be transferred into the name of the Account-General of Court of Chancery, &c.

auses 15 and 16 make provisions for the re-union of offices and the transfer of proceedings.

ause 17 says, "And whereas the duties of the Master of the Rolls as Vice-President of the Privy Council will prevent his devoting so much time as heretofore to the hearing of causes in Chancery: and whereas the business of the Court of Chancery has of late years greatly increased, and by reason of the transfer to the Court of Chancery of the equitable jurisdiction of the Court of Exchequer, further duties will devolve on the Court of Chancery; it is therefore enacted, for the better administration of justice in the said Court of Chancery, that two additional judges should be appointed to assist in the discharge of the judicial functions of the Lord Chancellor. Be it therefore further enacted, it shall be lawful for her Majesty to nominate and appoint, by letters patent, under the great seal of the United Kingdom, two fit persons to be additional judges assistant to the Lord Chancellor in the discharge of the judicial functions of

his office, each of such additional judges to be called Vice-Chancellor."

(To be continued)

## HOUSE OF COMMONS—ENGLAND.

March 13.

### PRINTED PAPERS.

(In Committee).—First clause (proceedings, criminal or civil, against persons for publication of papers printed by order of Parliament, to be stayed upon delivery of a certificate and affidavit to the effect that such publication is by order of either House of Parliament) p. 1, l. 20. Amendment proposed to leave out the words "heretofore, now, or." Question put, "That the words proposed to be left out stand part of the clause." The Committee divided—Ayes, 179; Noes, 9.

Order read, for consideration of petition of Messrs. Hansard (presented March 12.) Petition again read.—Motion made, and Question put,—"That John Joseph Stockdale, by commencing and prosecuting the action now depending at his suit against James Hansard, Luke Graves Hansard, and Luke James Hansard, and in which a notice of action was served on the 9th day of this instant March, such action being brought for acts done by the defendants as the officers and servants of this House, and under and pursuant to the authority of the orders and resolutions of this House, made in exercise of the privileges of Parliament, has been guilty of a contempt of this House, and a violation of the privileges thereof; and that all sheriffs, undersheriffs, agents, bailiffs, officers, clerks, and others, who shall act, aid, or assist in the continuing, furthering, and prosecuting the said action, will also be guilty of a contempt and violation of the privileges of this House, and subject themselves to the severe censure and displeasure of this House." The House divided—Ayes, 98; Noes, 33.

March 17.

### PETITION OF THE ATTORNEYS AND SOLICITORS.

Mr. *Freshfield* presented the following petition, signed by 757 attorneys and solicitors of the courts of law and equity.

"To the Honourable the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled.

"The humble petition of the undersigned attorneys and solicitors of her Majesty's courts of law and equity,

"Sheweth,—That your petitioners have seen with alarm the proceedings of your honourable House with reference to the cause of *Stockdale v. Hansard*.

"Your petitioners beg leave respectfully to

submit to your honourable House that it is the undoubted right of all her Majesty's subjects, who consider themselves aggrieved by the act of any person whomsoever, to seek for redress in her Majesty's courts.

"That your petitioners submit that all suitors in her Majesty's courts are entitled to the assistance of their attorney to conduct their cases, and that it is essential to the enjoyment of that right that the attorney should be protected in the lawful discharge of his professional duty.

"That the law has pointed out the proper remedy for an erroneous judgment of the courts; and the constitution has vested in the Legislature the power of altering the law, as may be necessary. But your petitioners most respectfully but firmly submit, that the constitution of this country does not recognise in any person or body in the state, not even in your honourable House, the right to supersede the administration of the law in her Majesty's courts.

"That your petitioners have heard with deep regret that an attorney has incurred the displeasure of your honourable House and been committed to prison, because he has acted as attorney of a party in an action in which it was supposed that a privilege claimed by your honourable House might be called in question.

"That your petitioners, without expressing an opinion on any privilege claimed by your honourable House, or on the conduct of any of the parties who have incurred your displeasure, beg leave respectfully to submit, that the imprisonment of an attorney for acting in his professional capacity, in accordance with the decision of her Majesty's courts of law, is most dangerous to the rights and independence of your petitioners' profession, and to the due administration of justice.

"Your petitioners most humbly pray your honourable House that your honourable House, while taking such measures for securing the privileges which the constitution has given you for the benefit of the people as in your wisdom you may think right, will not sanction any act which may be injurious to the rights of your petitioners, or interfere with the independence and dignity of the law and the free administration of justice. And your petitioners will ever pray, &c."

Ordered to lie upon the table.

Sir R. H. Inglis presented the following petition:—

"To the Honourable the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled.

"The humble petition of John Joseph Lawson, of No. 26, Newington-crescent, in the parish of St. Mary, Newington, in the county of Surrey, printer, and Thomas Payne, of No. 23, Pembroke-square,

Kensington, in the county of Middlesex, printer,

"Sheweth,—That your petitioners are printers and publishers of certain newspapers published daily in London, and severally entitled 'The Times' and the 'Morning Post,' and are responsible for the contents of those papers.

"That, to the conducting in an adequate and efficient manner the business in which your petitioners are engaged, and which consists in diffusing as widely as possible throughout the United Kingdom and its dependencies the fullest and most accurate information they can procure in relation to all affairs of public interest, it is indispensably necessary, upon occasions of frequent recurrence, that your petitioners should reprint and republish in their respective newspapers the whole or selected portions of reports and other documents previously printed and published by order of your honourable House.

"That the utility of such reports and documents depends in a great degree on their receiving publication through the medium of the public press.

"That your petitioners are liable to prosecution by indictment or information, as well as to actions at law for the recovery of damages, so often as any thing contained in the reports or other documents first printed and published by order of your Hon. House, and subsequently reprinted and republished by them, may be deemed by any individual whatever to reflect in any manner upon his character, or to be in any degree injurious to his private interests.

"That your petitioners are apprehensive, if legislative protection against such prosecutions or actions at law be given exclusively to the original printers and publishers of Parliamentary reports or other documents connected with Parliamentary proceedings, that prosecutions or actions at law against your petitioners, who are often compelled, in the regular and ordinary course of their business, to reprint and republish the same, may thereby be rendered more frequent, vexatious, and oppressive.

"Your petitioners, therefore, humbly pray your Hon. House that you will not pass any act having for its object or effect to prevent prosecutions or actions at law against the original printers or publishers of Parliamentary reports or other documents, unless such act shall contain a clause or clauses to prevent in like manner prosecutions or actions against your petitioners, and the registered proprietors of the said newspapers, for reprinting and republishing the same in whole or in part.

"And your petitioners will ever pray, &c."

"JOHN JOSEPH LAWSON

(Printer and publisher of *The Times*).

"THOMAS PAYNE

(Printer and publisher of the *Morning Post*)."

hon. baronet said that he would not move the petition printed with the votes, but give notice that if no other member should bring the matter up, he would in a future stage of the bill move the addition of clauses to the petition prayed for in the petition.

The petition was ordered to lie on the table.

March 18.

PRINTED PAPERS.

COMMITTEE.—Lord Howick brought up his report.—The following is the Bill, (as amended by the Committee), to give summary of persons employed in the publication of parliamentary papers:—

Whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of legislation, that no obstructions or impediments should exist to the publication of such of its reports, papers, votes, or proceedings of the House of Parliament, as such House of Parliament may deem fit or necessary to be published:

and whereas obstructions or impediments to the publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed acting under the authority of the Houses of Parliament, or one of them, in the publication of its reports, papers, votes, or proceedings: and for remedy whereof, it is expedient that more speedy protection should be afforded to persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and terminated in manner herein-after mentioned:

and whereas an action has been brought, and is now depending, against certain persons employed in the execution of a warrant granted and issued by the Speaker of the House of Commons during the present session of Parliament, for detaining into custody the person therein named, and it is expedient that such action should be put an end to, and that no other action should be allowed to be brought or prosecuted in respect of the execution of any such warrant which has been granted or issued by the said Speaker as aforesaid, during the present session of Parliament:

Be it therefore enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, by the authority of the same, that it shall be lawful for any person or persons who are, or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding, commenced or prosecuted in any manner soever, on account, or in respect of the publica-

tion of any such report, paper, votes, or proceedings by such person or persons, or by his or their servant or servants, by or under the authority of either House of Parliament, to deliver and leave or cause to be delivered and left at the office of the court or jurisdiction wherein any such civil or criminal proceeding shall have been commenced, or is or shall be depending or prosecuted, in which office the judgment in such matters is or may be signed or entered, or with the officer, clerk, or person whose duty it may be to sign or to enter such judgments, or to make up, prepare, or receive, or file the rolls or records of such judgments, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being or of the Clerk of the Parliament or of the Speaker of the House of Commons, or of the Clerk of the same House, stating that the report, paper, votes, or proceeding, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords, or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and from and after the delivery of such certificate and affidavit, every such civil or criminal proceeding, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this act.

“ And be it further enacted, that in every such civil proceeding as aforesaid, within 48 hours after the delivery of such certificate and affidavit as herein-before is provided, the defendant or defendants in such civil proceeding shall cause a notice in writing to be delivered at the residence, office, or lodgings of the plaintiff or plaintiffs, or of the attorney or attorneys of the plaintiff or plaintiffs, as the same may be, in the particular case indorsed upon the writ or process by which such civil proceeding shall have been commenced, in which notice it shall be stated that such civil proceeding is stayed pursuant to and by virtue of this act.

“ And be it further enacted, that all and every action or actions heretofore brought or prosecuted by any person or persons for or in respect of any trespass or trespasses alleged to have been committed in or under colour of the execution of, or in or under colour of the endeavouring to execute any warrant or warrants granted or issued by the Speaker of the House of Commons, by authority of the said house, since the commencement of the present session of Parliament, shall be and are stayed, put an end to, finally determined, discharged, and made void by virtue



of this act; and that no action, suit, or prosecution shall hereafter be brought or commenced for, on account, or in respect of any such alleged trespass or trespasses as aforesaid, but that all proceedings in any such action, suit, or prosecution, shall be null and void to all intents and purposes.

"Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever."

### Law Reports.

#### COURT OF CHANCERY—Feb. 26.

IN RE WILLIAM COE.

MILES v. PRISLAND.

*Act for abolishing arrest for debt. Sec. 14. Whether the court of Equity has the power to make orders creating a charge upon stock belonging to a debtor in favour of a judgment creditor.*

Mr. Hallett applied for an order directing that certain stock, standing in the name of the defendant to an action at law, might become charged with the amount of the sum recovered against him by the plaintiff in the cause. He applied under 1 and 2 Victoria, cap. 110, sec. 14, which empowered the judges of the superior courts to grant such order, if they thought fit. He said, the Master of the Rolls doubted his jurisdiction when applied to, although the Vice-Chancellor had made similar orders. The act of Parliament did not restrict the authority to the judges of the courts of law, and there could be no doubt that the courts of equity were included under the denomination "Superior." Besides, the Court of Chancery was itself a superior court of common law.

The LORD CHANCELLOR said, it was probable the attention of the Vice-Chancellor had not been called to the 18th section of the act, which it seemed difficult to interpret without considering the judges referred to as those sitting in the courts where the judgment was given. By the section he had named, the same powers were extended to the judges of courts of equity, as had been previously conferred upon the judges in courts of law. This seemed conclusive as to the meaning of the 14th section on the point, but he would speak with the Vice-Chancellor before he finally disposed of the question.

His Lordship afterwards gave judgment, and said, the question was whether the courts of equity had the power to make orders creating a charge on stock belonging to a debtor in favour

of a judgment creditor. His Lordship observed, that he had conferred with the Master of the Rolls and the Vice-Chancellor, and they both agreed the order ought to be applied for in the courts of common law. The Master of the Rolls doubted his jurisdiction, and though the Vice-Chancellor had made such orders, his attention had not been drawn to the objection.

#### COURT OF REVIEW—March 16.

FIAT AGAINST ——— WOOD.

*Ex parte Wood.*

LIABILITIES OF JOINT STOCK SHAREHOLDERS —the right of a Creditor of a Joint Stock Company to make a SHAREHOLDER a BANKRUPT.

Mr. Swanston appeared in support of this petition, which, in order, if possible, to prevent the appearance of the advertisement of adjudication in the Gazette, asked that the fiat might be annulled, on the ground that there had been no act of bankruptcy, and that the debt of the respondent was not such a debt as could clothe him with the right of acting as a petitioning creditor. Mr. Tomkinson, the respondent, sought payment of 3,000*l.* out of the alleged bankrupt estate, on the ground of his liability as one of the shareholders of the Imperial Bank of England. The fiat issued on the 6th of the present month. The question was, whether the creditor of a partnership could at once, as holder of a bill of exchange, issue a fiat without bringing an action, and becoming entitled by judgment and execution. The petitioner, Mr. Nicholas Price Wood, was a registered shareholder, but disputed his liability on the debt of a bill-holder of the Imperial Bank, who had not taken legal proceedings as bill-holder.

Mr. Anderdon, for the respondent, asked to meet the petitioner's application to annul the fiat, the matter not being yet ripe for hearing, but brought on by special application to stay the advertisement; but objected to any postponement of the insertion in the Gazette.

Mr. Swanston would have consented to the delay, but the non-compliance of the other side drove him to ask the Court to annul the fiat in the absence of proof of an act of bankruptcy.

Sir G. Rose said, any interference between adjudication and advertisement must be authorized by the appearance of some defect in the proceedings. He had looked at them with a view to assist the applicant, but could not say there was not evidence of a debt and act of bankruptcy.

Mr. Swanston then submitted a point of law. By virtue of the contract the respondent entered into with the bank, he had no right except under the act by which the bank was constituted (7th George IV.) It did not give a right to sue out a fiat against

elder, and the respondent could have no right except under it. The debt in question was not a debt with privilege of issuing the now sought.

J. CROSS said, this was a new question on the act of Parliament, and involved a point of importance to the community. This was a sufficient reason why the alleged bankrupt should not be allowed time, by the suspension of the proceedings, to bring the matter before the Court. The Court listened to hear if there was any valid objection to the step by a creditor of making a share of a bankrupt. The 9th section of the act of proceedings against the registered officer was not in inconvenience in process. The act did not take away the right of suing against individual partners, but in suing the officer who represents the whole company, judgment against the officer is also judgment against the whole of the company, with the right of process by action on the goods of each partner. The question arose whether this gave a right to sue out a writ of prohibition in the act prohibited it; and there was a common law right, existing before the act, to sue out a writ against any one of a body of persons on commission of an act of bankruptcy, although not having been expressly taken away, it was sufficient to support the writ against Mr. Wood. The only question now left was the absolute disposal was the suspension of the proceedings. It had been already temporarily suspended to allow the petitioner time to shew that there was no debt. Now, it had been fully heard, and the Court was of opinion that the writ was not to be stayed, there being apparently no objection to the petitioning creditor's debt.

G. ROSE coincided. His opinion of the writ was conclusive to the purpose of not interfering to stay the adjudication and advertisement. The petitioner ought, however, to have the right of objecting to the proceedings, and might then have had measures he might think fit. The advertisement in the Gazette not stayed; the writ to stand over; the petitioner to have the writ of access to inspect the proceedings, so far as they related to the act of bankruptcy and petitioning creditor's debt: costs reserved.

## REAL COMMISSION — MONMOUTH.

### FROST'S TRIAL.

(Continued from p. 224.)

A witness was called by the name of Mary Jones, which was to prove that he was at home at the time before, and that was so far important, as he could not have been at Pie-corner at the time he mentioned; if he was at home at the time he stated, a distance of 12 miles off, he could not have been at Pie-corner at the time he was given; and if he was not, and was stating a

conversation when he was not there, that would make him a witness upon whom they could place no reliance, and therefore they must consider first whether he was entitled to any credit at their hands. Mary Jones said he was in bed about 8 or 9 o'clock. Then, however, the inquiry was shifted—was she the witness of truth, because they could not set up one against the other unless they were satisfied one was superior to the other? This woman was at variance in her statement with the man Hodges, but in answer to her testimony they called another witness on behalf of the Crown, and they desired then to infer that Mary Jones could not be correct in her statement, and this was a man of the name of Watts, who stated that he saw Hodges, at half-past 7 in the morning, about three miles from Pie-corner, and that he knew the time from having looked at his watch and from the time of the morning. There was a man on horseback riding past to the tramroad, and he met Hodges by the Welch Oak. If this man was correct, then the evidence of Mary Jones could not be true; but it was for them to make up their minds upon the manner in which the witnesses gave their testimony, their appearance, and still more upon the probability of the circumstances to which they spoke. Then an inquiry, and a very proper one, was made, whether the witness had not been taking an active part for the prosecution—whether he had not been a busybody, getting up evidence; because if a man was so busy in assisting to get up the cause in which he was to be a witness, that would weaken his evidence. He said he had rendered assistance, and would do so again; that he was a constable. That was the direct contradiction offered to the testimony of Hodges,—that being extremely important as to what he heard at Pie-corner, it was for them to decide. The question of contradiction of evidence rested with the jury. For the defence they put in the deposition of Hodges before the magistrates in order to show that he had omitted in his deposition one or two things he had stated in this Court. The object, and a very proper one it was, was to show that he had not given an account in his deposition of the conversation which yesterday he had given as having taken place between the man in the glazed hat and the other person. The reason he had given was that he was not examined so particularly before the magistrates as he was in court, that he was told to state what he knew about Mr. Frost, and, inasmuch as this was not a statement made by Frost, he, in his own mind, thought it was not included in the general direction to state what took place. That was the reason he gave: it was an important piece of evidence, and one could not but wonder that matter of such importance should have been omitted in the first examination, but whether he

was speaking truly or falsely was for their consideration; whether he had given a sufficient reason or not, they must judge of it for themselves. Therefore, with respect to this witness, James Hodges, the testimony he had given was liable to two strong observations on the other side—namely, the contradiction of Mary Jones, and the omission on a former occasion of that which he now put forward as having been said by the man in a glazed hat.

The next witness, George Lloyd, spoke to the proceedings that took place in the adjoining parish, when Zephaniah Williams was supposed to have come down. It was no direct evidence against Mr. Frost; it was no immediate testimony to show that this observation about the necessity of being at Newport at two in the morning, was either communicated to Mr. Frost or adopted by him; but it was a feature in the case that another person connected with him did say the intention was to be in Newport by two o'clock. It was only matter of evidence, which they were to adopt or not, that this was ever communicated to him. In point of fact, they did not arrive till nine in the morning.

Then came James James; and he says, that orders were given that the men on the mountains were to arm themselves, and to provide themselves with victuals for their support; and afterwards he found those on the hills armed pretty much in the same way as the others. They would give all the weight it deserved as to that particular department of the men who were to come with Zephaniah Williams. According to his statement, he did not expect anything of that serious nature at Newport which afterwards occurred. Some of the persons had arms with them at the time, and therefore to the observation made that they did not intend there should be any conflict or danger arising from the arms, they would give their own meaning. Zephaniah Williams, he said, had told them to keep the peace. That was an observation denoting that he was rather disposed to gain his purpose by keeping the peace, and not by breaking it. But this again, they must recollect, was some time before the riot.

In the examination of William Howell, he stated that Zephaniah Williams had told him there was to be a large meeting on the mountain, and they were to take something with them to defend themselves, for fear that some people might interrupt them. The danger of large bodies of persons carrying arms to defend themselves was that they might attack as well as defend. He did not state that there was any object at that time to come down from the mountain, and therefore one did not exactly see what danger there would be to require any arms for the purpose of defending themselves. Whether there were any persons on the look-out for

them there was no evidence, but the statement the witness made was that the arms were taken by them for the purpose of defending themselves if they were interrupted.

After reading the evidence of Mr. Brough, who had been released by Frost from the custody of the Pontypool men, the learned Judge said it had been used on the part of the prosecution, and also by the counsel for the prisoner. On the part of the Crown, the witness was produced to convince the jury of the power Frost had over the whole of those who were on the following morning found in the town of Newport. The men, who had only spoken of Jones before as their leader, immediately Frost expressed the wish, allowed Mr. Brough and his companions to go at large. On the part of the prisoner, the evidence of Mr. Brough was used for the purpose of showing that Frost, being a man of humane and kind disposition, ready to do a kind action to persons, at the very time, would not be guilty of the enormities charged against the prisoner.

Mr. Kelly.—Pardon me, my Lord, we also used Mr. Brough's evidence for the purpose of showing that Frost was at the Welch Oak at day break.

The CHIEF JUSTICE said he was very much obliged to the learned counsel. The evidence was also used by the prisoner as a contradiction of Hodges' evidence, as to the time when the conversation occurred with the prisoner at the corner.

The learned Judge then commented on the evidence of John Harford, another important witness as to the declarations made by the prisoner at the bar. The ground, said his Lordship, which the cross-examination of this witness submitted to the jury to invalidate the weight attached to it was that, in the first place, a man had been imprisoned on a charge of being concerned in the transaction they were now inquiring into, and was, therefore, to be looked on as an accomplice, and liable to the same objections to which a partner in guilt with the prisoner was at all times subject. The answer the witness gave to that was, that all the he had in the transaction consisted in his being present with a sword in his hand, but against will, and he undertook to say that he was not afraid of anything that might happen to him, being convinced as soon as he told his story to the magistrates, not having willingly participated in any act of criminality, he would be released. It should be remembered that people were often found to consult their own safety by giving evidence for the Crown against a prisoner in the situation of the man at the bar: and their object being to save themselves rather than state the truth, they sometimes would make out a case against others unfavourable to themselves.

(To be continued.)

LIST OF SHERIFFS, UNDER-SHERIFFS, THEIR DEPUTIES, AND AGENTS,  
FOR 1840.

are granted in Town for all places except Exeter, Durham, Cinque Ports, Cardiganshire, Glamorganshire, Lancashire, and Kingston-upon-Hull.

<i>Counties, &amp;c.</i>	<i>Sheriffs.</i>	<i>Under Sheriffs.</i>	<i>Deputies for granting Warrants, &amp;c. and Town Agents.</i>
DESHIRE.—William Frederick			
n, of Dunstable, Esq.			
IRE.—Henry Hippisley, of Charles James Barnes, Messrs. Rickards and Walker,			
orne-place, Esq.	Esq. Lambourn.		29, Lincoln's-inn-fields.
KE-UPON-TWEED.			
, City of.—Richard Vaughan, William Ody Hare, Esq. Messrs. Bridges and Mason, 23,			
	Bristol.		Red-lion-square.
GHAMSHIRE.—John Peter Deer- J. Rumsey, Esq. High Messrs. Alexander, Gem, and			
f the Lee, Esq.	Wycombe (A. U. Mr. Pooley, 60, Lincoln's-inn-		fields.
	H. Hatten, Aylesbury).		
IDGE and HUNTS.—T. Mort- Charles Pestell Harris, Esq. Messrs. Taylor, Sharpe, Field,			
of Little Abingdon, Esq.	Cambridge.		and Jackson, 41, Bedford-row.
BURY, City of.—James Fyfe, Thomas Wilkinson, Esq. Mr. Thomas Kirk, 10, Symond's			
	Canterbury.		Inn.
RE.—John Tollemache, of Til- Thomas Bond Dumville, Mr. John Cole, 4, Adelphi-ter-			
Lodge, Esq.	Esq. Tarporley.		race, Strand.
R, City of.—Thomas Griffith, Finchett Maddock, Esq. Messrs. Philpot and Stone, 3,			
	Chester.		Southampton-st., Bloomsbury.
PORTS.—His Grace the Duke Thomas Pain, Esq. Dovor. Messrs. Egan, Waterman, and			
llington.			Wright, 23, Essex-st., Strand.
LL.—Sir Richard Rawlinson, P. P. Smith, Esq. Truro. Messrs. Adlington, Gregory, and			
in, of Trelowarren, Bart.			Co. 1, Bedford-row.
RY, City of.—Samuel New- Messrs. Troughton and Messrs. Austin and Robson, 4,			
Esq.	Lea, Coventry.		Raymond-buildings.
LAND.—Sir George Musgrave, Thos. Dobson Bleaymire, Mr. Addison, 8, Mecklenburgh-			
in Hall, Bart.	Esq. Penrith.		square.
IRE.—Sir Henry John Jo- John Barber, Esq. Derby. Mr. George Capes, 48, Bedford-			
Hunloke, of Wingerworth, Bt.			row.
IRE.—Augustus Stowey, of Charles Brutton, Esq. Ex- Messrs. Brutton and Clipperton,			
try, Esq.	eter.		17, Bedford-row.
SHIRE.—J. S. W. S. Erle Drax, H. M. Aldridge, Esq. Messrs. Cuvclge and Co. South-			
arborough Park, Esq.	Poole.		ampton-buildings.
I.—Sir Hedworth Williams, of John Bramwell, Esq. Mr. James Griffith, 6, Ray-			
urn Hall, Bart.	Durham.		mond-buildings.
-Christopher Thos. Tower, of Thomas Morgan Gepp, Mr. T. W. Nelson, 1, New-			
l Hall, Esq.	Esq. Chelmsford.		court, Temple.
, City of.—Richard Bastard, Richard Thomas Abra- Mr. H. T. Shaw, 18, Ely-place.			
	ham, Esq. Exeter.		
STERSHIRE.—Sir M. H. Beach, John Burrup, Esq. Glou- Messrs. Jones, Trinder, & Tud-			
lliamstrip Park, Fairford, Bart.	cester.		way, 1, John-st. Bedford-row.
STER, City of.—Charles James Thos. Bailey, Esq. Glou- Mr. Wilton, 16, Gray's-inn-			
t, Esq.	cester.		square.
IRE.—John Meggott Elwes, Charles Seagrim, Esq. Mr. Sowton, 27, Great James-			
ssington House, Esq.	Winchester.		street, Bedford-row.
ORDSHIRE.—Thomas Heywood, Thos. Evans, Esq. Here- Mr. C. G. Jones, 11, Gray's-			
pe End, Esq.	ford.		inn-square.
ORDSHIRE.—Charles Snell George Nicholson, Esq. Messrs. Hawkins, Bloxham, and			
ncey, of Little Munden, Esq.	Hertford.		Stocker, 2, New Boswell-court.
—Arthur Pott, of Bentham Hill, William Woodgate, Esq.			
bridge Wells, Esq.			
ON-UPON-HULL.—William Thos. Holden, Esq. Hull. Messrs. Hicks and Marris, 5,			
res, Esq.			Gray's-inn-square.
SHIRE.—Thomas Fitzherbert Messrs. Pilkington and Mr. Fiddy, 14, Serjeants'-inn,			
holes, of Claughton Hall, Esq.	Walker, Preston.		Fleet-street.

Counties, &c.	Sheriffs.	Under-Sheriffs.	Deputies, &c.
LEICESTERSHIRE.—Sir George Joseph Palmer, of Wanlip, Bart.			
LITCHFIELD, City of.—Halford Wotton Hewitt, Esq.	John P. Dyott, Esq. Litchfield.	Messrs. R. M. and C. Bazeley, 48, Lincoln's-inn-fields.	
LINCOLNSHIRE.—Thomas George Corbett, of Elsham Hall, Esq.	John Nicholson, Esq. Brigg.	Messrs. Dyneley, Coverdale, and Lee, 1, Field-court, Gray's-inn.	
LINCOLN, City of.—George Bailey, Esq.	Richard Mason, Esq. Lincoln.	Messrs. Willis, Bower, & Willis, 6, Tokenhouse-yard.	
LONDON, City of.—William Evans and John Wheelton, Esqs.	Thomas France, Esq. Bedford-row.	24, Secondary's Office, Basinghall street.	
MIDDLESEX.—Ditto	ditto	Henry Jackson, Esq. 15, St. Helen's-place.	Messrs. Burchell and Co. Red lion-square.
MONMOUTHSHIRE.—Summers Harford, Esq.	Henry Mostyn, Esq. Usk.	Messrs. White and Whitmore, 2, Bedford-row.	
NEWCASTLE-UPON-TYNE.—Robert Boyd, Esq.	William Dunn, Esq. Newcastle.	Messrs. Clayton and Cookson, New-square, Lincoln's-inn.	
NORFOLK.—Henry Villebois, of Marham House, Esq.	Fred. Browne Bell, Esq. Downham Market.	Messrs. Taylor, Sharpe, Field, and Jackson, 41, Bedford-row.	
NORWICH, City of.—John Barwell, Esq.	A. Dalrymple, Esq. Norwich.	Messrs. Adlington, Gregory, Faulkner, and Follett, 1, Bedford-row.	
NORTHAMPTONSHIRE.—Thomas Alderson Cooke, of Peterborough, Esq.	Christopher Markham, Esq. Northampton.	Messrs. King, Robinson, Ouseley, 13, Tokenhouse-yard.	
NORTHUMBERLAND.—William Lawson, of Longhirst, Esq.			
NOTTINGHAMSHIRE.—Sir J. Granville Juckes Clifton, of Clifton, Bart.			
NOTTINGHAM, Town of.—Jonathan Nevill, Esq.	Christopher Swann, Esq. Nottingham.	Messrs. Holme, Loftus, and Young, 10, New-inn.	
OXFORDSHIRE.—Hugh Hammeraley, of Haseley, Esq.	Samuel Cooper, Esq. Henley-upon-Thames.	Mr. Charles Berkeley, 52, Lincoln's-inn-fields.	
POOLE, Town of.—Ambrose Tucker, Esq.	Thos. Arnold, Esq. Poole.	Mr. George Weller, 29, East street, Strand.	
RUTLANDSHIRE.—Samuel Richard Fydel, of Morcott, Esq.			
SHROPSHIRE.—Thomas Eyton, of Eyton, Esq.	Joshua John Peele, Esq. Shrewsbury.	Mr. Harvey B. Jones, 22, Attin Friars.	
SOMERSETSHIRE.—John Jarrett, of Camerton, Esq.	Edward Coles, Esq. Taunton.	Messrs. W. & E. Dyne, Lincoln's-inn-fields.	
SOUTHAMPTON, Town of.—John Hole, Esq.	Richard Blanchard, Esq. Southampton.	Messrs. Davies and Cleobury, Warwick-street, Regent-st.	
STAFFORDSHIRE.—Henry John Pye, of Clifton Hall, Esq.	Francis Willington, Esq. Tamworth.	Messrs. Swain, Stevens, & Co. Frederick's-place, Old Jewry.	
SUFFOLK.—George St. Vincent Wilson, of Redgrave, Esq.	John Jackson, Esq. St. Edmunds.	Messrs. Dixon, 5, New Bow court.	
SURREY.—The Hon. J. P. Locke, King, of Woburn Farm, Chertsey.	Mr. Potter, Guildford.	Messrs. Jenkins and Abbott, New-inn.	
SUSSEX.—John Davies Gilbert, of Eastbourne, Esq.			
WARWICKSHIRE.—Dempster Fleming, of Caldecott, Esq.	J. W. Unett, Esq. Birmingham.	Messrs. Tooke and Son, Bedford-row.	
WESTMORELAND.—The Earl of Thanet.	John Heelis, jun. Esq. Appleby.	Mr. George Mounsey Gray, Staple-inn, Holborn.	
WILTSHIRE.—William Henry Fox Talbot, of Lacock Abbey, Esq.	West Awdry, Esq. Chippenham.	Messrs. Nethersole and Burt, 15, Essex-street, Strand.	
WORCESTERSHIRE.—James Foster, of Stourbridge, Esq.	George Clarke, Esq. (A. U. Messrs. Gillam and Son, Worcester.)	Messrs. Cardale and Hill, Bedford-row.	
WORCESTER, City of.—William Corles, Esq.	Edward Corles, Esq. Worcester.	Mr. Becke, 59, Lincoln's-inn-fields.	

<i>Muties, &amp;c.</i>	<i>Sheriffs.</i>	<i>Under-Sheriffs.</i>	<i>Deputies, &amp;c.</i>
IRE.—Sir Clifford Constable, James Russell, Esq. York.			Messrs. Beaven and Anderson,
ton Constable, Bart.			2, Adelphi-terrace.
City of.—William North, Esq. John North, Esq. York.			Messrs. R. M. and C. Baxter,
			48, Lincoln's-inn-fields.

**SOUTH WALES.**

SHIRE. — Richard Douglas Henry Mayberry, Esq.	Messrs. I. Gregory and Son, 12,
h, of Yniscedwin, Esq.	Brecon. Clement's-inn.
ANSHIRE. — John William Horatio Hughes, Esq.	Messrs. Hawkins and Co. 2,
, of Llanarchayron, Esq.	Aberystwyth. New Boswell-Court.
THEN, Borough of.—John Philip Griffith Jones, Esq.	Messrs. Poole and Gamlen,
l Davis, Esq.	Carmarthen. Gray's inn-square.
THESHIRE. — John Lloyd	
of Glanwilly, Esq.	
IGANSHIRE. — Michael Wil- C. B. Mansfield, Esq.	Messrs. Holme, Loftus, and
h, of Scorrer, near Truro, Esq.	Swansea. Young, 10, New-inn.
KESHIRE. — Richard Llewellyn, William Lock, Esq.	of Messrs. Norris, Allen, & Simp-
gwynt, Esq.	Tenbey. son, 19, Bartlett's-buildings.
SHIRE. — Edward Roger, of Thomas Stephens Rogers, Messrs. Meredith and Reeve, 8,	Esq. of Kingston. New-square, Lincoln's-inn.
ge Park, Esq.	

**NORTH WALES.**

IA. — Sir Love Parry Jones Messrs. Williams & Breese Messrs. Williams and Roberts,	
of Madryn, Bart.	of Pwllheli (A. U. Mr. 38, Hatton-garden.
	Owen Owen, of Gadlys,
	near Beaumaris.)
VONSHIRE. — The Hon. Edw. Messrs. Williams & Breese, Ditto	ditto
n Lloyd Mostyn, of Plas Hen.	of Pwllheli.
SHIRE. — Townshend Main- Richard Williams, Esq.	Mr. Dean, Essex-street, Strand.
g, of Marchwiel Hall, Esq.	Denbigh.
IRE. — William Shipley Con- C. W. Wyatt, Esq. St.	Messrs. Bloxam and Ellison, 2,
of Bodryddan, Esq.	Asaph. Lincoln's-inn-fields.
THESHIRE. — George Price Messrs. Williams & Breese, Messrs. Williams and Roberts,	
, of Plasyndre, Esq.	of Pwllheli. 38, Hatton-garden.
MERTSHIRE. — Thomas Evans, Thomas Edmund Marsh, Mr. E. S. Bigg, 38, Southamp-	
ton, Esq.	ton-buildings.

**FREEDHOLD ENFRANCHISEMENT**  
 LL.—(Continued from p. 318.)

*Payment to Steward.* Sums payable to the steward for compensation to be paid to executors or administrators.

*Receipts to be Discharges.* Receipts to whom money directed to be paid to the charge person making payment; and, in evidencing payment, the steward shall, for compensation, forthwith after payment, to payment for enfranchisement from the rights, forthwith after production of the same, signed by the party entitled to the same, enter, on the copy apportionment, be deposited with him as aforesaid, a return of such payments; and such return shall be sufficient evidence of such payments, and discharge lands and person from the sums therein mentioned to be

*Lands to become Freehold, &c.* From the final confirmation and apportionment

the lands therein comprised shall, subject to the payment of the enfranchisement consideration in favour of lords and stewards as aforesaid, become and be of freehold tenure, and all mortgages affecting the same shall be deemed and become mortgages in fee of the same lands, if such enfranchisement consideration shall be paid off; and, if not so paid off, mortgages in fee of the equity of redemption thereof, subject to such mortgage estates respectively as aforesaid, for securing such consideration; provided that nothing in the act contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached to such lands notwithstanding the same shall become freehold.

*71. Reservation of Lord's other Rights.* The act not to affect rights of lords of manors to escheats, fairs, markets, appointments, franchises, royalties, rights of chase and in game, fisheries, &c., or any rights in mines or minerals, save that the person whose lands shall be enfran-

chised, his heirs, &c. shall have right to dig for, raise and get stones, lime, slate, clay, brick-earth, turf, or peat.

**72. Substituted Titles.** The lands enfranchised shall be deemed to be held under the same title up to the time of enfranchisement as that under which the same were held at the time of the enfranchisement, and shall not be subject to any estates, rights, titles, interests, incumbrances, claims, or demands affecting the manor of which the same were holden.

**73. Power to Lords and Tenants to effect Enfranchisements independent of the Act.**

For the purpose of affording to the lords and tenants respectively the opportunity of obtaining an enfranchisement of their respective lands, free from any delay or expense under this act, it shall be lawful for the lord and tenants of any manor (whatsoever may be their interest therein), with the consent of the commissioners under this act, at any time or times before such agreement for enfranchisement as aforesaid shall be entered into, to enfranchise any of the lands holden of the said manor, in consideration of a sum of money to be agreed on between them and the tenants affected, and certain facilities are given to such enfranchisements.

**74. How such Enfranchisements may be effected.**

Every such enfranchisement shall be made by such conveyance, deed, or assurance as would be adopted for effecting such enfranchisement if the lords were seised of the manor for an absolute estate of inheritance in fee simple in possession.

**75. Agreements, Contracts, and Awards not to be liable to Stamp Duties.**

No agreement, award, or power of attorney made or confirmed or used this act chargeable with any stamp duty.

**76. Correspondence of Commissioners relating to this Act to be free of Postage.**

**77. False Evidence to be deemed Perjury. Withholding Evidence a Misdemeanor.**

**78. Limitation of Actions against Commissioners, Assistant Commissioners, Justices of the Peace, &c.**

**79. Proceedings under this Act not to be quashed for Want of Form, nor to be removed by Certiorari.**

**80. Limits of Act.**

**81. Act may be altered this Session.**

**82. Interpretation Clause.** In construction of act, unless something in subject or context repugnant to such construction, the words after mentioned, or similar words, to extend to and be construed as herein provided; (that is to say,)

The word "Manor" shall extend to manor or reputed manor, of whatsoever tenure the same may be.

The words "lord" and "steward" shall include the person or persons for the time being filling those respective characters, or acting in those respective capacities, whether those persons shall be lawfully or rightfully entitled to fill such characters or act in such capacities or not.

The words "tenant" or "tenants" shall extend to and comprise persons holding by Copy of Court Roll or as customary tenants, or holding lands subject to any manorial rights, and whether holding to them and their heirs, or for life, or in any other manner whatsoever.

The words "land" or "lands" shall extend to and comprise all lands, of whatever tenure, holden of the manor, and whether the interests therein to be affected shall be an estate of inheritance in fee, or for life or lives, absolute or qualified, or for any other estate or interest whatsoever.

The word "enfranchisement" shall mean and include the commutation or discharge of all lands holden of a manor from heriots or any manorial rights.

The word "person" or "party" shall extend to and include the Queen's Majesty, and any body politic, corporate, or collegiate, as well as an individual.

Every word imputing the singular number only shall extend to and include several persons or parties as well as one person or party, and several things as well as one thing respectively, and the converse.

And every word imputing the masculine gender only shall extend to and include a female as well as a male.

## NEW FORMS OF WRITS.

(Continued from page 314.)

### No. III.

*Writ of Capias ad Satisfaciendum*, on an order of the Court of Queen's Bench, for payment of money and costs.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to the Sheriff of ———, greeting. We command you that you take C. D. if he shall be found in your Bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof to satisfy A. B. £——, which lately in our said Court before us at Westminster, by a rule of our said Court entitled, &c. [as the case may be], were by the said Court ordered to be paid by the said C. D. to the said A. B., together with the costs of the said rule, which said costs were afterwards on the ——— day of ———, the year of our Lord ——— taxed and allowed.

the said Court, at the sum of £—, and  
to satisfy the said C. D., the said sum  
—(a), together with interest upon the  
several sums of £— and £—,  
at the rate of four pounds per centum per  
annum, from the said — day of — in the  
year of our Lord —(b), and have there then  
written.

Witness, Thomas Lord Denman, at West-  
minster, on the — day of —, in the year  
of our Lord —.

## No. IV.

*f Capias ad Satisfaciendum*, on a Judge-  
ment in an inferior Court in an action of  
detainer, removed into the Court of Queen's  
Bench.

Whereas, by the Grace of God, of the  
Kingdom of Great Britain and Ireland,  
Defender of the Faith; to the She-  
—, greeting. We command you,

to take C. D. if he shall be found in  
any place and him safely keep, so that  
he may have his body before us at West-  
minster, immediately after the execution  
of the writ to satisfy A. B. £— which the said  
Court at [insert the style of the Court,]  
in its judgment of the said Court recovered  
of the said C. D. for his damages which  
he sustained, as well on occasion of the  
performing certain promises and under-  
takings then lately made by the said C. D. to  
the said A. B., as for his costs and charges  
about his suit in that behalf expended;  
and if the said C. D. is convicted, as appears  
of record, and which judgment was  
given on the — day of — in the  
year of our Lord —, removed into our Court  
at Westminster, by virtue of an  
order of our said Court before us at Westmin-  
ster of —, one of the Justices of our  
Court before us at Westminster, as the  
style be,] in pursuance of the statute in  
that behalf made and provided, and the costs  
incurred upon the application for the said  
removal and upon the said removal were on the  
day of —, in the year of our Lord —  
and allowed by our said Court before us  
at Westminster, at the sum of £—, and  
to satisfy the said A. B. the said sum  
—(c), together with interest upon the

the amount of the costs taxed.  
the day on which the costs of the rule were taxed,  
if it were prior to the 1st of October, 1836, say  
the 1st day of October, in the year of our Lord

the costs attendant upon the removal of the  
case out of the inferior Court into the Court of  
Queen's Bench.

said two several sums of £— and £—,  
at the rate of four pounds per centum per  
annum, from the said — day of —, in  
the year of our Lord —,(d) and have there  
then this writ.

Witness Thomas Lord Denman, at West-  
minster, on the — day of —, in the year  
of our Lord —.

(To be continued.)

## TO THE EDITOR OF THE LEGAL GUIDE.

March 17, 1840.

SIR,—I should not have troubled you with  
the following remarks, but for the very great  
error your correspondent R. H. has com-  
mitted in answering Problem 13, vol. 3,  
which runs thus: "Writ of summons: de-  
scribe this writ: What are the requisites of  
this process, and the proceedings to compel  
an appearance where the defendant can be  
served?" The first and second points raised  
by the problem, R. H. says have been elabo-  
rately answered by C. B. With regard to  
that I most readily agree with R. H. But  
with respect to the part of the problem which  
says, "What are the proceedings to compel  
an appearance when the defendant can be  
served?" R. H. informs us what we are to  
do if the defendant cannot be served; con-  
sequently he has given us an answer just the  
reverse to what the problem required.

I hope, whilst making the above remarks,  
it will not be supposed that I impute the  
least carelessness or partiality upon the  
learned Editor of this truly valuable work;  
my only motives being to point out to R. H.  
the great error he has committed, (for if  
R. H. will refer to pp. 147 and 163, vol. 2,  
he will see that C. B. has given us informa-  
tion upon the proceedings necessary for a  
distringas), and to submit to the learned  
Editor whether this answer is or is not a  
proper answer to the problem which was  
asked.

I remain, Sir,

Your obedient servant,

S. A. W.

(d) The day on which the costs of removal were  
taxed.



## NOTICE TO CORRESPONDENTS.

W. M.—E. A. or, E. D.—R. H.—L. P.  
—W. A.—S. T.—I. I.—I. A.—M. W.—W.  
R.—S. C.—B. B.—all under consideration.

An Articled Clerk.—You must not place reliance on the *first* book named in your letter. The *second* needs no comment, but you must in these days of *constant change* assist its reading with modern authorities. The *third*, if one of the modern editions, you must read cautiously. The information you seek, you will find in Vol. I. of this work, p. 175.; take the new edition of the first work there mentioned. No Gentleman, wishing to pass the examination, should be without.

"UNUS à MULTIS."—Every Articled Clerk must continue and be actually employed by the Attorney or Solicitor to whom he is articled, or by his Agent, in the proper business, practice, or employment of an Attorney or Solicitor during the entire period of five years; and of that time *one year only* may be served with the Agent; and he may serve, not exceeding *one year*, as pupil to a practising barrister or certificated special pleader.

A. H.—Does not the preceding notice also answer your questions? if not, write again.

Δ.—It is not within our rule to answer cases (if at all), *twice*. We will endeavour next week to comply.

RICHARD ROE.—To do as you require would be equal to an advertisement. Our publisher will send you the number (vol. i. no. 11.) if you require it.

R. H.—See letter by S. A. W.

## NOTICE TO SUBSCRIBERS.

Letters continue to arrive requiring the *double number*, but the applicants are still in a *minority*. We may add, in reply to many, that the extra sheet would be exclusively devoted to clearing off OUR MONTHLY ARREAR; after we shall have got rid of our large *stock on hand*. We shall most certainly not copy the London Gazette or Lloyd's List.—We had hoped to have given answers to two problems this week; that is however impossible.

AMICUS.—We have *some* assents to your proposition. (See the letter *ante*, p. 320.)

## ERRATUM.

*Ante*, p. 307.—Col. 1, line 8 from the top, for "*sued*" read "*served*."

On April 1, will be published, *price 4s. 6d.*  
*continued Monthly, Vol. IV. Part III.*

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# The Legal Guide.

[III.]

SATURDAY, MARCH 28, 1840.

[No. 22.]

## THE LAWS OF REAL PROPERTY.

### ESSAY II.

3 & 4 Wm. IV. cap. 74.

*Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.*

(Continued from page 322.)

#### PROTECTOR OF A SETTLEMENT.

#### TRUSTEES TO SUPPORT CONTINGENT REMAINDERS.

The last point to be considered is, what will be the effect of the fine and recovery?

As to the fine, it hath been insisted that it is a feoffment upon record, and that a fine by tenant for years is not void; as to the recovery, it must be considered either as a lease for years, or as a fine of a reversion in tail; fines of lessee for years, I think, are not absolutely void, but operate by way of estoppel, and therefore bar the claimant under them; a reversioner who takes by a fine, for this reason, and it bars him in tail, but it can never be considered that the fine of a reversioner can get him the estate; let us therefore consider it as a fine of a lessee for years; it has been insisted that a lessee for years in this case might be barred all remainders by a feoffment; that a fine *sur done grant* and renders it a gift, which means a feoffment,

and therefore is equivalent to a feoffment. I am of opinion that even a feoffment would not have been a bar unless the trustees had been asleep, for they might have immediately entered and possessed the estate, if they had lain by till the recovery had been perfected, that might have been a bar, but that is not to be supposed. It has been said that a fine supposes a feoffment, but the word *done*, though it sometimes signifies a feoffment, has many other significations; it may signify grants of incorporeal inheritances, which will not pass by feoffment, and therefore does not necessarily suppose a feoffment. A feoffment differs very materially from a fine, for in notoriety of fact, the feoffment is supposed to be made openly upon the land, and the feoffee is immediately put into the possession, but a fine has nothing public except the proclamations; and, therefore, by the Act of Parliament of 4 Henry 7, nonclaim runs only from the proclamations; whereas, if a fine supposes a feoffment, it will have its effect from the time of acknowledging, which is a private transaction; a feoffment can only lie of land, a fine may be of tithes and in other corporeal inheritances.

Great weight has been laid upon Lord Coke's authority, who says a fine is a feoffment upon record; he was certainly a great man, which has made some people think every thing he says is right, though he has his mistakes; but in answer to it, I shall offer two or three great authorities, and one

[III.]

Z

of equal age and authority with Lord *Coke*: In the cases that were cited at the bar, it was determined by Lord Chief Justice *Holt* and Lord *Macclesfield*, that a fine was a feoffment upon record, when the party had such an estate as will entitle him to levy a fine, that is, an estate of freehold; otherwise a fine has no effect whatsoever with respect to a stranger, and operates as an estoppel only, and bars none but the party claiming under it.

As to the authority I promised which was equal to the authority of Lord *Coke*, it is Lord *Coke* himself, who in the page before that of the case cited Co. Lit. 9, a, has these expressions: a feoffment is the most ancient and sure way of conveyance, both for that it is solemn and public, and therefore best proved, and also for that it cleareth all disseisins, &c. which cannot be done even by fine and recovery; so that it is Lord *Coke's* own opinion that a feoffment can effect that which a fine and recovery cannot; and therefore it cannot longer be maintained that he has laid it down, a fine is to all purposes a feoffment upon record.

It was said that if a fine was void in this case how would it make a forfeiture? there are sure many cases where an act may be void as against another, and yet be a forfeiture to the person. I will give one instance, that of a copyhold tenant. A lease made by him is certainly void against the lord, and yet is a forfeiture.

The Court was of opinion that the fine and recovery were no bar to the remainders.

## PROBLEM XXII. VOL. III.

### WRIT OF INQUIRY IN ORDINARY CASES.

What is this writ? In what cases is it necessary? How is it executed, and in what manner is execution had after verdict?

TO THE EDITOR OF THE LEGAL GUIDE.

## ANSWER TO PROBLEM VI.

VOL. 3. p. 84.

What is an estate tail by implication?

On the creation of an estate tail by deed it is absolutely necessary to express that the heirs are to be of the *body* of a person; for if by deed lands be given to a man and his heirs, male or female, the word "male" or "female" is rejected, and the donee takes fee simple.

An estate tail by implication, therefore, arises in those cases where the words "of the body" are not strictly required, but may be expressed by words which amount to as much.

If a person by *will* devise lands to a man and his heirs male, this, by construction of law, is an *express* estate tail, the law supplying the words "of his body;" but where express estates tail are not the subject of present consideration, I shall, in the solution of this problem, confine myself as strictly as possible to the object in view, and adduce the ten following instances, in each of which, an estate tail has arisen by implication.

1. Where a man devises to A. for his life, and then gives the subject of such devise over to B., after the failure of issue of A. In this case it clearly appears, that an *interest* only is given to A., and that the benefit is given to B. whilst there is no issue of A. The consequence is, that no interest springs to B., and no *express* estate is given after the death of A. The intermediate interest would be supposed of, unless A. were considered as taking for the benefit of his issue as well as of himself, and as the words in this case are susceptible of such an amplification, an intention in the testator is naturally implied, that A. should so take, that the property might be transmissible through him to his issue.

e was therefore considered as taking  
ate tail by implication, which would  
nd to such issue.

Where there was a devise to A. gene-  
and if he died without heirs or issue  
r general or special), then over it was  
ued an estate tail by implication in A.  
Where an estate was given to A. for  
nd if he died without issue, then to B.,  
likewise construed an estate tail in  
implication.

In a case where there was a devise to  
nd if he died leaving no child lawfully  
en then over, this was also considered  
in implied estate tail in A.

Where a testator having two sons, A.  
, devised that if A., his eldest son,  
happen to die and leave no issue of  
ly lawfully begotten, that then, and  
t case, and not otherwise, after the  
of his said son A., he gave and be-  
ed all his lands of inheritance in H.  
t., to have and to hold the same, after  
ath of the said A., to him and his  
it was held that A. took an estate tail  
plication, and that the limitation to  
is a remainder expectant on such  
tail.

It was also construed an estate tail by  
ation, where the devise was to "A.  
r maintenance, and after her death  
it issue," then to another.

And so, where the testator "made A.  
e heir, and if he died without issue,"  
ver.

In the case of a devise "to A., and if  
s no heirs, then over to his sister or  
collateral heir," the word heirs was  
ued heirs of the body, because A.  
not die without having heirs, if "his  
or other collateral heir" was living at  
ath, and therefore the word "heirs"  
onstrued heirs of the body, and accor-  
that devise was held to give an estate  
implication to A.

Where lands were devised "to the

three daughters of A. to be equally divided,  
and if any of them died before the other,  
then the others to be her heirs, equally to  
be divided, and if they all died without  
issue," then over, the devise was construed  
an estate tail by implication.

Lastly. Where a person seised in fee de-  
vised his lands to A. and his heirs, and if he  
died without issue then to B. In this case  
(as in all others of a similar nature) the  
death of A. without heirs was considered as  
a remote possibility, and the devise was qua-  
lified by the addition of the words "and if  
he died without issue," to give an estate tail  
by implication to A.

The above instances of an estate's tail aris-  
ing by implication, it will be observed, prin-  
cipally resulted from the state of the law  
before the passing of the statute 1 Victoria,  
cap. 26, "For Amending the Law relating  
to Wills." In wills made after the 1st of  
January, 1838, the rule of construction is  
now very materially altered by ss. 28 and  
29 of that statute in respect to devises similar  
to most of those above instanced, as giving  
estates tail by implication; it being thereby  
enacted, that where the expressions "die  
without issue," or "die without leaving  
issue," or "have no issue," or any other  
words occur which may import either a want  
or failure of issue of any person in his life-  
time, or at the time of his death, or an inde-  
finite failure of his issue, they shall be con-  
strued to mean a want or failure of issue in  
the lifetime or at the time of the death of  
such person, and not an indefinite failure of  
his issue, unless a contrary intention appears  
by the will. The effect of this enactment  
will be to give the first devisee an executory  
devise, defeasible on his dying without issue  
living at the time of his death, instead of an  
estate tail as heretofore, and this alteration  
in the rules of construction makes a very  
material alteration in the estate of the person  
entitled under the devise, over as well as in  
the quantity and value of the estate of the

first devisee, as the following example will shew:—

If the devise were to A. generally, or to A. and his heirs, and if he dies without issue to B.; or to B. and his heirs under the old rule of construction, A. took an estate tail, and of course as an inseparable incident thereto the power of acquiring the absolute ownership, by suffering a recovery which would bar B.'s remainder, whether it were for life or in fee; but now, by sec. 28 of the above-cited statute, the devise to A. without words of limitation carries the fee, and by sec. 29 above cited, the devise over gives a fee to B., to take effect in the event of A.'s dying without leaving issue living at his death, an executory devise, indefeasible by A.

E. A.

### Imperial Parliament.

#### HOUSE OF COMMONS—ENGLAND.

March 23.

Sir E. SUGDEN gave notice, "that if any measure were introduced into this House for the appointment of additional equity judges, unaccompanied by any improvement of the present appellate jurisdiction of the House of Lords, he should at some stage of the measure take an opportunity of drawing the attention of the House to the necessity of such improvement. This proposition he intended to make known he would lay before the House at an early day, so as to be printed with the votes."

March 24.

#### PRINTED PAPERS.

Printed Papers.—Petition of Thomas George Johnston Pearce (presented the 12th of March) read: Motion made, and question proposed—That Thomas George Johnston Pearce be released from the payment of the sum of 4l. 19s. being the cost of his maintenance during his confinement: and that the Sergeant-at-Arms be directed to supply the said Thomas George Johnston Pearce with rations free of expense." (Sir F. Burdett.) Amendment proposed, to leave out from "Thomas George Johnston Pearce" to the end of the question, in order to add the words "be discharged forthwith from the custody of the Sergeant-at-Arms attending this House," instead thereof: Question put,

"That the words proposed to be left out stand part of the question." The House divided,—Ayes, 98; Noes, 56.

### Law Reports.

#### ROLLS COURT.—Dec. 24.

##### IN RE BOORD SOLICITOR.

COUNTRY ATTORNIES AND THEIR LONDON AGENTS.—*Whether the Bill of Costs of a London Agent, upon the Application of the Country Solicitor, is or is not taxable; and if so, whether as of course or upon terms.*

Mr. Pemberton appeared upon the petition of Mr. Boord, a country solicitor, praying that his London agents, Messrs. Morris and Beke, might be restrained from proceeding in action in the Common Pleas for the recovery of their bills of costs upon a deposit with the registrar of the balance in question, and that costs in which they had been employed as agents for Mr. Boord upon the principle of country solicitor and town agent. Mr. Morris claimed that he did not act as agent in some of the matters he had transacted, but as a solicitor generally. He had not communicated to the petitioner that he had so done; if he had, the petitioner would have had an opportunity of exercising his discretion whether he would have permitted Mr. Morris to act for him upon those terms. No arrangement was entered into allowing other than agency charges to be made.

Mr. Dixon said the point was material, because it involved the question whether the costs of a London agent, upon the application of a country solicitor, was or was not taxable. The act which gave the right to tax costs was 2 George II., c. 23, but the 12th George III. enacted that that act should not extend to bills, fees, charges, or disbursements that should become due from attorneys or solicitors in the counties or boroughs. There was a decision of the Court of Common Pleas in "Weymouth Knipe," 3 Bing. N. C. against the taxation of such bills. (a)

Mr. Pemberton said the jurisdiction of the Court had been established in the case of "v. Nuttall," 2 Myl. & Ker. 284, (b) before the Vice-Chancellor. There was an order of the Master of the Rolls in 1745 for taxation, and an attempt to discharge that order before Hardwicke was not successful. His noble lord said that the petitioner was entitled to an order for all the bills upon the ground of principal agent, and not of solicitor and client.

Jan. 13.

LANGDALE said he had referred to the case, and that, with the exception of *Wey-v. Knipe*, cited by Mr. Dixon, he found them in conformity with all of them, and must therefore grant the prayer of this case made accordingly.

In that case proceedings had been brought by a London attorney against a counsellor, for whom the plaintiff had employed as town agent, and the latter pleaded a rule that the plaintiff should shew why his bills of costs should not be referred to the prothonotary to be taxed, as the plaintiff was undertaking to pay into Court £400. *Ad.*, without prejudice to his pleadings, and taking short notice of proceedings in the mean time to be

contended against the rule that the court had no power to order the taxation of bills, as the Stat. 2 G. 2, c. 23, s. 23, only to cases between an attorney and his client: and that to exclude all others upon the subject, the Stat. 12 G. 2, c. 6, was cited.—That it was indeed so in *Wilson v. Gutteridge* (3 Barn. & C. 157.) that the Court has a para-jurisdiction, independently of the Stat. c. 23, to refer an attorney's bill for taxation in all cases. But this doctrine was overruled in the subsequent case of *Dagley v. Smith*, (2 Barn. and Adol. 411,) which applied the application to tax the bill of an attorney against an ordinary client, when the bill contained no taxable item; and after taking time to consider, LORD DENHAM, in delivering the judgment of the Court, said—"We have referred to the authorities in this case, and so much doubt is entertained on the point, that we cannot order the bill to be taxed." And in *Clutterbuck v. Coombes*, (5 Barn. and Adol. 400.) it was affirmed that the jurisdiction of the Court to refer an attorney's bills appears to be again

In support of the rule, it was argued that the present case was distinguishable from all those which had been previously brought under the consideration of the Courts. There being an actual suit pending, and the litigants being both officers of the Court, the Court had a jurisdiction over them in the double character of suitors and officers. To discharge the rule, would be virtually to decide, that the judge and jury at *Nisi Prius* should examine the propriety of the items charged, and the correctness of the amount claimed for each portion of the bills. Unless the power to direct taxation in such case existed, no limit could be affixed to agency charges. *Wildbore v. Bryan*, (8 Price, 677.) decides that the Court will not interfere on the application of the client in the cause, but that the application must be made by the immediate employer of the agent, is an express assertion of the general power. In *Innes v. Hake*, (2 Cox, 173.) the Chancellor, on the production of several precedents sanctioning the motion, made an order on an agent to submit his bill to taxation. And in *ex parte Bearcroft*, (1 Doug. 190.) it is stated to be the settled practice of the Court of Common Pleas to order the taxation of agent's bills. It was also insisted that the argument in opposition of the rule rests upon the supposition that the application has been made under the statutes referred to: but the Court possesses a common law jurisdiction over its own officers.

The Court were of opinion that the only authority possessed by them of ordering the taxation of an attorney's bill was conferred by statute: and that as the sixth section of 12 G. 2, c. 13, had expressly exempted agents' bills from the operation of the former statute of 2 G. 2, c. 23, s. 23, they had no power to refer those bills to the prothonotary to be taxed, and accordingly the rule was discharged.

An agent need not deliver a signed bill of costs under the statute, before he delivers

his bill for agency, (*Sandys v. Hornby*, Mo. and R. 33.) though a delivery of a bill for business done for another attorney in the superior Courts, is in other cases necessary, (*Reynal v. Smith*, 2 Barn. and Adol. 469.; *Heming v. Wilton*, 1 M. and M. 529.)—

EDITOR.

(b) The question in that case *in fact* was, whether the Court will permit a solicitor to obtain an order *as of course* for the taxation of his agent's bills which there had been obtained, and a motion was made to discharge such order. The MASTER OF THE ROLLS observed, that in a matter so much the same as the taxation of bills of costs, both at law and in equity, it was desirable that the same rule should prevail; and the rule of law, that upon an application by a solicitor for the taxation of his agent's bill, *the amount of the bill should be brought into Court*, was recognized by LORD ELDON, in *Ostle v. Christian* (1 Tur. & Russ. 324), as being equally the rule with respect to similar applications in the Court of Equity. That in *Puget v. Nicholson*, (Beames on costs, 361.) the rule was dispensed with under *special circumstances*; for as there was a fund already in the hands of the agent, which might have exceeded the amount of his bill, it was unnecessary that the amount should be brought into Court. That the defendant could not be heard to say that the bills were not *agents' bills*, because that was the very ground upon which he applied for an order to tax them, this order was obtained upon a suppression of facts. The order was therefore discharged with costs, as well upon the merits as upon the ground of *irregularity*.—

EDITOR.

#### BAIL COURT—Feb. 1.

(Before PATTESON, J.)

HOGSON v. CASLER.

PRACTICE—JUDGE'S SUMMONS—*Whether it operates as a stay of proceedings.*

Mr. Roberts had obtained a rule for setting

aside a judgment the plaintiff had signed in this cause for want of a plea, the defendant having taken out a summons for time to plead, which the plaintiff had abandoned; and the question was, whether the summons operated as a stay of proceedings.

Mr. Hoggins now showed cause, and contended that the proceedings were regular; that as the summons taken out was not afterwards acted upon, it was no stay of proceedings; and from the affidavits it appeared that the present application was for the mere purpose of gaining time and putting the plaintiff to inconvenience.

Mr. Roberts—On the other side, contended that all summonses operated as a stay to proceedings till the time they were returnable. It was true that the present summons was abandoned by the plaintiff; yet the defendant, according to the rules of practice, was entitled to his second summons, and, in the interval, the proceedings would necessarily be stayed—otherwise any plaintiff might entrap a defendant into the supposition that a first summons was *bona fide*, prevent the defendant from pleading, and then sign judgment the moment the time had expired. The present case was one by which the defendant had been greatly deceived.

Mr. Justice PATTESON—After consulting the master, said that this judgment ought not to be set aside, as prayed by the rule, and the costs ought to be paid by the plaintiff.

Rule made accordingly.

#### PREROGATIVE COURT—Feb. 13.

WILL OF BARTHOLOMEW BROWN, DECEASED.  
NEW WILL ACT, sec. 9.—*Attestation Clause*

The testator in January, 1838, made his will and added a codicil in the following December both of these papers were duly executed and attested. In November last he made another codicil, and signed it in the presence of two witnesses, but left the room after signing it, as the witnesses signed their attestation in his absence.

Pratt, Dr. moved for probate of the Will and two codicils, insisting that the intention of the testator being so clear, the Court should not refuse it merely on account of the circumstance of the second codicil being attested while the testator suddenly was absent from the room.

Sir H. JENNER said—It does not depend upon the intention of the testator, but upon the express words of the Act, and cited section 9. In this case the testator left the room before the witnesses subscribed the second codicil, and was absent when they signed their attestation.

Probate refused of the second codicil—*and* of the will and first codicil.

## SOLVENT DEBTORS' COURT.—Jan. 8.

CASE OF ABRAHAM HENRY CHAMBERS.

(Continued from p. 160.)

*for abolishing Imprisonment for Debt, 1866.—JURISDICTION of the COURT as to committing a person to Newgate for contempt in not filing his Schedule after a creditor had obtained a VESTING ORDER.*

r. Woodroffe renewed his application to sit Mr. Chambers to the common gaol of county in which he lived for a contempt of law.

THE CHIEF COMMISSIONER.—This is the case in which it appeared the party had had about four days notice to file his schedule.

r. Commissioner BOWEN.—In what gaol is Chambers confined?

r. Woodroffe.—In the Fleet, and the application is to commit him for contempt in not filing his schedule under a vesting order.

r. Commissioner BOWEN.—We have discussed the question over and over again, and we have no power to take him out of the custody of the warden.

THE CHIEF COMMISSIONER concurred with the learned colleague.

r. Woodroffe said he was on the other side of the case of Jeremiah Board, which was the case alluded to by the learned Commissioner; he contended that the section had only reference to assignees, but the Court was not with him on that point. The Court thought it had reference to default under a vesting order, and that they might entertain the question; but as the man was in the custody of the warden of the Fleet, he could not be removed. He was not aware that a definitive decision had been given; and a similar case was now brought before the Court. There was a sum of £23,000 in this case, and it would be a deplorable state of things if the Court was not sufficiently strong to reach such a

r. Commissioner BOWEN.—On whose behalf is motion made?

r. Woodroffe.—Mr. Henry Wilton, a solicitor who obtained the vesting order; he is the retaining creditor. Mr. Wilton was the attorney assisting the bankruptcy, and, to acknowledge the bankruptcy, it had been agreed, by the said assignees, that Mr. Chambers should be £23,000, of which sum we say he has received £2000.

r. Commissioner BOWEN.—Has not Mr. Wilton been discharged under the act?

r. Woodroffe.—He has, sir, but the present debt was subsequently incurred.

r. Commissioner BOWEN.—When was Mr. Wilton discharged?

Mr. Woodroffe.—In 1836, when his claim was £16,000. Mr. Wilton is a retaining creditor for a subsequent debt.

Mr. Cooke.—It is for subsequent costs.

Mr. Commissioner BOWEN.—Go on.

Mr. Woodroffe proceeded to read the affidavit of Mr. Wilton in support of the present application. It set forth that the vesting order was granted in this case on the 19th of December, and on the same day Mr. Chambers was served with a notice to file his schedule within fourteen days; he had not done so, and up to the present hour no schedule had been filed. That the said A. H. Chambers had, since he had been in the Fleet Prison, received £2000 from the accountant-general of the Court of Bankruptcy; that he had ample funds to obtain his discharge from prison, or to file a schedule, but had wilfully disobeyed the order served upon him; that deponent was a creditor for £16,000; that it had been proposed to pay Mr. Chambers out of the estate £23,400 to acknowledge the validity of the commission, and which he had agreed to accept, although he (Mr. Wilton) had for ten years resisted the act of bankruptcy, and Mr. Chambers and his family had on oath denied the commission of an act of bankruptcy; that the payment of £2000, part of the sum agreed upon, had been made in fraud of deponent, and he believed that no distribution of the assets would be made unless enforced by this Court. The learned counsel said this case showed the impotency of the Court of Bankruptcy, and his object was to show that this Court was not so useless. There were ample funds, and one of two things must be clear to establish the total inefficiency of the jurisdiction under which the matter had been in agitation since the year 1825. If Mr. Chambers was not a bankrupt, it was extraordinary that the Court should have been so many years trying the question; and if he was a bankrupt, it was strange, and showed the impotency of the Court, that the estate should give £23,400 to induce him to acknowledge that he had committed an act of bankruptcy. He (Mr. Chambers) refused to acknowledge the validity of the commission, unless he got £23,400; and was he in the same way to set this Court at defiance? He had under his control a considerable sum, and this Court was called upon to take such steps as would cause justice to be done to the creditors. The first was to order his commitment for refusing to file a schedule.

THE CHIEF COMMISSIONER asked under what clause the application was made;

Mr. Woodroffe referred to the 66th sec. of 1 & 2 Vic. c. 110, which he read, and under which the Court was empowered to commit for the disobedience of an order to the Queen's Bench or common gaol of the county in which the party



was resident at the time. Mr. Chambers was in the Fleet, and the common gaol was Newgate. In the case of Board, he (Mr. Woodroffe) had appeared on the part of the warden respectfully to state that he would not obey an order for the removal from his custody. If such was the case, all he could say was that the act was a very inefficient one, and must have been drawn by an inefficient person. Was this person to remain in prison and not pay his creditors, but to receive a large sum of money?

Mr. Commissioner BOWEN said the act was so worded that their power was only to commit to the Queen's Bench or Newgate, but they had no power to detain a person in the Fleet Prison.

Mr. Woodroffe remarked that the Court had power to commit to the county prison, which had reference to the country; and the prison of the Queen's Bench was also mentioned. It was difficult to comprehend the meaning of the Act. Here was a wrong without a remedy. The Act was to be compulsory—was, according to the recital, to give creditors a power over property, and to make debtors give up the same; and, after all, it could not touch a case of this description.

The CHIEF COMMISSIONER said the question for the Court to determine was whether they had the power. Here was a man in the Fleet Prison, and could they send him to Newgate or the Queen's Bench Prison—could the Court take him out of the custody of the warden?

Mr. Woodroffe observed that the detainer could be lodged with the warden for the contempt, as in a case of felony; and, when he was free from his power, it could be acted upon, and Mr. Chambers taken to prison.

Mr. Commissioner BOWEN.—That is utterly impossible. A man could not be taken without a *habeas corpus*.

Mr. Woodroffe regretted the state of the Act. The impotency of bankruptcy for fifteen years had been evident enough. The Court would not think they had been treated with disrespect if an application was to be made to the Court of Queen's Bench for a *mandamus* to try the power of the act.

Mr. Commissioner BOWEN.—I wish there was some other Court to overhaul our decision. I shall be pleased if you do apply for a *mandamus*.

The CHIEF COMMISSIONER expressed a similar opinion.

Mr. Commissioner BOWEN was quite satisfied the Court had no power to grant such an order to remove Mr. Chambers; he should, however, be glad to see the question raised on an application for a *mandamus*.

The CHIEF COMMISSIONER was not quite disposed to concur, but he would wish to have the

opinion of a learned brother, as he had some impression on the clause in question.

Mr. Commissioner BOWEN said the learned Commissioner must attend so as to form a majority. He was of opinion that the Court had no powers.

## SHERIFFS, IRELAND.

- ANTRIM—T. Gregg, Esq., Ballymunch, Holywell.  
 ARMAGH—W. J. Armstrong, Esq., Elm Park, Armagh.  
 CARLOW—H. Rochfort, Esq., Clogrennon, Carlow.  
 CAVAN—J. Nisbitt, Esq., Lismore Lodge, Cavan.  
 CLARE—J. B. Scott, Esq., Cahircion, Kildysart.  
 CORK—J. C. Fitzgerald, Esq., Clogroec, Cork.  
 DONEGAL—R. G. Montgomery, Esq., Convoys Raphoe.  
 DOWN—M. Forde, Esq., Seaford, Clough.  
 DUBLIN—J. Godley, Esq., Ramount, Lucas.  
 FERMANAGH—S. Armstrong, Esq., Hollymount.  
 GALWAY—F. W. Trench, Esq., Woodlawn, Kilconnell.  
 KILDARE—H. Barton, Esq., Straffan, Celbridge.  
 KING'S CO.—G. O'More, Esq., Cloghan Castle, Kinnitty.  
 KERRY—S. D. Lawler, Esq., Castletongh, Kilmarney.  
 KILKENNY—L. N. Izod, Esq., Chapel Island, Kells.  
 LEITRIM—H. L. Montgomery, Esq., Belhovel, Drumkeerin.  
 LONGFORD—S. Galbraith, Esq., Newgrove, Summer-hill, Dublin.  
 LIMERICK—R. Hart, Esq., Coolrus, Croom.  
 LOUTH—J. M'Climock, Esq., Dramear, Dealeer.  
 MAYO—Colonel A. Knox Gore, Balceek House, Ballina.  
 MEATH—R. C. Wade, Esq., Clonsbrany, Kesh.  
 MONAGHAN—W. Hamilton, Esq., Castleblaney.  
 QUEEN'S COUNTY—J. Tibeau, Esq., Portlurch, Emo.  
 ROSCOMMON—N. Balf, Esq., South Park, Oulsteragh.  
 SLEIGH—J. Wynne, Esq., Haslewood, Sligo.  
 TIPPERARY—H. Prittie, Esq., Corville, Roscrea.  
 TYRONE—J. Lyndesay, Esq., Loughry, Dungannon.  
 WATERFORD—W. Moore, Esq., Moone, Tallow.  
 WESTMEATH—W. Pollard, jun., Esq., Kanturk, Castlepollard.  
 WEXFORD—Sir T. Esmonde, Bart., Ballinacorney, Gorey.  
 WICKLOW—R. Hudson, Esq., Springfarm, Newtown Mount Kennedy.

SPECIAL COMMISSION—MONMOUTH.  
FROST'S TRIAL.*(Continued from p. 330.)*

ch evidence was at all times admissible before y, who were to estimate it according to the e of confidence they could repose in the s. In doing so they ought principally to erved by observing how far his testimony utorated by other witnesses. The cre- y of this witness was also said to be ched on another ground. He did not come d immediately: the disclosure he made was he had remained twelve days in prison. for the jury to decide whether such dis- e, made by a person under the same dread he prisoner, was consistent with the credi- of his evidence. Undoubtedly these facts tract from the weight of his testimony, but ld be for the jury to estimate its value ing to the best of their judgment.

Mr. T. Jones Phillips's evidence one very ar circumstance appeared, that when was apprehended he was found armed in inner described by this witness. On his examination, however, this witness said the cripts in Frost's handwriting were handed n by a member of Frost's family. This ut forward on the part of the prisoner at ur, by showing that inasmuch, when his cripts were searched at Partridge's house is own residence, there was nothing found to criminate him in respect to transactions reasonable nature; no letters from him or anication with him from them on the sub- no planning—no designs of his own—no —as you would naturally expect to find if was so large a conspiracy intended as was on the present occasion. But they must well that matter, and give it all the consi- on to which it was entitled. That was the part of the prosecution. Witnesses, ly a few, had been called for the prisoner, as of them gave evidence to show that the

"Surrender yourselves prisoners" were oken, but that the words said were, "Sur- us our prisoners." That had, however, conceded on the other side; but, und- ly, it was a more favourable interpretation : prisoner, in respect of the proceeding at estgate, and, therefore, it was right to look o the evidence of those witnesses. In r part of the evidence witnesses were to show that Frost had, at different public gs, advised the people to keep the peace. was a matter for their grave consideration they were to determine whether the pri- was guilty of high treason; but it was by ans decisive in his favour, and they must well what was due to that testimony. It

was evidence, in the nature of speaking to cha- racter, to shew that a person of a peaceful dispo- sition would not directly make such affrays and tumults as had led to this charge; that such a person was not likely to be guilty of a charge of treason by levying war against her Majesty the Queen; and that his character was such as would make it very improbable he would commit the act now imputed to him. A man known for honesty was not likely to commit a theft; and so a man of peaceful disposition was not likely to be a party to and commit himself by an act of high treason in levying war against the Queen. But it was no more than a question of probabi- lity, and to be put in opposition to and be weighed against other evidence. If that evi- dence which went to the principal points was sufficiently strong, then it was for the jury to consider well whether that act of criminality was likely to have been done by such a person; and if they should doubt that fact, then let them give the prisoner the benefit of the doubt of his having been guilty of it, from his peaceful dis- position, character, and previous conduct in pri- vate life; but let them not bring it as positive evidence to contradict evidence on the other side of that act having been done. The jury would say to what extent the contradiction was worthy of consideration. The next witness adverted to by the learned judge was a grocer at Newport. He stated his belief that the mail from Newport went through Bristol, and the object of putting that question was for the purpose of showing that it would be absurd in the prisoner to have entertained the idea of stopping the mail, be- cause the coach did not go all the way to Bir- mingham, but was changed at Bristol. The fact, however, that the object in stopping the mail would be nugatory did not decide the question; because, though nugatory, it might not have been attempted. At all events the engagement to stop the coach might have given encouragement to persons in other districts. It must also be observed that the word coach was not always used, but the mail was mentioned, so that the communications failing in any particular part, that circumstance must soon become known. This point, however, he need not repeat, the jury must determine. With respect to the "bill," the learned judge observed that it did not appear that any particular provision for its payment was made. All that was known was, that when the bill became due it was paid in ordinary course. The examination of Henry Williams was next adverted to. That witness deposed that the demand made by the mob at the Westgate was, not "Surrender yourselves prisoners," but "Surrender our prisoners;" which was the expression really used, observed the learned judge, it was for the jury to decide.

This was the whole of the evidence on which the jury had to decide; and they must say whether it amounted to a levying war against the Queen. That there was a violent personal attack on a number of persons assembled in the Westgate Inn, on the 4th of November, is placed beyond doubt. A very large body of men came into the town at a very early hour of the morning, not from one direction, but brought from different parts, and uniting before they came to the town. Of this there was no question, nor that the prisoner at the bar appeared and put himself at the head of this armed multitude. The ground on which it is sought to fix the prisoner with the heavy offence of high treason partly consists in the share which he appears to have taken in the transactions, and partly from declarations alleged to have been made by him. On both these points you must bring your judgment to bear in considering your verdict in the present case, and he thought it might not be unadvisable again to call their attention more particularly to the exact share which, according to the evidence, Mr. Frost had taken in those proceedings, and to the declarations attributed to him, and to the objections taken to the evidence by the prisoner's counsel. The learned judge accordingly read over the whole of his notes referring to those particular parts of the evidence. He then observed that the jury must make up their minds as to what was the intention of this armed multitude in the proceedings of which Mr. Frost had, to a certain extent, interfered. If it was their design either to destroy the Government or Constitution, or to march into Newport to take violent and forcible possession of the town, or to attack the Queen's troops for the purpose imputed to him, that would amount to the crime of high treason; but if, as the prisoner alleged, the mob was merely intended as a demonstration of moral force to induce the magistrates to treat Vincent with greater favour, and if it was found that they had no general design, that was an offence which did not amount to high treason. The question, however, did not rest there, for an attempt to attack the soldiers for the purpose of releasing the prisoners was liable to be visited with severe punishment. The jury had to decide whether it was the intention of the mob to attack the soldiers, and whether, if they had entertained any such design, they would not rather have attacked the poor-house, where the soldiers were quartered, when they heard that a detachment had left it. His Lordship having then adverted to the other declarations alleged to have been made either by the prisoner, or in his presence, proceeded to say "These were the declarations alleged by the witnesses to have been made by the prisoner; whether made or not they were to be the judges."

It was for them to say whether they inferred from such declarations, accompanied with the other statements, whether they inferred an intent and a mind on the part of the prisoner, by means of these preparations, to alter and effect any great and general movement among the people; whether it was an object with him, by the terror these armed men would inspire, by the force he carried with him, to seize the town of Newport and keep possession of it, or whether his intention was to make the beginning then, that there should be a further spread of such conduct, which would then be carried into effect. They were to say whether there was such an intention, or whether they were not satisfied by the evidence that such could fairly be imputed to him. The ground he took was one of a much more moderate complexion. He said all he intended to do was, by showing the force of the men, that they should be able to carry a measure of a more limited nature, the amelioration of Vincent's treatment. They would recollect that it laid upon the Crown fully to establish the guilt of the prisoner; and, if they considered it had been established, then, however painful the duty, still it was necessary for them to fulfil it. It was a case for their consideration alone; the Court could not interfere with it, and, therefore, he left it in their hands, quite convinced that they would come to that conclusion which truth and justice required.

#### VERDICT.—GUILTY.

The foreman of the jury then said, "We wish my Lords, to recommend the prisoner to the merciful consideration of the Court."

The LORD CHIEF JUSTICE.—That shall be forwarded through the usual course.

### Spring Assizes.

1840.

#### NORFOLK CIRCUIT.

HUNTINGDON—March 17.

(Before Alderson, B.)

DORRIS, PRYME v. GIFFORD.

LANDLORD AND TENANT.—*Construction of tenancy "for the term of seven years, and so on from year to year."*—What notice to quit is necessary.

This was an action to recover the possession of a farm in the parish of Wistow.

The plaintiff, by a lease dated in January 1832, demised this property to the defendant. It held from October, 1831, "for the term of seven years, and so on from year to year," &c.

as he contended, expired in 1833. Being anxious of putting an end to the tenancy, Mr. ne gave the defendant notice at Lady-day to at Michaelmas last. The defendant not ing in pursuance of this notice, the present on was commenced. The defence turned on effect to be given to the terms "and so on year to year" in the lease under which the dant held. For the defendant it was con- ed that it constituted a tenancy for two years in, commencing at the termination of the years. For the plaintiff the case of *Doe Chadborn v. Green*, 1 Per. & Dav. 454. (a) cited. There a farm was leased for "one and so on from year to year;" and the t decided that the landlord might put an to the tenancy at the end of the second by giving six months' notice to quit. If, fore, "one year, and so on from year to " meant two years, "seven years, and so on year to year," must mean eight years, at d of which time the plaintiff was entitled session, having given due notice to quit. DERSON, B. was of opinion that the plain- as entitled to recover. e Jury returned a verdict accordingly (b).

) That case differed from the present, in that the parties also agreed to deter- the tenancy by either of them giving to ther three months' notice to quit, and essor of the plaintiff gave the defendant months' notice to quit, at the end of the year. The case was tried at the Glou- r Spring Assizes, 1838, before Parke, B. thought it was a demise capable of being inated at the end of the first year, on authority of *Thompson v. Maberly*, ampb. 573.) and a verdict was given for laintiff. A rule for a new trial was ned, on the ground of misdirection, h came before the Court for argument he 29th Jannary, 1839, when, after ag time to consider the judgment, ord DENMAN said, the decision turned u the sufficiency of the notice to quit. think the case *Thompson v. Maberly* is ly distinguishable, as the terms of the ement there, by stating the holding to be *twelve months certain*, and six months e afterwards, limited all that was defi- vely agreed on between the parties to the

first twelve months. In this case the agree- ment was for one year, and so on from year to year, which, in conformity with *Birch v. Wright*, 1 Term. Rep. 378. and other cases, we think constitutes a tenancy for two years certain, and therefore the notice to quit at the end of the first was insufficient. S. C. 1 Per. & Dav. 456.—Ed.

(b) See 4 Bacon's Ab. Tit. Leases (L. 3.), and Sir H. Gwillim's observations on *Harris v. Evans*, 1 Wils. 262. S. C. Amb. 320. Ed.

# The LORD CHANCELLOR's new Bill for FACILITATING the ADMINISTRATION of JUSTICE.

## ANALYSIS.

(Continued from page 325.)

18. That from time to time, when and as often as any vacancy shall occur in the said office of Vice Chancellor, by the death, resignation, or removal from office of any Vice Chancellor for the time being, it shall be lawful for her Majesty, by letters patent under the Great Seal of the United Kingdom, to appoint a fit person to supply such a vacancy.

19. That each such Vice Chancellor shall have full power to hear and determine all causes, matters, and things which are or shall be at any time depending in the Court of Chancery in England, either as a Court of Law or as a Court of Equity, or incident to any ministerial office of the said Court, or which have been or shall be submitted to the jurisdiction of the said Court, or of the Lord Chancellor, by the special authority of any Act of Parliament, as the Lord Chancellor shall from time to time direct; and all decrees, orders, and acts of such Vice Chancellor so made or done shall be deemed, and taken to be respectively, as the nature of the case shall require, decrees, orders, and acts of the said Court of Chancery, or of such incident jurisdiction as aforesaid, or under such special authority as aforesaid, and shall have force and validity and be executed accordingly, subject nevertheless in every case to be reversed, discharged, or altered by the Lord Chancellor; and no such decree or order shall be enrolled until the same shall be signed by the Lord Chancellor: Provided always, that such Vice Chancellor shall have no power or authority to discharge, reverse, or alter any decree, order, act, matter, or thing made or done by any other Vice Chancellor to be appointed under this Act,

not being a predecessor in office of such Vice Chancellor, or any decree, order, act, matter, or thing made or done by any Lord Chancellor, unless authorized by the Lord Chancellor so to do, nor any power or authority to discharge, reverse, or alter any decree, order, act, matter, or thing made or done by the Master of the Rolls, or the Vice Chancellor for the time being, appointed in pursuance of an Act passed in the fifty-third year of the reign of his Majesty King George the Third, intituled "*An Act to facilitate the Administration of Justice*," or any order, act, matter, or thing made or done by the Court of Review in bankruptcy.

20. That each or either of the Vice Chancellors to be appointed in pursuance of this Act shall sit for the Lord Chancellor, whenever he shall require him so to do, and shall also, at such other times as the Lord Chancellor shall direct, sit in a separate Court, whether the Lord Chancellor, or the Master of the Rolls or the Vice Chancellor appointed in pursuance of the said Act shall be sitting or not, for which purpose the Lord Chancellor shall make such orders as to him shall appear to be proper and convenient from time to time as occasion shall require.

21. That every person holding or who shall have held the office of Vice Chancellor under this act shall, if a member of her Majesty's Privy Council, be a member of the judicial committee of the Privy Council.

22. That the Vice Chancellors to be appointed in pursuance of this act shall, during the continuance in office of the present Vice Chancellor, respectively have rank and precedence next to the Lord Chief Baron of her Majesty's Courts of Exchequer at Westminster; and that the Vice Chancellor to be appointed in pursuance of this said act of the fifty-third year of the reign of King George the third, and the Vice Chancellors to be appointed in pursuance of this act, shall after the death of the present Vice Chancellor, or his resignation or removal from his office respectively, have rank and precedence next to the Lord Chief Baron of the Court of Exchequer at Westminster, and as between themselves shall have rank and precedence according to seniority of appointment to their respective offices.

23. That it shall be lawful for her Majesty, in and by such letters patent as aforesaid, and in and by any other letters patent under the Great Seal of the United Kingdom, to direct that each such Vice Chancellor to be appointed in pursuance of this act shall have a secretary, usher, and trainbearer, to be from time to time appointed and removed by such Vice Chancellor at his pleasure; and that the secretaries, registrars, and other officers appointed

to attend the Lord Chancellor shall attend such Vice Chancellor when sitting for the Lord Chancellor, and also when sitting in his separate court, as circumstances shall require, and as the Lord Chancellor shall order and direct.

24. Vice Chancellor to hold office during his good behaviour, but may be removed upon address, &c.

25. Oath.

26. That from and after the appointment of the Vice Chancellors under this act, it shall be lawful for the Lord Chancellor, with the advice or concurrence of the Master of the Rolls and Vice Chancellors for the time being, or any two of them, and he is hereby authorized and empowered to do all such acts, and to make and issue all such rules and orders, as by any act or acts of parliament now in force the Lord Chancellor, with the advice or concurrence of the Master of the Rolls and the Vice Chancellor for the time being, or one of them, is empowered to do, make, or issue.

27. That it shall be lawful for the Lord Chancellor and the Master of the Rolls from time to time to direct that any causes or matters, which shall be at any time or times depending for hearing or determination before the Master of the Rolls for the time being, shall be heard and determined by the Lord Chancellor or by one of the Vice Chancellors for the time being; but all decrees and orders to be made by any Vice Chancellor in pursuance of such direction shall be subject to be reversed, discharged, or altered by the Lord Chancellor.

28. Appointment of Richard Richards, Esq. to be a Master in Chancery. References depending before the Masters on Equity Side of Exchequer transferred to him, and such other references as the Lord Chancellor shall direct.

29. Her Majesty empowered by letters patent to appoint successors to Mr. Richards.

30. Appointment of ——— Buckland, the present clerk to the Masters in Exchequer, to be chief clerk to Masters in Chancery, &c.

31. Salaries to Vice Chancellor and his officers, and to Master, to be paid out of interest and dividends arising from Suits' Fund.

32. Her Majesty empowered to grant annuity to Vice Chancellor on his resignation. Said annuity may be limited as herein mentioned Period of service.

33. So much of 53 Geo. 3; as directs payment to Vice Chancellor of the salary of £2500 repealed.

34. Regulating future salaries of Vice Chancellor appointed under 53 Geo. 3, c. 24.

35. 3 & 4 W. 4, c. 94. Number of registrars increased to ten. Provisions for filling vacancies.

36. Registrars to attend each judge of the

as Lord Chancellor, &c., shall direct. In case of illness they may appoint a deputy.

7. Clerks to the registrars increased to twelve. Vacancies to be filled up by seniority. Lord Chancellor empowered to fill up vacancies in the office of twelfth clerk to the registrars.

8. Preserving rights to the present registrars' clerks.

9. Proviso as to succession of sworn clerks,

0. Office of master of reports and entries.

1. Duties of registrars and clerks.

2. Accountant General empowered to appoint additional clerks, 55 G. 3, c. lxiiv.

3. Masters, registrars, and clerks to register, to hold their offices during good behaviour; with other officers, to be subject to provisions, &c.

4. Repeal of certain powers of 3 & 4 W. 4, c. 4.

5. Salaries to registrars, and clerks, and masters and clerks, paid out of Suitors' Fees.

6. Compensation to Master of Exchequer and other officers of Court of Exchequer, to be paid out of Suitors' Fund in Chancery. Act of compensation to be laid before Parliament.

7. Interpretation clause.

8. Act may be altered, &c.

*Schedule referred to by the foregoing Act.*  
Salary.

first registrar	- - £2,000 per ann.
second, third, and fourth registrars	- - 1,800 per ann. each.
fifth, sixth, seventh, and eighth registrars	- - 1,500 per ann. each.
ninth and tenth registrars	- - 1,250 per ann. each.
first and second clerks to the registrars	- - 800 per ann. each.
third, fourth, fifth, and sixth clerks to the registrars	- - 600 per ann. each.
seventh, eighth, ninth, and tenth clerks to the registrars	- - 400 per ann. each.
eleventh and twelfth clerks to the registrars	- - 300 per ann. each.
chief clerk to the master in ordinary in Chancery, appointed under this act	- - 1,000 per ann.
junior clerk of such master	- - 150 per ann.

March 19.

On the order of the day for the 2nd reading of the Bill was discharged on the motion of the Lord Chancellor.

SIR E. SUGDEN'S PROPOSED RESOLUTIONS ON THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS AND COURT OF CHANCERY.

"1. Resolved, That it is expedient to abolish the Court of Review in Bankruptcy, as far as regards the judges of that Court, and to restore the jurisdiction of the Great Seal and the Vice-Chancellor.

"2. That it is expedient to abolish the Judicial Committee of the Privy Council, and to remodel the Court.

"3. That it is not expedient to take away any equity judge from his court for the performance of judicial functions elsewhere without an absolute necessity.

"4. That it is expedient, in the contemplated creation of new courts of equity, to make provision for the independence of the judges, and for the regular hearing of causes according to their priority, so that no cause may be advanced out of its turn without sufficient cause, and for the regulation of the hearing of short causes, so that important points of law may not be decided hastily, and without due deliberation; and also provision for having in each court a list of the judgments in arrears always hung up in court, and a copy thereof delivered to the judge by the registrar on the first Monday's sitting in every month; and likewise provision that no case be postponed in hearing on account of the absence of counsel in another court, unless (if the judge shall think fit) where the counsel has followed a cause upon appeal.

"5. That it is expedient that the appointment of the Masters in Chancery should again be vested in the Lord Chancellor instead of the Crown, and that the Masters' notices should be remodelled, and their sittings be made public.

"6. That it is expedient that the Lord Chancellor shall continue to hear motions, appeals, and other matters in the Court of Chancery, and that causes be reheard in the courts below, but that no appeal be reheard by the Lord Chancellor.

"7. That it is expedient that the decision of the Lord Chancellor shall be final where both parties have entered with the register a consent that the appeal be heard by the Lord Chancellor, and that the Lord Chancellor's decision, whether in the first instance or upon appeal in interlocutory matters, should be final, subject to certain exceptions.

"8. That it is expedient that the Court of Appeal in the House of Lords should consist of the Lord Chancellor and two Judges, to be appointed during good behaviour, and to be called Lords President, but not necessarily to be peers, and that the Lords President be at liberty to act as judges during the hearing, and to openly de-

clare their judgments; but not to have voices if not peers.

"9. That it is expedient that the House of Lords, when the arrear of appeals may render it necessary, should sit to hear appeals only, notwithstanding a prorogation.

"10. That it is expedient that the House of Lords should have the power of summoning the equity judges upon the hearing of appeals, in like manner as they have the power of summoning the 15 judges.

"11. That it is expedient that the appeals in the House of Lords should be heard with as many of the forms and regulations of the superior courts of justice, as are consistent with the jurisdiction and authority of the house.

"12. That it is expedient that the two Lords President should sit and hear the matters now referred to the Judicial Committee of the Privy Council, and with that view that the Privy Council should be remodelled as a court.

"13. That it is expedient that the Lords President sitting on the Privy Council should have power to call to their aid any other judge except the Lord Chancellor, and that the Lord Chancellor might attend upon their request if he should think it proper.

"14. That it is expedient that one of the Lords President should be styled Chief Lord President, and should preside at the Privy Council whenever another judge is called in.

"15. That it is expedient that where the two Lords President sit alone, but cannot agree, the case should be adjourned into the House of Lords, to be there heard and settled like any other cause.

"16. That it is expedient that the hearing of the appeals before the House of Lords and the Lords President respectively, should as far as possible be so regulated as to give to the House of Lords and the Court fixed days for hearing of trials throughout the sitting."

#### NEW FORMS OF WRITS.

(Continued from p. 335.)

##### No. V.

*Writ of Capias ad Satisfaciendum*, on an order of an inferior Court for payment of money, removed into the Court of Queen's Bench.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith;—To the Sheriff of —, greeting. We command you that you take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £—, which lately in [insert the style of the Court,] by a rule

of our said Court, entitled, &c. [as the case may be], were by the said Court ordered to be paid by the said C. D. to the said A. B., and which rule was afterwards on the — day of —, in the year of our Lord —, removed into our Court before us at Westminster, by an order of our said Court before us at Westminster [or of —, one of the Justices of our said Court before us at Westminster, as the case may be,] in pursuance of the Statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were on the — day of —, in the year of our Lord, taxed and allowed by our said Court before us at Westminster, at the sum of £—, and also to satisfy the said A. B. the said sum of £— (a), together with interest on the said two several sums of £—, and £—, at the rate of four pounds per centum per annum, from the said — day of — in the year of our Lord — (b) and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the — day of —, in the year of our Lord —.

##### No. VI.

*Writ of Capias ad Satisfaciendum*, on an order of an inferior Court, for payment of a sum of money and costs, removed into the Court of Queen's Bench.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith;—To the Sheriff of — greeting. We command you that you take C. D. if he shall be found in your Bailiwick, and him safely keep, so that you may have his body before us at Westminster, immediately after the execution hereof, to satisfy A. B. £— which lately in [insert the style of the Court by a rule of the said Court, &c. [as the case may be,] were by the said Court ordered to be paid by the said C. D. to the said A. B., and also £—, for the costs of the said rule. The said Court, also ordered to be paid by the said C. D. to the said A. B., which said rule was afterwards on the — day of —, the year of our Lord —, removed into our Court before us at Westminster [or of — one of the Justices of our said Court before us at Westminster, as the case may be,] in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the last-mentioned, and upon the said removal, were on the — day of —, the year of our Lord —, taxed and allowed

(a) The costs of removing the rule of the inferior Court into the Court of Queen's Bench.

(b) The day on which the costs of removal were taxed.

our said Court before us at Westminster, at sum of £——, and also to satisfy the said sum of £—— (a), together with rest on the said three sums of £——, and —, and £——, at the rate of four pounds centum per annum, from the — day of —, in the year of our Lord — (b), and there then this writ.

Witness, Thomas Lord Denman, at Westminster, the — day of —, in the year of Lord —

ENMAN,	J. GURNEY,
C. TINDAL,	J. WILLIAMS,
SINGER,	J. T. COLERIDGE,
LITTLEDALE,	T. COLTMAN,
PARKE,	T. ERSKINE,
B. BOSANQUET,	W. H. MAULE,
H. ALDERSON,	R. M. ROLFE.
PATTESON,	

### UNIVERSITY COLLEGE, LONDON.

SESSION 1840.

#### FACULTY OF LAWS EXAMINATION.

What is the first process in a personal action?

What is the first process in a real action?

Over what actions have the Courts of King's Bench, Common Pleas, and Exchequer, concurrent jurisdiction?

Over what actions has the Court of Common Pleas an exclusive jurisdiction?

To whom is the writ of summons directed?

What are the endorsements required to be on a writ of summons?

What are the purposes for which a plaintiff may obtain a writ of distringas?

Under what circumstances is a plaintiff at liberty to enter an appearance for the defendant?

Under what circumstances may a *capias* be obtained against a defendant before final judgment?

To whom is the *capias* directed?

What is the effect of an arrest upon the defendant?

What security does a plaintiff obtain by arresting the defendant?

If after being arrested the defendant escapes, what remedy has the plaintiff, and against whom?

What is the difference between a negligent escape and a voluntary escape?

What is the principal distinction between an action of trespass and an action on the case?

What is the nature of an action of trover?

What is the difference between a simple contract and a special contract?

The costs of removing the rule from the inferior Court into the Court of Queen's Bench.

The day on which the costs of removing the rule from the inferior Court were taxed.

18. Are there any causes of action in respect of which a plaintiff has the option of suing either in assumpsit or debt?

19. Are there any causes of action in respect of which the plaintiff has the option of suing either in assumpsit or case?

20. Are there any causes of action in respect of which the plaintiff has the option of suing either in assumpsit or covenant?

21. In an action of assumpsit on a promise to pay the debt of a third person, what is put in issue by the plea of *non assumpsit*?

22. In an action of indebitatus assumpsit for goods sold and delivered, what is put in issue by the plea of *non assumpsit*?

23. In an action of assumpsit against a carrier for not delivering goods, what is put in issue by the plea of *non assumpsit*?

24. In an action upon the case against a carrier for the loss of goods delivered to him, what is put in issue by the plea not guilty?

28. What is the rule as to the inadmissibility of a witness on the ground of interest?

29. Under what circumstances may the objection to a witness be removed by indorsing his name on the record?

30. What was the point as to the admissibility of evidence decided in *Price v. Torrington*?

31. What were the two points as to the admissibility of evidence discussed in *Doe on the demise of Tatham v. Wright*.

32. What is a nonsuit?

33. What is the difference between a special verdict and a special case?

34. What is sufficient ground for a motion in arrest of judgment?

35. If new matter of defence arises after plea pleaded and before trial, in what manner can the defendant take advantage of it?

36. If new matter of defence arises after verdict, in what manner can defendant take advantage of it?

37. What lands may be extended under a writ of *elegit*?

P. S. CAREY, Professor.

### POST OFFICE RETURNS.

#### UNDER THE FOURPENNY AND PENNY RATES TO THE 3d. FEB. 1840.

The Post-office returns to the order of the House of Commons exhibit the working of the present compared with the former system. The first table shows the amount of postage collected in the London district during the fourpenny rate—viz., from the 5th of December, 1839, to the 9th of January, 1840, compared with the corresponding period of 1838-9, as far as regards the General Post-office, and gives 57,300*l.* 1*s.* 3*d.* as the total amount of the period in



question in 1838-9, and 38,692*l.* 5*s.* 11*d.* as that of the similar period in 1839-40. Of the former of these sums, 3,637*l.* 8*s.* was received from Government departments: of the latter sum, 38,692*l.* 5*s.* 11*d.*, the sum of 1,316*l.* 2*s.* was received from Government departments.

The second table gives the total amount of postage collected in the London district during the penny rate from the 10th January to the 13th February, 1830, so far as regards the General Post-office, with the amount in the corresponding period of 1839. This gives 60,060*l.* 14*s.* 8*d.* for the period of 1839, of which 4,624*l.* 12*s.* 1*d.* was received from Government departments, and 40,527*l.* 8*s.* 7*d.* for 1840, of which 858*l.* 11*s.* 1*d.* has been received from Government departments, and 11,044*l.* 12*s.* 5*d.* remains due.

The return of the amount of postage for the London district post during the fourpenny rate, gives 10,382*l.* 14*s.* 3*d.* as the sum collected from the 5th of December, 1839, to the 9th of January 1840, while the amount collected in a similar period in 1838-9 was 12,933*l.* 19*s.* 7*d.* The return of postage for January 10 to February 13, 1840 (during the penny rate), for the London district post, gives 10,368*l.* 15*s.*, while the amount for a similar period in 1839 was 13,714*l.* 10*s.*

A fourth account, in which both general and district post letters are included, gives the following result:—

1838-9 Dec. 5 to Jan. 9	£70,234	0	10
1839-40 Ditto	49,075	0	2

Decrease under the fourpenny rate	21,159	0	8
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1839 Jan. 10 to Feb. 13	£73,774	15	6
1840 Ditto	50,896	3	7

Decrease under the penny rate	22,878	11	11
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#### STOCKDALE v. HANSARD.

The nephew of Sir William Gossett, the Sergeant-at-Arms, has been to Hertford to serve notices on the executive there, cautioning them against executing the writ issued into that county in this cause. The notices are similar to those served upon the Sheriff, Under-Sheriff, &c. of Middlesex; and it is understood that the authorities of Hertfordshire have declined to execute the inquiry until they have had an opportunity of applying to the Court of Queen's Bench for further directions.—*Morning Herald*, Mar. 26.

#### NOTICE TO CORRESPONDENTS.

C. B.—Our best thanks for your letter.

W. M.—R. H.—A. P.—I. T.—N. R.—A Subscriber.—T. W.—W. H.—J. L.—J. G.—

W. C.—J. R.—T. A. L.—An Articled Clerk, Dublin.—W. J.—all under consideration.

R. C. J.—It is against our rule to insert such questions. We are disposed to assist all our subscribers as far as we can consistently upon any *personal* question, where the *facts* are clearly stated to us. Your letter we take to be not according to the fact: instead of the 27th and 28th sections, do you not allude to the 37th and 38th sections of the statute?

R. J. T.—In reply to your letter dated 4th inst. see *Ex parte Ann Rebecca Richardson* and *re Christopher Richardson*, a bankrupt, ante vol. I. p. 266.

On April 1, will be published, price 4*s.*, to be continued Monthly, Vol. IV. Part III.

**PRECEDENTS IN CONVEYANCING** adapted to the Present State of the Law Illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England," dedicated by command to her Majesty the Queen &c. in continuation of the PRECEDENTS by S. VALLIS BONE, Esq.

This work, independent of the Precedents which are all drafts of *actual practice*, abounds with valuable practical information to TOWN and COUNTRY SOLICITORS. The NOTES are to *purpose only*. Among these, the term "CUSTOM OF THE COUNTRY," is fully explained, and Tables are given, shewing those Customs in the SEVERAL COUNTIES OF ENGLAND for granting LEASES.—Almost every Number contains a NEW FORM of Instrument to meet the existing state of the laws.

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With the Law relating to USES, REMAINDERS and POWERS.

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# The Legal Guide.

III.]

SATURDAY, APRIL 4, 1840.

[No. 23.]

## THE DUBLIN LAW SOCIETY.

I have been much gratified by a perusal of the proceedings of the excellent Law School established in Dublin, called DUBLIN LAW INSTITUTE, the PRINCIPAL of which is TRISTRAM KENNEDY, Esq., a Barrister at Law and Member of Lincoln's Inn, and the PROFESSORS are as follow:—

MOLYNEUX, Esq. *Equity.*

J. HARDEY, Esq. *Law of Property and Conveyancing.*

NAPIER, Esq. *Common Law.*

BRADY, M.D., } *Medical Jurisprudence.*  
Professor in the College of Physicians,

The Institution appears to have been founded to meet the almost universal public demand for a preparatory system of legal education; to elevate the standard of knowledge in both branches of the legal profession; to cultivate diligence; to encourage the study of law as a science; to enable the members of the profession to participate in the guidance of the experienced; and to provide for regular and permanent benefit. (It is a misfortune that the House of Commons in Chancery Lane had not adopted this system.)

It is observed that the school is divided into four departments.—A CLASS for COMMON LAW; another for MEDICAL JURISPRUDENCE; a third for EQUITY; and a fourth for CONVEYANCING; in which lectures are

delivered by the Professor presiding over each, and the examination of the students is conducted upon the same principle as OUR PROBLEMS; that is, by means of printed questions and written answers, with fictitious signatures, so that persons may attend without being in any way subjected to any species of examination. The answers are voluntary.

Mr. NAPIER in his introductory lecture says: "The result of our diligent examination of the plans of other Law Schools has convinced us that the most profitable to the students will be, by examination upon approved text books, through the medium of printed questions. These questions can be answered in writing; and by the judicious selection of the questions, and the observation of the bearing of the answers, a test will be supplied for ascertaining the extent of the student's knowledge, and the precise difficulties with which he may be embarrassed in his progress. This will secure the advantage of combined emulation and individual instruction. The Professor will be guided in his explanation, to confine his remarks to what is really useful and absolutely necessary, and the repetition and enforcement of that which all can comprehend, of their own capacity, will be profitably superseded." We have by OUR OWN WORK, originated and opened here a school of precisely the same sort. It is true, a curtain is drawn between us and our pupils: we get no lec-

ture fees, and we have persevered in our course *malgré* all opposition. We hope the learned Principal and Professors of the Dublin Law Institute will fearlessly pursue **THEIR** course. An entire new system of Legal Education is required in England; one "*more intended for utility than display*;" from whence solid instruction can be gained, and it is to be lamented that a similar institute, *with its advantages*, is not to be found in London. "THE DUBLIN LAW INSTITUTE" has our best wishes for its success. We observe that a deputation from this Institute waited upon Lord Morpeth last week, for the purpose of obtaining a CHARTER of INCORPORATION, when Mr. WISE, M.P. Chairman of the late Select Committee on Education in Ireland, forcibly endeavoured to impress upon his Lordship the want, so sensibly experienced in Ireland, of a *system* of legal education, so different from the course pursued by all other European nations, and that this Institute required a Charter in order to its perpetuity, and the better to secure *an improved system of Legal Education*. His Lordship appears to have viewed the application favourably, (and why should he not do so?) and promised to submit it to the consideration of the Lord Chancellor of Ireland. We take for granted that LORD PLUNKETT will readily do for IRELAND what has already been done for ENGLAND, when we find the Attorney and Solicitor General for Ireland, Serjeants Jackson and Curry, all the Queen's Counsel and the principal members of the Irish bar, advocates for this Charter. "Such a schema," says the Solicitor General, "as this, which the projectors of the Law School have begun, must, if well supported, and well worked, do much towards supplying the learners of the law the want of a safe and early guide, and teaching how to secure the two great objects of a student, *method in his studies, and economy of his time*." It is the first attempt which has been made in Ireland to teach law as a sci-

ence, and "such a school," Mr. Litton, Q.C. says, "has been long wanted in Ireland. The Institution will be one of the greatest practical utility, and in my opinion one which will much advance the interests of the country at large, not only by leading to better practical information, our barristers and solicitors, but by affording to the community in general the easy means of acquiring a knowledge of the laws and constitution of the country." No society can be pronounced to be well constituted, whose form of government and institutions do not admit this essential principle; the unlimited extension of knowledge to the whole of its constituent members. The *Attorney General* says: "The necessity of such a school for directing the studies of those embarking in legal pursuits, is particularly apparent in Ireland, where the habits and arrangements of business have not heretofore admitted those means of instruction and early initiation in practical studies to be found in the offices of the several branches of our profession in London." If the axiom we have put, therefore, be just, the Charter cannot be refused, or *a limit will* be put by such refusal to legal education in Ireland. Mr. Watkins, in his introduction to the "*PRINCIPLES of CONVEYANCING*," observes that "among the many discouragements which attend the study of the law, there is no more obvious, or more generally complained of, than the want of method and direction. To take a young person from an university or a school, where his mind has been occupied with other pursuits, and to toss him headlong into the practice of the law, who is unprepared, or with little preparation, for so arduous a study, is in itself so absurd, that we can only wonder at its occurrence. We must be the embarrassment of such a person amid business of such nicety as to call for the full exertion of the veteran in practice. It is folly to expect from the human mind what a moment's reflection would tell us

ld be impossible for the human mind to form. Conveyancing is not intuitive any e than the mathematics. The mind can- draw conclusions without having been ously furnished with premises. And ever the individual may be prepossessed avour of a peculiar mode of study, e are, and while the human mind con- es to be what it is, there must be, gene- rles which ought to be attended to in acquiring of knowledge." In another of the same Introduction, Mr. Watkins rves that "Law should be considered as ral science, as the rule of rational and untatable beings, and he concludes pro- ically that the day was very fast ap- ching when knowledge shall be justly eciated; when systematic pedantry shall ore acquire the reputation of learning; those literary pursuits which encum- the memory without calling forth the tion of intellect, or amending the heart, be deservedly reprobated; when preju- shall melt away before the genial beams vestigation and truth; and when learn- shall only be esteemed as it becomes rvient to the virtue and of consequence e happiness of mankind."

the wide sphere of moral science, in non with all other sciences, but which, others, is doubtless the most important, mber of self-evident truths have exist- . To discover these moral truisms, and y them to their definite and appropriate ts; or, in other words, to allow them most extensive and beneficial sphere of ence and agency, is to conform the more ly to the highest and best principles of anity—correlative with, and constituting d and social duty. It is then at once ifest, that this complicated sphere of on and duty resolves itself into two dis- and leading branches of social life;— one constituting the diversified and com- elements of LEGISLATION, and the other ing the important and delicate art of

EDUCATION; the last named being the first in importance, as claiming the priority, since its professed object is, to foster and direct the latent and the best principles of human nature into their proper channels. "Happy," says Lord Coke, "were arts, if professors would contend and have a conscience to be learned in them, and if none but the learned would take upon them to give judgment of them."

### PROBLEM XXIII. VOL. III.

#### LAW OF EVIDENCE.

What will under ordinary circumstances be received at Law as a sufficient proof of hand writing?

#### TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—I herewith send an answer to Prob. II. Vol. III. on the Question, "When a Contract is to be performed?" and as I have taken a different view of the subject from that of Alphonso—whose answer does not appear to me exactly to meet the Problem—I trust you will excuse my troubling you with this answer, which will form a kind of supplement to that already inserted in your valuable Guide. Yours obediently,

J. A. M.

### ANSWER TO PROBLEM II. VOL. 3.

Contract—when it is to be performed.

In deciding on the question when a Contract is to be performed, the intention of the parties will in a great measure guide us, and the following rules and decisions ought also to be considered.

When a Contract is silent as to the period of performance, the law infers an engage- ment that it shall be executed within a rea- sonable time. *Chippendale v. Thurston*, 4 C. and P. 98. For example, in the case of a covenant at all times to make further assurance, a reasonable time to levy a fine, advised by counsel, would, before the recent

## Answer to Problem 2 Vol. III

the abolition of Fines and Recoveries, be computed from the making of the contract. *Purpus v. Tye*, 10 Mod. 149; 1 East, 492. But if the whole of the month had elapsed when the agreement was made, it shall be intended that the parties intended that the act should be done within a month from the actual making of the agreement. And the words "one month from the making of the agreement" or "from henceforth" in an agreement, impliedly signify one month from actual execution, not the date of the contract. *Williams v. Jones*, 7 D. and R. 108. *Chitty on the Law of Contracts*, p. 5 B. and C. 108. S. C.

Where a contract is to be performed within the expiration of a month, the presumption of law is that the parties meant a lunar month, unless there be something in the contract, or some custom in the trade, in reference to which the agreement is made to rebut the presumption, and show that a calendar month was intended. *Lang v. Gale*, 1 M. and Sel. 111; *Borke v. Dale*, 4 Mod. 186; *Jocelyn v. Marchina*, 1 Str. 446; *Titus v. Lady Prosser*, 11 Mod. 632; *Chitty's Statutes*, tit. Time, note page 1044; *Jolly v. Young*, 1 Esp. R. 186.

A day is natural which consists of 24 hours, or artificial which contains the time from the rising of the sun to the setting. *Co. Litt.* 135 a. A day is usually intended as of a natural day, as in an indictment for burglary we say in the night of the same day. *Co. Litt.* 135 a. 3 Inst. 318.

A legal act done at any part of the day will in general relate to the first period of the day. *11 East*, 498. The law generally looks to fractions of a day. *15 Ves.* 237. *Co. Litt.* 135 b.

When a computation is to be made from the day of the act to be done by the party, the day of the act shall be included; but not otherwise. *Pellon v. The Inhabitants of the Parish of St. John*, 9 B. and C. 144, per Lord Tenison, C. J. Where a contract is to be performed within ten days after the date, or of the date, it seems that the day of the date is to be excluded. *Id.* *Pugh v. Duke of Devon*, 11 East, 142. *Birch v. The Earl of Lincoln*, 9 B. and C. 392.

In marriage contracts, the engagement is binding, although the precise time for completing is not agreed upon; and in such case the law presumes that the parties intended

intermarry within a reasonable or convenient time, upon request. *Harrison v. George*, Carth. 467. 1 Lord Raym. 386, 8 C. 11. *Atter v. Deboos*, 1 Stark. R. 82. *Atchinson Baker*, Peake's Addl. c. 103.

Let us now consider a few cases where the question is of importance between the vendor and purchaser of real property.

Where an abstract is to be delivered or a conveyance to be executed, on or before a certain specified day, the time fixed is considered to be of the essence of the contract; the vendee may rescind the contract, if the vendor be not ready before or on the fixed day, although the vendor has not in the interim to insist on so strict an execution of the contract. See Sugd. Vend. and Purch. Edit. 359 to 369, and 370, 371.

Neither party be ready at the appointed time, and both are in default, the contract is to be *ipso facto* dissolved, and the debt is recoverable unless the time has been waived by consent. See *Clarke v. King*, 1 M. & C. 394. 2 C. and P. 266. 8 C. 11. It seems that where no time is fixed for completion, it suffices that the vendor who brings his action, has a complete title at the time of the trial, although he acquired it by action brought; provided the vendee was not, prior to the action, applied for a writ.—*Thompson v. Miles*, 1 Esp. R. 184.—If the vendor has abandoned the contract on a valid objection to the title.—*Bartlett v. Tuckin*, 1 M. & C. 583. J. A. M.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XVI. VOL. 3.

Before the Statute of Frauds, no agreement for the sale or purchase of an estate was valid, unless it was sealed as well as signed. It is now however clearly established that sealing is not necessary; and if a man has the habit of printing or stamping instead of writing his name, he will be considered to have signed by his printed name.—*Anderson v. Jackson*, 2 Bos. and Pull.

238. *Schneider v. Norris*, 2 Maule and Sel. 286. Where the name is inserted in such a manner as to have the effect of giving authenticity to the whole instrument, it does not signify in what part of the instrument the name appears. *Allen v. Bennett*, 3 Taunt. 169.

Therefore the signing of the name at the beginning of the agreement will be sufficient, even though a place be left for such signature at the bottom of the instrument. *Saunders v. Jackson*, supra.

If the party know the contents of the agreement, a subscription as a witness will be a sufficient signing; as where an agreement was signed "Witness A. B. for C. D. agent to the seller," it was held to be sufficient. *Welford v. Beazley*, 3 Ask. 503. *Blere v. Sutton*, 3 Meriv. 237.

And it seems to be sufficient if merely the initials of the name are set down. *Phillips v. Barry*, 1 Camp. 513.

It seems that the signature of the purchaser by himself or his agent, on the back of the particulars of sale, will be a sufficient compliance with the Statute. *Eminence v. Heelis*, 2 Taunt. 38. (a) J. S.

(a) The law upon this subject will be found very clearly explained in Sugden's Vendors and Purchasers, Vol. 1. chap. 3. sec. 4. We have an Answer to this Problem signed W. M. copied entirely from this useful work, without a single variation or comment made by the writer. This is not as it should be.—It certainly is not the way to gain solid information and instruction, for which useful purpose alone these Problems are intended.

EDITOR.

### Imperial Parliament.

HOUSE OF COMMONS—ENGLAND:

March 30.

MR. SHERIFF EVANS.

Capt. POLHILL put a question to Lord John Russell with respect to Mr. Sheriff Evans, that

as the order now stands on the books, he is to appear at the bar of the House on the 6th of April. He wished to know whether it was the intention of the Noble Lord to enforce that order or no. The Noble Lord's reply was, that in a few days he would move his attendance be postponed till after Easter.

#### JUDGE OF THE ADMIRALTY COURT—SALARY.

Matter considered in Committee. (In Committee.) Motion made, and Question proposed—“That a yearly sum of 4,000*l.* be paid to the Judge of the High Court of Admiralty out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.” Whereupon Motion made, and Question put,—“That a yearly sum of 3,000*l.* be paid to the Judge of the High Court of Admiralty out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.” The Committee divided—Ayes 17, Noes 83.

*March 31.*

#### STOCKDALE v. HANSARD.

On the motion of the ATTORNEY-GENERAL, the Sergeant-at-Arms appeared at the bar, and acquainted the House that on Saturday last the Assistant-Sergeant and four other officers of the House were served with a notice that a declaration in an action had been filed against them in the Court of Queen's Bench, at the suit of Thomas Barton Howard, and he had thought it his duty to obtain a copy of that declaration.

The declaration was then delivered in, and read by the clerk at the table. The damages were laid at £1000.

The ATTORNEY-GENERAL then rose and stated, that, in the absence of his noble friend the Secretary of State for the Colonies, it became his duty, with his noble friend's concurrence, to make a motion on the subject. From the verbiage of the document which had been read, it was exceedingly difficult to learn the real cause of action. But there seemed great reason to believe that Howard did not at all call in question the privileges of the House, or the regularity of the warrant or writ which had been issued against him. What he said was, that there had been excess on the part of the officers of the House; and the question now was, what course the House should adopt under the circumstances? Where an action was brought questioning their privileges, the House had not only a right, but was called on to interfere in a summary manner; and in Stockdale's actions they had, in his opinion, exercised a constitutional and wholesome jurisdiction. In this case, however, their authority was not called in question; the complaint was, that the officers had been guilty of excess in the execution of their duty. The Court of Chancery, if such a complaint were made against

one of its officers, would not suffer its jurisdiction to be questioned in a court of law; but would on petition ascertain whether the complaint was well founded, and if so, would punish the officer, and award compensation to the party aggrieved. If Mr. Howard had taken that course and presented a petition to the House, stating that one of its officers had acted improperly in entering his house, or seizing his person, the House, on being satisfied that there was some foundation for the complaint, would no doubt have punished the officer, and given compensation to the complainant. But the notice of action in the Court of Queen's Bench having been served upon their officers, he humbly recommended, that as their privileges were not questioned, the better course would be, not to instruct or command the Attorney-General to appear and defend the action in the name of the House of Commons, but that leave should be given to the defendants to appear and defend it, when he has no doubt they would be enabled to show satisfactorily that they had been guilty of no excess and had done nothing but what they were justified and required to do; that they had entered the house after Howard had long evaded the service of the process against him; that they had entered it with the consent of the inmates, and that an exchange of civilities even took place during the time they remained there. Upon such evidence being given in justification, there would be no difficulty in returning a verdict in the defendants. The honourable and learned gentleman concluded by moving that the officers of the House who had been served with notice be at liberty to appear and defend the action.

LORD HOWICK, though he was persuaded after what the House had done, that this motion would be carried by a large majority, could not silently consent to a course which he thought still more humiliating than the proceedings already taken. Why should the House allow what the Court of Chancery would not? (He told him, because the House has not what the Court of Chancery has—an officer called Master, constituted for the very purpose of inquiring into facts, and possessing authority to administer an oath). The Attorney-General continued Lord Howick, talked with confidence of a verdict for the defendants; his own confidence would be quite the contrary way, after the late decision of the Queen's Bench. If the verdict should be against the defendants, would again be told that you had submitted, were precluded from interfering. But all was the consequence of the recent Bill, which had placed all the privileges of the House at the discretion of the courts of law.

Mr. O'CONNELL protested against this shrinking of the House from the assertion of its privileges.

Sir W. FOLLETT entirely approved of the course which the Attorney-General had recommended to the House. It had been repeatedly decided in former cases, that the legality of the Speaker's warrant could not be disputed, and that it was conclusive against any action for trespass, assault, or false imprisonment, and it had so been decided in the case of Sheriffs and Wheelton when brought before the Queen's Bench by writ of *habeas corpus*. But reasons for excess in the execution of the warrant had been brought centuries back; and it was hardly necessary for him to remind the House of the well-known case of Sir F. Burrell. Could the House prevent those proceedings being taken? Instead of an excess being committed, suppose a life had been lost in the execution of the Speaker's warrant, was it possible for the House to prevent the question being committed to a judge and jury? He did not understand why the House should throw its protection around its officers, if they had exceeded their duty.

The ATTORNEY-GENERAL utterly denied that the course he now proposed to pursue was inconsistent with any single vote he had given on the question.

The SOLICITOR-GENERAL entirely dissented from the course about to be taken. Having repeatedly expressed his opinion on the subject, and not supposing that anything he could now say would alter the opinion of the House, he did not occupy the attention of the House longer than by observing that he should vote against the motion.

The House then divided—

For the motion	142
Against it	51
Majority for the motion	— 91

## SCOTLAND.

### LAW OF EVIDENCE BILL.

The LORD ADVOCATE moved that the Speaker leave the chair for the purpose of going into Committee on this bill.

Mr W. RAE thought that a measure of this kind should not be brought in at once, but that a change should be made gradually. He had attended to the second reading of this bill, under the impression that it had the assent of the bar generally, but since that time he had received letters from judges on the bench and lawyers at the bar, which expressed a strong wish that the bill should be delayed until the subject was thoroughly investigated. He should therefore request that the Speaker do leave the chair that day six months.

Mr. H. DRUMMOND supported the amendment.

The ATTORNEY-GENERAL was of opinion, that the bill, even as it stood at present, would be a great improvement upon the existing law. At present a father could not give evidence in favour of his son, nor was a man a competent witness in the case of his brother or sister—nay, the law went further still, and prevented uncle and nephew from giving testimony in one another's behalf. It was obvious that in many cases—such as that of an *alibi*, for instance—rules like these must deprive a prisoner of the only evidence which the nature of the case admitted.

The amendment was withdrawn, and the House went into committee.

The clauses were agreed to.

The House resumed, and the report was ordered to be brought up to-morrow.

## Law Reports.

### COURT OF CHANCERY.—Jan. 14.

#### RUDD v. SEWELL AND ANOTHER.

*Solicitors purchasing property of their Clients—Whether in the absence of fraud, and with long acquiescence, such a Sale will be disturbed by the Court.*

Mr. Joseph Rudd, the plaintiff's father, had employed the defendant's Solicitors at Norwich, as his Solicitors. In the year 1809, he was desirous of purchasing an estate that was then for sale in the County of Norfolk, for £5000. but Mr. Joseph Rudd, the plaintiff's father, in order to make up that sum found it necessary to sell an estate of his own for £2,400., for which sum a Mr. Murray agreed to buy it, but that agreement was afterwards rescinded, the purchaser discovering an objection to the title. Messrs. Sewell and Blake were employed by Mr. Rudd in these transactions. When the contract with Murray went off Rudd agreed to sell his estate to Mr. Blake for £2,200., in June, 1809. No conveyance was then executed, but in the September following, Mr. Blake sold the estate for £2,500. to a Mr. Middleton, who paid £1,000. of that sum, leaving £1,500. a charge on the estate. A conveyance was executed by Rudd directly to Middleton. Rudd received the £2,200. from Mr. Blake, and did not, for upwards of twenty years, make any complaint of the conduct of Messrs. Blake and Sewell; but after his death, a few years ago, his executor hearing the circumstances, with some exaggerations, from a clerk to Sewell and Blake in 1809, called upon them to pay over to Rudd's estate £300. the difference between the price Mr. Blake paid for and received for the estate.

Mr. Wigram, for the plaintiff, contended that Sewell and Blake being the solicitors for Rudd,



in the negotiation for sale of the estate, were themselves precluded from being the purchasers, by reason of the judiciary character with which they were clothed. That they availed themselves of a formal objection to the title to purchase the estate at less than its value from their client, and almost immediately afterwards obtained from a purchaser, with whom they had been previously in treaty, a profit of £300. and then got Mr. Rudd to convey the estate, not to themselves, but to the new purchaser, without informing him of the nature of the transaction. All these circumstances were features, if not of fraud, at all events of gross impropriety in solicitors towards their client, and the transaction altogether was one which a court of equity could not sanction.

Mr. K. Bruce, for Messrs. Blake and Sewell, characterised the suit as an impudent attempt to extort money from the defendants. The transaction took place 30 years ago. Mr. Rudd never complained of the matter; he well knew all the circumstances attending it. He was now dead, so was Middleton, and every other person who could explain the true nature of the transaction. A discarded clerk of the defendants set the plaintiff in motion by false representations of the transaction. The defendants solemnly denied the breach of trust imputed to them. Mr. Rudd was most anxious to sell his estate to purchase the other, and the agreement with Murray failing by reason of the fault in the title, he importuned Mr. Blake to purchase. Sewell and Blake offered to raise money for him on the estate, but he preferred to sell; upon which Mr. Blake said, if he were to buy, it would be on speculation merely, as he did not want to keep the estate, and he paid down £2,200. to Rudd. But though he got £2,500. from Middleton, he did not get in hand more than £1,000.; so that it suited Rudd's purpose better to sell for £2,200. ready money. This was altogether a stale demand, and the court would not do ample justice to the defendants unless it dismissed the bill with costs.

Jan. 20.

The LORD CHANCELLOR delivered judgment. The bill was filed by the son and executor of a gentleman of the name of Rudd, who in 1809 sold an estate to the defendants, Messrs. Sewell and Blake, solicitors, of Norwich, for £2,200. and they in three months afterwards sold the same estate for £2,500. The object of the bill was to recover from the defendants the difference between the two sums, on the ground that, they being the solicitors of Mr. Rudd, generally and particularly, in negotiating the sale of the said estate, before Mr. Blake himself, one of the solicitors, bought it, they could not in equity be allowed to derive any profit from the sale of the

estate; and the bill imputed fraud to them in the transaction. They, in their answer and in their defence, denied that they took any advantage of Mr. Rudd, who, being in want of money to purchase another estate, and a former contract to dispose of his own failing in consequence of an objection to the title, pressed Mr. Blake to buy. Mr. Blake distinctly told Mr. Rudd, that if he bought the estate it would be to sell it again. He did buy it, and advanced forthwith the £2,200. and though he sold the estate soon after for £2,500. he received only £1,000. in hand, and the balance was unpaid for years. Mr. Rudd was well aware of all the circumstances, and he never complained during his lifetime. The defendants further said that though they were not conscious of any misconduct in the affair, yet rather than come into court they offered the plaintiff to pay him the difference in price of the estate with interest, and he refused the same.—The Lord Chancellor, having shortly stated the facts, proceeded to observe that the rule which prohibited solicitors from purchasing the property of their clients was well established and admitted of no exceptions. Nothing that the court did with reference to the present case would in the slightest degree affect the principle of the authorities on that important subject, as it ought to be well known to all professional men that they never could be allowed to take any gain from such transactions, while there was the greatest risk of their losing much in professional character. The present case was, however, a very peculiar one. The bill alleged fraud but no fraud was proved. It was undoubtedly wrong in the defendants to purchase their client's property under any circumstances, but it appeared that the plaintiff's father knew of the sale and the profit made on it; that he never complained of it, and that he never contemplated any measure to obtain redress. After the lapse of more than a quarter of a century, and without any proof of fraud, but on the contrary a failure of such proof, it was not possible that the court could disturb the transaction between the parties. The bill must therefore be dismissed, and the question then arose how it was to be dismissed. If there had been fraud proved, the court could not have allowed lapse of time to be a bar to the plaintiff's claim; but it appeared that the father of the plaintiff acquiesced; and the plaintiff, whether misled by his witness or not, allowed himself to make a charge of fraud; and then when the defendants put in their answer, denying the fraud, and stating their evidence, the plaintiff persisted in the cause, although the defendants offered to make what reparation they could, by returning the £300. with interest. Lord Eldon, in a case which came before the House of Lords, expressed an opinion that, with

proof of fraud failed, the bill ought to be dismissed, but without costs, in order that solicitors' clients might know that when suspicious sales took place, the solicitors would have to bear the costs of the inquiry. In the present case the plaintiff, by his mode of dealing with the defendants, had deprived himself of that advantage, and the bill must be dismissed with

Feb. 28.

NEWLANDS v. HOLMES.

SEPARATE USE.

I have already reported this case fully, (a) as heard before the Vice-Chancellor; and so gave a copy of the order then made, (b) which we were favoured by a solicitor in view.

The question raised was, whether *chattels* attached to a *feme sole* to her separate use, who after the death of the testator becomes a widow, but has no settlement, are liable to be taken in execution by a judgment creditor of her husband. An injunction was had restraining the sheriff from selling the chattels upon terms ordered upon the plaintiff; and upon appeal to the Lord Chancellor, pending the case of *Tullett v. Armstrong*, (c) his Lordship ordered the Vice-Chancellor's order to be suspended; that the plaintiff should resume possession of the chattels, and a restraint against his selling them until a further order should be made, unless the plaintiff should go before the master and give security for the defendant's debt and costs, or pay the amount into court until the hearing of the case before the order of court. Upon that order being made, the defendants resumed the possession of the effects, having obtained an *alias* writ of execution, and they have been in possession ever since.

The Lord Chancellor having lately given judgment in *Tullett v. Armstrong*, establishing a wife's exclusive right to property left to her separate use before her marriage.

*Wigram* now moved to restore the injunction, and to make it perpetual, as being a coming within the principles laid down by the Lordship in *Tullett v. Armstrong*; observing he only doubt that could be raised by any argument on the other side, was as to the identity of effects in the house being part of the property bequeathed to Mrs. Newlands.

*Bethell*, for the defendant Holmes, said, that property in this case was partly leasehold and partly moveable property, all bequeathed to the plaintiff when she was single and unmarried. The single she had unquestionably a right to the use of all or any part of the property. The

question was, whether upon her subsequent marriage that clause in the will against the control, interference, or debts of any husband she might marry, operated as a restriction on the absolute power she had before marriage, and fixed such a trust to the property as excluded all marital right. It was to be remarked, that much of the property so bequeathed was moveable property, and that there was no trustee interposed to support the distinction between legal and equitable ownership. The general law was, that where a woman has moveable property of which she can dispose absolutely, that property by her marriage becomes the property of her husband. Of choses in action and other property, the husband, by his marriage, obtained capacity to reduce them into his possession; but they did not become his absolutely by the marriage. In this case the defendants had no notice of the alleged trust before they executed the writ. It would be a dangerous doctrine to extend the protection of the court to unknown trusts between husband and wife—it would open a wide door for fraud on creditors. The wife might have given all this property to the husband at the marriage. The law would give him the moveable property without any act on the part of the wife.

Mr. *Painter*, for the sheriff, submitted to any order the court would make.

The LORD CHANCELLOR. The principle is, that when property is given to a woman for her separate use, upon her subsequent marriage, a trust attaches on that property for her use during the coverture. At present, he could not say whether such was the case here, but he suggested an inquiry before the master to ascertain how much, if any, of the property seized by the sheriff and now in his possession, was the property left to the plaintiff by her father's will, and also (on Mr. *Wigram's* suggestion,) how much of it was purchased by the wife by the property so left to her.

Mr. *Wigram*. And the sheriff ought to withdraw, as the leasehold houses are ample security for the debt, and it is not likely the plaintiff will remove the property, or any part thereof, during the proposed inquiry. According to the evidence now before the court, all the property was the wife's.

The LORD CHANCELLOR. I cannot remove the sheriff's officer, nor say this is the wife's property. That is the subject for inquiry before the master.

Mr. *Wigram*. We are ready to give a charge on the whole of the property, for so much as may be found by the master not to be the trust property of the wife.

The LORD CHANCELLOR. I cannot vary the former order. The security must be for all that the judgment creditor and the sheriff may be entitled to,—the costs to be reserved to the hearing.

Ante, p. 184.  
Ante, p. 216.

(b) Ante, p. 215.

It was then arranged, that on the plaintiff giving security for whatever the defendants would be found entitled to, the sheriff should give up the possession.

### COURT OF EXCHEQUER—Jan. 31.

*Sittings in Banco.*

TAYLOR v. NICHOLL.

**WARRANT OF ATTORNEY**—*As to its due execution under 1 & 2 Vict. c. 110. & R. 72. Hil. 2. W. 4. (a)*—*Whether the party must himself originate and primarily suggest the name of an attorney to attest its execution.*

In this case a rule nisi had been obtained to set aside a warrant of attorney. The ground of the rule was, that the provisions of the 1st and 2d Victoria, c. 110, relative to the nomination and attendance of an attorney on behalf of the party executing such an instrument had not been complied with. It appeared by the affidavits that the defendant had been written to by the plaintiff's attorney to come to Halifax from a neighbouring town, for the purpose of giving the warrant of attorney. He attended at the offices of the attorney, when the instrument was prepared, read over, and explained to him, and he was informed that it would be necessary for him to procure the attendance of some attorney on his behalf to witness the execution. In reply to this he said he knew no one on whom to call for that purpose, and then the plaintiff's attorney suggested the name of Mr. Crossley. The defendant assented, and repaired to that gentleman's office with the clerk of the plaintiff's attorney, when, the nature of their business being explained, Mr. Crossley asked him if he wished him to attest the execution of the warrant as his attorney, to which he replied in the affirmative. Mr. Crossley swore that he asked if he knew the contents of the instrument, and whether he wished him to read it to him, when he said that he did know them, as the warrant had been read over to him by the plaintiff's attorney, and that he would not trouble him. Upon this, the instrument was signed. In answer to this the affidavit of the defendant himself, swore that he never knew Mr. Crossley's name at the time, that he did not name him as his attorney, and that the nature and contents of the warrant were not explained to him, and that if he had thought that it would have been put into execution so soon, he would not have signed it.

Mr. Crosswell shewed cause against the rule, and relied upon *Bligh v. Brewer*, 1 Crompt. M. & R. 651. (a).

Sir F. Pollock contended, that as the name of Mr. Crossley had been suggested by the plaintiff's attorney, the act had not been complied with in its spirit or terms, as it was meant to guard against any interference of the plaintiff or his attorney.

The COURT, however, thought that nothing had been shown to lead them to swerve from the decision in "*Bligh v. Brewer*." It can only put a construction on the actual words of the statute, which does not say "originally named or suggested," thereby meaning that the defendant must himself originate and primarily suggest the name of the attorney who is to attest his execution of a warrant of attorney. The suggestion may come from a third party, and there is no reason why that should not be the plaintiff's attorney. When that is so, the COURT would narrowly watch the case; but there was no imputation of fraud here, and as it is made necessary by the act that the attorney named should actually read over and explain the document to the party about to execute it, we think enough was done here to bring the case within the statute, and that this warrant was attested by Mr. Crossley, an attorney expressly named by the defendant on his behalf.

*The rule discharged with costs.*

(a) In that case a defendant was in custody and about to execute a *cognovit*, and as the attorney being absent from home, the plaintiff's attorney suggested the name of another attorney to attend and act for the defendant if he had no objection, and he replied "I did not care much who it was." They then went to the office of the attorney so suggested, and he enquired of the defendant whether he wished him to attest the execution as his attorney. The defendant replied in the affirmative, and prevented the *cognovit* being read over to him by stating he had heard its contents. A rule had been then obtained to set aside the *cognovit*, on the ground that the rule (Hil. 2. W. 4. 72.) had not been complied with. In shewing cause PARKER B. said,—In this case every thing which the rule demands has been complied with. The rule requires two distinct things:—*first*, that there shall be an attorney attending on the behalf of the person in custody; *secondly*, that it shall be a different person from the plaintiff's attorney.

(a) See *Rising v. Dolphin*, ante, p. 310.

thirdly, that he shall be expressly named defendant, and shall attend at his request. Now, in this case, it appears that defendant having consented to give a writ, the clerk of the plaintiff told him an attorney must be present for him, suggested that Mr. Cummins was in prison. He replied that he did not care if it was, he had no objection to him. I do not say how it would have been if he stopped there; but the defendant went to Cummins's office, and Cummins asked if he wished to have him as his attorney, which he answered in the affirmative. The rule requires the attorney to be expressly named by the person in custody. It seems to me that this case comes within those rules; for it is the same thing, whether the defendant states affirmatively that he adopts such an attorney, or says in the first instance, I wish you to be my attorney. The effect of the words cannot make any difference. Then did he act at his request? It is immaterial whether the attorney comes to him, or he goes to the attorney, if he gets actually to see to the transaction. The effect of the rule is, that he shall be informed of the effect of the act, and there is no objection for the attorney's reading over the writ, if the party be already acquainted with it. Here the attorney was a different person from the plaintiff's attorney: he was expressly named by the defendant, and acted at his request. In *Fisher v. Papanicholas* (2 C. & M. 215.) the defendant did nothing; he merely made no objection. In *Walker v. Gardner*, (4 Barn. & C. 371.) the conversation, by which the presence of the defendant was supposed to be proved, was denied; and therefore the court must be presumed to have treated the case as though such conversation had existed.

PERSON B.—observed, that in *Walker v. Gardner*, the nomination was only to be deduced from the circumstance of the de-

fendant having afterwards paid him; so in *Fisher v. Papanicholas*, there was merely an inference arising from the party making no objection. The rule does not require that the individual named should be mentioned; it is sufficient, if he is the person particularly appointed. The rest of the Court concurred, and the rule was discharged, with costs.

EDITOR.

### INSOLVENT DEBTOR'S COURT, March 9.

#### CASE OF ABRAHAM HENRY CHAMBERS. (a) *As to annulling a Vesting Order.*

Mr. Cooke applied to the Court to annul the vesting order obtained by Mr. Wilton under the compulsory clause of the statute. He said the Master of the Rolls had set aside the attachment because it had not been served within the three weeks. An appeal had then been made to the Lord Chancellor, who confirmed the decision of the Master of the Rolls. Mr. Wilton was not, therefore, in a situation to detain Mr. Chambers.

March 25.

Mr. Woodroffe said, he was instructed by Mr. Wilton to consent to the application to annul the vesting order. Mr. Wilton was desirous to give full force to the dismissal of the vesting order.

The Chief Commissioner said, he was not quite certain, that if the creditor who obtained the vesting order had his debt discharged and satisfied, that would be a reason why the vesting order, as a matter of course, should fall to the ground.

Mr. Woodroffe said, Mr. Wilton's debt had not been satisfied. The attachment at the suit of Mr. Wilton had been set aside, but his debt remained.

The Chief Commissioner ordered the vesting order to be discharged.

#### SHERIFF'S COURT, LONDON.—Jan. 21.

REGINA v. BICK.

OUTLAWRY—*Special Writ of CAPIAS ULTAGATUM—As to the right to SEIZE MONEY.*

In this case, the defendant having been outlawed, a writ had issued commanding the Sheriffs of London to enquire, by a jury, of the defendant's goods and chattels, lands and tenements, in the City of London, and to extend and

(a) See ante, p. 343.

appraise the same, and to take them into the Queen's hands and safely keep them; so that they may answer to the Queen for the value and issues of the same.

Mr. *Lay*, solicitor, stated the proceedings were taken on behalf of a Mr. Salt, to whom the defendant was indebted. The property, of which evidence would be given, were two sums of money, one of 109*l.* 17*s.* 3*d.* in the Bank of England, standing in the name of the Accountant-General; and the other 58*l.* 1*s.* 9*d.* which was in the hands of the Sheriff of Stafford.

The SECONDARY—How do you make it appear that money in the Bank, in the name of the Accountant-General, belongs to the defendant?

Mr. *Lay*—Proceedings had been taken in another suit, and 810*l.* 1*s.* 8*d.* had been paid in by order of court; and after the debt and costs in the first action had been paid, there was the balance of 109*l.*

A certificate of the Accountant-General was put in, to the effect that such balance stood in his name.

Mr. *Whitmore*, of the firm of White and Whitmore, agents to the Under-Sheriff of Stafford, produced the sum of 58*l.* 1*s.* 9*d.* which was a surplus of monies seized under an extent by the Sheriff of Stafford.

The SECONDARY said they had no power to take the money; first, because the writ was only to inquire what goods and chattels, lands and tenements, in the bailiwick of the sheriffs of London, and to extent and appraise the same; secondly, because under the writ they could not take money; and thirdly, they could not take what was out of their reach. The money was in possession of Mr. Whitmore, who lived out of the bailiwick, and after showing it to us he may put it into his pocket, and walk away with it.

Mr. *Lay*—Money is certainly a chattel, and can be seized.

The SECONDARY—Under a different writ it might, but by this we are to appraise the value. It would puzzle a conjuror to value bank notes so as to please legal gentlemen. Besides, it is not legally in the city.

Mr. *Lay*—Why here it is in my hand.

The SECONDARY—No, fact and law are at loggerheads there. If you can induce Mr. Whitmore to take a lodging in the city, perhaps we could do something. Or if he likes to leave it, and we find it, that's another case, but we can't seize it—in truth, according to law it is not here at all.

Mr. *Whitmore* said he should have nothing more to do with it, and if any one found it all very well.

The SECONDARY (putting the money in his pocket)—Well, now mind this, we don't seize it. We only find it in the city.

The jury found a verdict for 109*l.* 17*s.* 3*d.*

## PREROGATIVE COURT—March 5.

### WILL OF SIR GEORGE TEESDALE.

NEW WILL ACT, Sec. 21.—*Obtiteration unattested, admitted upon presumption.*

Major-General Sir George Teesdale, K.H. had a will attested by two witnesses, *without date* but in a legacy of 1,000*l.* bequeathed to his nephew, the word "one" was written upon an erasure, and the registrars had refused to receive it without affidavit that the alteration had been made prior to the execution. The only attesting witness in England could not speak to this point, having attested the paper in March of April, 1838, without minute inspection. The other witness to the will was out of the country, but the word "one" was proved to be in his handwriting. The widow, her sister, and the executors, proved that at the finding of the will which was contained in a sealed envelope in the General's writing desk (but which envelope had been destroyed), they noticed the alteration. A copy of the paper in the deceased's handwriting was found, enclosed in the same envelope in which the word "one" was written without erasure.

Dr. PHILLIMORE submitted that, under the circumstances, the legal presumption was that the alteration was made before the execution.

Sir H. JENNER decreed probate of the paper as it stood with the alteration, upon the presumption that it was made before signature.

## TO THE EDITOR OF THE LEGAL GUIDE.

*Lincoln's Inn Fields, March 25, 1844.*

SIR,—In the solution of the Problem included to by your correspondent, S. A. W., experienced some little difficulty in deciding upon the nature of the required Answer: I was fortified in the view I ventured to take of the subject, by the opinion of an eminent legal friend to whom I read the question, this opinion being further strengthened by your silent acquiescence in its propriety. Your correspondent will also see (if he will take the trouble of perusing my Answer) that in my few prefatory remarks, I indirectly admitted the possibility of its being liable to another interpretation, confidently leaving the matter to your decision.

I was therefore somewhat surprised at the tenor of your correspondent's remarks, who disclaiming all idea of imputing "carelessness or partiality" to yourself, virtually accuses you of both.

I have the honor to be, Sir,  
Your very obedient servant.

R. I.

OF THE EDITOR OF THE LEGAL GUIDE.

27 March, 1840.

THE MASTERS v. THE JUDGES.

SIR.—Allow me through the medium of your Journal to call the attention of the public to a glaring instance of the taxing officers acting in direct opposition to the decision of the Court of Exchequer in the case of *Wick v. Hunt*, 7 Dowl. 397, and 5 M. & G. 61.

In that case the Court held upon the construction of the rule of H. T. 4 W. 4. [which provides a reduced scale of costs "in all actions of Assumpsit, Debt, or Covenant, when the sum recovered or paid into Court, and accepted by the plaintiff in satisfaction of his demand, does not exceed £20. exclusive of costs"] that when in an action for unliquidated damages an order is made for staying proceedings on payment of a sum under £20. the costs to be taxed, the plaintiff is only entitled to costs on the reduced scale.

Having consented to a similar order as in the case in a special Assumpsit for a trifling breach of a contract, I yesterday submitted to the taxing officers of the Court of Exchequer, that the plaintiff was only entitled to costs according to the reduced scale, and reduced the case above cited. Whereupon I was coolly informed that the masters would not concur in the propriety of that decision, and the plaintiff was allowed his costs according to the higher scale.

Upon the impropriety of the conduct of the taxing gentlemen in taking upon themselves to reverse the judgments of the Court, there is but one opinion; and the mischievous consequences of such conduct is apparent in the confusion it produces. The case which has been thus overruled is quoted in the books of practice as *law*. It will therefore be important to practitioners to know that the taxing officers refuse to recognise it.

I am, Sir,

Your obedient servant,

M. J. M.

## CONTROVERTED ELECTIONS.

*Report of the Select Committee appointed to consider in what manner the regular service of the notices required by the Act to amend the Jurisdiction for the Trial of Controverted Elections may be best secured.*

The Committee, in the first place, proceeded to inquire in what manner and under what regulations the notices ordered by the House, or Committees, are at present served on the several parties to whom they are addressed.

It appears from the evidence of Sir William Gosssett, that the messenger whose duty it is to serve notices is required to keep a book, in which he is to enter all orders and notices, with the names of the parties to whom they are addressed, the subject matter to which they refer, and the manner in which he has served them on the parties.

The Committee are of opinion, that if this book is regularly and correctly kept, no further regulations are required to insure the correct service of the orders of the House; and had the several columns been correctly filled up in the case of the notices in the matter of the Ludlow election petitions, the mistake as to the service of those notices could not have occurred.

The Committee have subjoined in the appendix the entries of the service of the first notices in the Ludlow case, and also the entries of the second set of notices which have been issued by the General Committee.

The Committee are, however, of opinion, that on account of the importance of the subject it is expedient that the House should give some further directions to insure the correct and early delivery of the notices required under the Act for amending the Jurisdiction for the Trial of Controverted Elections, as difficulties have in some instances been found to exist in discovering the address of the parties; and they therefore beg to suggest, as the best mode for obviating this difficulty, and securing the regular service of the notices required to be given by the above-mentioned Act, that the House should make an order that every election petition shall have endorsed thereon the name of the agent or other person to whom, and the place where, the notices for the parties petitioning are to be served.

The Committee are also of opinion, that the clerk attending the General Committee should be directed to keep a book, in which he should enter all notices issued by order of the Committee, with the date and manner in which they have been served by the messenger, who should be ordered to make a report to that effect to the clerk attending the General Committee, on the day following that on which any such notices may have been given to him for delivery.

March 19, 1840.

# **CIRCUITS** OF THE COMMISSIONERS FOR THE RELIEF OF INSOLVENT DEBTORS.

1840.	Home Circuit.	Southern Circuit.	Northern Circuit.	Midland Circuit.
Summer Circuits.	W. J. Law, Esq. Commissioner.	H. B. Reynolds, Esq., Chief Commissioner.	J. G. Harris, Esq. Commissioner.	T. B. Bowen, Esq. Commissioner.
Wednes. June 10	.	.	Oakham . .	
Friday . . 12	.	.	Sheffield . .	
Monday . . 15	.	.	Wakefield . .	
Monday . . 22	.	.	Kingston-upon- Hull . .	
Tuesday . . 23	.	Reading		
Wednesday . 24	.	.	York and City	
Thursday . 25	.	Oxford . .		
Saturday . 27	.	Worcester & City	Richmond . .	
Monday . . 29	.	.	Durham . .	
Tuesday . . 30	.	Hereford		
Wednes. July 1	.	Presteigne	Newcastle-upon- Tyne and Town	
Friday . . 3	Horsham . .	Cardigan		
Saturday . . 4	.	Haverfordwest and Town	Carlisle	
Monday . . 6	.	.	Appleby . .	
Tuesday . . 7	.	Carmarthen and Borough	Kendal . .	
Thursday . . 9	.	Swansea	Lancaster . .	
Saturday . . 11	Dover . .	Cardiff . .		
Monday . . 13	Canterbury	Brecon . .		
Tuesday . . 14	Maidstone . .	.		
Wednesday . 15	.	Monmouth		
Friday . . 17	.	Gloucester & City	Preston . .	
Saturday . . 18	.	.	Mold . .	Chelmsford
Monday . . 20	.	.		Colchester
Tuesday . . 21	.	Bristol . .		Ipswich
Wednesday . 22	.	.	Ruthin . .	
Thursday . 23	.	.		Yarmouth
Friday . . 24	.	Bath . .	Beaumaris . .	Norwich & City
Monday . . 27	.	Wells . .	Carnarvon . .	Lynn
Tuesday . . 28	.	.		Bury St. Edmund
Wednesday . 29	.	.	Dolgelly . .	Cambridge
Thursday . 30	.	Plymouth		
Friday . . 31	.	.	Welchpool	Huntingdon
Same day-	.	.		Peterborough
Saturday Aug. 1	Hertford . .	Bodmin		
Monday . . 3	.	.	Liverpool . .	Lincoln & City
Tuesday . . 4	.	Exeter and City		
Wednesday . 5	.	.		Nottingh. & Te
Thursday . . 6	.	.	Chester and City	
Friday . . 7	.	Dorchester		Derby
Saturday . . 8	.	.		Leicester
Monday . . 10	.	.		Lichfield
Tuesday . . 11	.	Salisbury		Stafford
Wednesday . 12	.	Southampton .		
Thursday . 13	.	Winchester		
Friday . . 14	.	.		Shrewsbury
Monday . . 17	.	.		Oldbury
Tuesday . . 18	.	.		Birmingham
Thursday . 20	.	.		Coventry
Friday . . 21	.	.		Warwick
Monday . . 24	.	.		Northampton
Tuesday . . 25	.	.		Bedford
Wednesday . 26	.	.		Aylesbury

## MINATION OF ARTICLED CLERKS.

EASTER TERM, 1840.

It is stated that this examination will probably place on Thursday, May the 5th.—The number of candidates is 133.

LEMENT to a letter to the RIGHT HON. EDWARD KNATCHBULL, BART. relating the Bill before Parliament, for the FRANCHISEMENT of LANDS of COPYHOLD TENURE, and other lands subject to hereditary rights. London: Payne and Sons, 81, Pall Mall. 1840

In the 2nd Vol. of this work (a) we had occasion to review the letter to which this is a supplement, and which in our opinion took a biased view of this very important subject. The present letter bears principally upon BROUGHAM'S Bill being compulsory and voluntary. In the progress of the bill introduced in the House of Commons last session, the compulsory clause was struck out. In Lord Brougham's Bill the same appears. The writer says,

It is presumed that the compulsory clause can be permitted to remain, but must be struck together, for the reasons already stated; it is strongly urged that the only proper, and correct act of legislation, should consist in a separation for the regulation of HERIOTS; and for settling in the case of particular estates, the duration of the term on building leases, on similar regulations also.

It is further submitted, that whether the bill be compulsory or voluntary, that every condition should be fixed which can be fixed; and the commissioners should have only so much discretionary power as may be thought to be necessary.

It is submitted also, that it should be extended to such cases where the tenant's right is of inheritance. There are many copyhold tenures, not of inheritance, but upon lives. In some instances the grant for each life forms in itself a distinct and separate estate: any future term is optional. In some cases both parties agree to it, in some only one, in some neither; sometimes the lord only, and sometimes the tenant only. To make these parties renew the lease at their will, or against the will of one of them, would oblige the lord who has the whole interest vested in him, to sell to the tenant his own interest; or to oblige the tenant to buy a new interest, where he has neither the means nor inclination so to do. This description of

tenure then ought to be excluded in distinct terms.

"If the act is to be compulsory, the fixing of the average of heriots by the three last compositions (see clause 28), ought no longer to remain; and for this plain reason, that they will afford nothing like a criterion of the real value. In Manors where the copyholds are of inheritance, the lord is apt to take what is below the value of the heriot; and where the copyholds are for lives, this is still more frequently the case. Hitherto it has been thought a sufficient protection, either to vary the amount of the composition, or to state it to be '*pro hac vice*' only. But if the lord's right is to be taken from him without his sanction, surely he is entitled to that full compensation which he must receive had his heriots been taken in kind; and is not to be made a sufferer through his own good nature and forbearance.

"Another strong argument arises against the compulsory clause, where buildings are required in towns and other populous places.

"It has been already shewn, that in the present state of things, buildings can be raised with advantage to the copyhold tenants, and a method has been pointed out by which such a measure may be accomplished. But no fair compensation at all can be given to the lord under this bill. If the town increases in rent, the houses increase also in value and in rents. The future improvement is certain, although the extent is uncertain; and the Lord of the Manor can have no compensation at all given him upon any practical principle, and is certain of becoming a loser in the long run. He ought at least to have a ground rent varying according to the value. Again, soil, at present valueless, suddenly becomes of the highest value, through some accidental or scientific discovery; and the lord is cut off from all participation in this future accumulation of wealth. He may live to see his copyholder in possession of immense riches, whilst himself remains in a state of stationary poverty.

"It is further submitted that some gentlemen of the highest attainments, have been taught to view this measure in an erroneous manner, and have been led away from the main question. I must humbly remind these gentlemen, that the basis upon which this bill must stand or fall is, that the copyhold tenures operate prejudicially to the interests of agriculture. If they say "I would never buy a copyhold estate," and this observation is made to apply to a purchase as a residence, say for instance, a few acres for the erection of a villa, I at once accede to the remark, I should certainly prefer building on my own, in preference to another's soil; but if they mean to say that an investment of money in the purchase of copyhold land, is not a profitable



concern, I must say that they are labouring under a great error; and that in many instances a copyhold purchase will return them a better interest for their money than any freehold.

"Lastly, it is submitted, that no one can look through all the clauses of this bill without being satisfied that the consequent expense must be enormous; and, I fear, absolutely ruinous in many instances to the smaller tenants. Every individual case must stand by itself, if justice is to be arrived at, and must be settled by its own peculiar position, and the particular evidence belonging to it. With respect to many of the less affluent copyholders, the small capital which they now expend on their land will be exhausted in the redemption of these rights and services; and they will be driven either to part with their estates, or to cultivate them in a very inadequate manner."

The writer then proceeds to make some very pertinent remarks upon the clauses of the bill. We wish however he would look to the tenant as well as the lord. The letter bears the same one-sided stamp as the former.

#### NOTICE TO CORRESPONDENTS.

We have made room for Answers to Two Problems this week.

"An Articled Clerk and Subscriber".—Yes, if in the ordinary occupation and employ of the gentleman to whom you are articled, as an Attorney.

J. T. T.—Where an Articled Clerk or his parents are in justice entitled to a return of part of the premium given with him, the Court will in general interfere summarily, and refer it to the Master to say what sum shall be refunded.

R. J. T.—You deserve much praise for your industry, but some of your Answers betray a want of close reading upon your subject; as an instance, your Answer to the Problem—"Damage Feasant." We wish many others of our correspondents would apply themselves to the Cases they refer to, and the arguments *pro* and *con*, so as to be enabled to form judgments of their own, and not copy so closely from the text books.

W. M.—Your Answer to Problem XVI. in this volume is copied *verbatim* from Sugden's Vendors and Purchasers.—You have even adopted one of that learned writer's MSS. as your own. This is not as it should be.

Alphonso.—See letter by J. A. M.

Δ.—We can find no precedent to meet your Case, and we have taken some trouble with it. We will think about your last questions;—they call upon our leisure, of which we have none, and from being personal they have become some-

what professional, which we do not admit.

G. G.—Is not the remedy with yourself?—In our 2nd volume you will find a letter from a correspondent on the same work.

S. A. W.—See letter by R. H.

Our many correspondents during the week shall all have due attention.

#### NOTICE TO SUBSCRIBERS.

We can only say to those who express their wishes for and against the Lists and Court Papers which we are in the habit of inserting, as necessary and useful information, that—*Frustra laborat qui omnibus placere studet*. We must therefore be guided by our own judgment.

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# The Legal Guide.

L. III.]

SATURDAY, APRIL 11, 1840.

[No. 24.]

## THE LAWS OF REAL PROPERTY.

### ESSAY II.

3 & 4 Wm. IV. cap. 74.

*Act for the Abolition of Fines and Reversions, and for the Substitution of more simple Modes of Assurance.*

(Continued from page 337.)

### BASE FEES.

§ 29 enacts, That if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall, at the time of the passing of this act, or at any time afterwards, be in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall *ipso facto* be enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any will or deed under this act if such remainder or reversion had been vested in any other person.

§ 30 ESTATE IN FEE, *qualified or base*, is an estate in fee to A. and his heirs, till a certain event happens, or to be defeated if such an event occurs: as to A. and his heirs, tenants of the Manor of Dale. Here, so soon as A. and his heirs cease to be tenants of that Ma-

nor, the estate will cease (a) So when Henry VI. granted to John Talbot, Lord of the Manor of Kingston-Lisle in Berks, that he and his heirs, Lords of the said Manor, should be peers of the realm, by the title of Barons of Lisle, here John Talbot had a base or qualified fee in that dignity (b); and the instant he or his heirs quitted the seignory of this manor, the dignity was at an end. So when a person holds his estate to him and his heirs, so long as A. has heirs of his body he has a base or qualified fee (c): which occurs in cases where, formerly, tenants in tail, not being seised of the immediate reversion in fee, levied a fine with proclamations to a stranger in fee, in which case the issue under the entail were barred by the fine of their ancestor from claiming the estate, and the stranger had a fee so long as there was issue under the entail; or where now, under this statute, such tenants in tail execute a *quasi-fine* to such a stranger, without the consent of the protector of the settlement, when a similar base fee arises. When a base fee, and the remainder or reversion in fee simple of the same lands, become united in the same person, with no other estate intervening, the base fee becomes *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector of the settlement (if any) might have created under this section of

(a) Watk. Conv. ch. 9. (b) Co. Litt. 27.  
(c) 10 Rep. 97 b.

the statute, if such remainder or reversion had been vested in any other person.

The *Real Property Commissioners*, in their observations upon merger of base fees, (d) say—"If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging, in the remainder or reversion, the base fee acquired by the fine, as he thereby not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary afterwards, to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense." This difficulty is removed by the present section of the Act, by preserving base fees from merger, and enlarging them, when united with the immediate reversion, in as large an estate as the tenant in tail, if in possession, could have created. Indeed, it provides generally for the enlargement of the base fee, whenever it shall happen to be united with the immediate remainder or reversion in fee, whether the base fee shall have been created by a fine prior to the Act, or shall be created by an assurance under the Act itself.

All the New Real Property Acts, commence by defining the words or expressions employed, and frequently giving *several meanings to the same terms*, thus, the expression "*base fee*," the Act says, shall mean exclusively *that estate in fee simple into which an estate tail is converted*, where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred. As—where A, tenant in tail in remainder, expectant on a life estate in B, with remainder over, makes a disentailing assurance, without B's consent as protector, and acquires to himself and his heirs (general), or conveys to a stranger and his heirs,

an estate to endure so long as there shall be issue in tail; which estate is descendible, alienable, and devisable, like an estate in fee simple. (e) An *estate tail* means not only the thing it properly imports, but likewise "a base fee into which an estate tail shall have been converted," though a base fee has just been classed with a fee simple, because it has not the limited qualities of an estate tail. An "actual tenant in tail" is "exclusively the tenant of an estate tail which shall not have been barred," notwithstanding that "the estate tail may have been divested or turned to a right." Thus, if an estate tail had been discontinued before the Act, the person having the right of action would still be actual tenant in tail, and *a fortiori* if the tenant in tail were merely dispossessed.

The simple term "tenant in tail" includes not only the idea of an actual "tenant in tail," (understood of course in the sense in which that term is previously defined), but also "a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail, if the same had not been barred;" so that in the case above supposed of a disentailing assurance by B, tenant in tail in remainder, A and his issue, though deprived of the estate tail, and all right to the estate tail, would yet be tenant or tenants in tail within the scope of this definition, for the purpose of barring the remainders over, whatever may be the destination of the base fee created by the assurance.

The next term "tenant in tail," entitled to a "base fee," is explained to mean "a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail." Thus, if in the case before stated, A. had conveyed to the use of himself and his heirs, then, as he would have taken the base fee, created by

(d) 1st Rept. p. 28.

(e) See *Hayes's Copy*, 165.

assurance, and would, but for the assurance, have had the estate tail, he would be tenant in tail entitled to a base fee" with the meaning of the definition; and if he could die, without disposing of the base fee, leaving an eldest son, such son being once owner of that fee, and nominal heir to the entail, would fall within the same definition.

Lord Coke thus defines the *base fee* here referred to. Where a tenant in tail bargains and sells the estate to another and his heirs, afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple, as long as the tenant in tail has issue of his body, derived out of the estate; this being an inferior release, bargain, and sale, or covenant to stand seised by a tenant in tail would create a base fee voidable by the issue in tail; see Co. Litt. 328. 2. *Ld. Raym. 779. Doe dem. Neville v. Turner, 7. T. R. 278.* Lord Kenyon thus describes the effect of a fine in merging a base fee in the reversion. If a tenant in tail with reversion in fee to himself, levy a fine, the effect of that on the estate tail is creating a base fee, and that becomes merged in the reversion in fee, and lets in all the incumbrances of the ancestor, which has frequently happened, in practice, from such a person being ill-advised to levy a fine instead of suffering a recovery; generally speaking, when two estates unite in the same person, in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together; in such a case, by the operation of the statute *Quia Emptores*, the estate tail is kept alive, not merged by the reversion in fee. See *Roe v. Crom v. Baldmore, 5. T. Rep. 110.*

#### PROBLEM XXIV. VOL. III.

##### DEVASTAVIT.

What shall amount to a *Devastavit*.

TO THE EDITOR OF THE LEGAL GUIDE.  
ANSWER TO PROBLEM XIX. VOL. 2.

##### TRUSTS.

What is a simple trust? and

#### PROBLEM XX. VOL. 2.

What is a special trust?

Let us divide this subject, and consider—

1st. *A simple trust.*

2ndly. *A special trust.*

1st. *A simple trust* is what a *use* was before the statute of Henry VIII. and is thus described by Lord Coke: "A use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral thereto, and is annexed in privacy to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* shall take the profit, and that the *trustee* shall make an estate according to his direction." Co. Litt. 272 b. See *Hayes' Conveyancing*, p. 27. Or to speak in less ambiguous terms it is—where property is simply vested in one person upon trust for another, and the nature of the trust, not being qualified by the settlor, is left to the construction of law.

In the case of a simple trust, as the statute of Henry operates on the first use only, whether designated in the instrument as a use or a trust, if the conveyance or devise be to A. and his heirs "in trust for B. and his heirs," the possession will be executed in B. As in *Austin v. Taylor*, 1 Ed. 361; *Robinson v. Grey*, 9 East. 1; *Broughton v. Langley*, 2 Salk. 679; and the statute must operate notwithstanding the intention of the settlor to the contrary. In order therefore to make a simple trust effectual as such, the conveyance or devise must be "to the trustee and his heirs to the use of the trustee and his heirs, or unto and to the use of the trustee and his heirs," in trust for *cestui que trust* and his heirs. See *Lewin on Trusts*, pp. 21, 102.

In cases of simple trust the cestuique trust, or person having the equitable ownership, is entitled to the pertainance of the profits, and the disposition of the estate, the *jus habendi* and *jus disponendi*, *Smith v. Wheeler*, 1 Mod. 17, per Pemberton, J.; and cestuique trust hath neither *jus in re* or *jus ad rem*, but only a confidence and trust, for which he hath no remedy by the common law; but for breach of trust his only remedy is in chancery. Co. Litt. 272 b.

2dly. A special trust is where the conveyance to the trustee is to answer some particular and immediate purpose. Such as trusts to sell for payment of debts, &c.; for the separate use of a married woman; to preserve contingent remainders, &c. In which cases the trustee is not, as in the case of a simple trust, a mere passive depository of the estate, but is bound to exert himself actively in the execution of the settlor's intention.

Special trusts are not within the statute of uses; and therefore if any agency be imposed on the trustee, as by a limitation to A. and his heirs upon trust to pay the rents, *Robinson v. Grey*, 9 East, 1; or to convey the estate, *Garth v. Baldwin*, 2 Ves. 646 &c.; or any controul is to be exercised, or duty to be performed, as upon trust to apply the rents to a person's maintenance, *Sylvester v. Wilson*, 2 T. R. 444; or in making repairs, *Shalpand v. Smith*, 1 Bro. C. C. 75; to hold for the separate use of a feme covert, *Harton v. Harton*, 7 T. R. 652; or to preserve contingent remainders, *Biscoe v. Perkins*, 1 V. & B. 485; and a fortiori if to raise a sum of money, *Wright v. Pearson*, 1 Ed. 119; or to dispose of land by sale, *Bugden v. Spencer*, 1 Ves. 142; in all these cases, as the trust is of a special character, the operation of the statute of uses is effectually excluded. Lewin, 103.

The cestuique trust's estate in the case of a special trust is the right to enforce in equity the specific execution of the settlor's

intention, to the extent of that cestuique trust's particular interest. Id. 495.

J. A. M.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XVIII. VOL. 3

CHANCERY.

Plea to a Bill—What is its object? What constitutes a good plea?

A Plea is put in to a Bill to avoid a discovery, or for the purpose of reducing the same, or some part of it to a single point and from thence to create a bar to the suit. Mitf. Pl. 177. The office of a plea generally is not to deny the equity, but to bring forward a fact, the result, perhaps, of a combination of circumstances which, if true, displaces the equity. *Rowe v. Teed*, 15 Ves. 377. It is not every good defence in equity that is likewise good as a plea: for where the defence consists of a variety of circumstances there is no use of a plea, the examination must still be at large, and the effect of allowing such a plea would be that the Court would give their judgment on the circumstances of the case before they were made out by proof. *Chapman v. Turner*, 1 Atk. 53. Two inconsistent facts cannot be joined in one plea, *Whitbread v. Brockhurst*, 1 Bro. C. C. 404, nor can various facts be pleaded in one plea, unless all are conducive to a single point of defence, *Rütchte v. Alry*, 15 Ves. 82. But on a special application to the Court (where circumstances require it) leave will be given to the defendants to plead doubly, *Kay v. Marshall*, 1 K. 190. *Gibbs v. Whitehead*, 4 Madd. 241. The leading distinction between a plea and demurrer is that the former is used as a defence where the defect is not apparent on the face of the Bill, while the latter is the proper defence where the defect is apparent on the Bill. *Cockburn v. Thompson*, 16 Ves. 325. *Billings v. Flight*, 1 Mad. 230. If a plea be replied to it is thereby admitted to be good, if it is.

ue, and the validity of the plea cannot be  
 introverted, but only the truth of it as he  
 oves it, or the plaintiff disproves it. 2 Mad.  
 br. 235. A plea may be *good* in part and  
 d in part, *Plunket v. Benson*, 2 Atk. 51.  
 which it differs from a demurrer. But if  
 e part of the plea be inconsistent with the  
 er it will be overruled. 4 Bro. C.C. 254.  
 plea may be to the *whole* Bill, or to *part*  
 ly. A plea therefore with an exception,  
 y be good, but a plea with an exception  
 erally, "of what is not answered" is not  
 ed, for, in such case, the Court could not  
 ow what the plea covers, without looking  
 o the answer, *Salkeld v. Science*, 2 Ves.  
 and 3 Atk. 70, but if the exception is  
 ily stated, it is unobjectionable, *Howe*  
*Duppa*, 1 Ves. and Bea. 514.

R. J. T.

## Imperial Parliament.

HOUSE OF LORDS.—April 6.

### PRINTED PAPERS BILL.

We cannot spare room for the important  
 es of Lord DENMAN and the LORD  
 CANCELLOR upon this Bill. We have there-  
 adapted the summary of a contemporary.

The second reading of the Printed Papers  
 was moved, last night, in the House of  
 s, by the LORD CHANCELLOR. A dis-  
 on on the far-famed *privilege* question natu-  
 attracted a full attendance of peers. Nei-  
 Lord LYNTHURST nor Lord BROUGHAM  
 present.

The speech of the LORD CHANCELLOR was  
 and temperate—with a leaning, it may be,  
 ds the assertors of privilege. Lord DENMAN  
 ced in a speech of the most admirable cha-  
 —a speech, learned, luminous, argumenta-  
 in the highest degree—and pervaded, more  
 y, by a spirit of the most devoted attachment  
 constitutional freedom. Lord DENMAN's no-  
 nification of the majesty of English law  
 his defence of the conduct of that court over  
 he presides, ought to be circulated in every  
 of the kingdom.

Lord DENMAN, while he distinctly recognised  
 possession by the House of Commons of  
 an most important privileges, pointed out  
 clearly the recent assumption by that body

of powers never, in former times, claimed by  
 either of the branches of our Legislature. The  
 House of Commons, it is true, as Lord DENMAN  
 observed, claimed for the House of Lords the  
 same privileges which it arrogated for itself; but  
 his Lordship ventured, in behalf of the members  
 of the Upper House, to disclaim all pretension  
 to the possession of any power, in virtue of  
 which 'whatever they printed should be privi-  
 leged, and whatever they did should possess the  
 force of law.' By reference to a resolution on  
 their Lordships' journals—a resolution yet un-  
 rescinded—Lord DENMAN proved that the House  
 of Lords had solemnly recognised the supremacy  
 of law over parliamentary privilege.

"In illustration of the tendency of the House  
 of Commons to grasp at power which does not  
 constitutionally appertain to that body, Lord  
 DENMAN stated the very instructive case of  
 Floyd—a case determined in the reign of James F.  
 His Lordship showed, however, that in that case  
 the House of Commons, when their usurped  
 power was challenged by the House of Lords,  
 resigned it; and his Lordship proceeded to point  
 out the very striking consequences that might,  
 in certain circumstances, have followed, had the  
 House of Commons persisted in exercising the  
 unconstitutional functions which it, in the first  
 instance, claimed. His Lordship assumed the  
 case of the sheriff having been called on to do  
 justice to Floyd's heirs, in opposition to the  
 pleasure of the House of Commons—and ad-  
 verted to his probable fate—incarceration, aggra-  
 vated by that 'base buffoonery' of which Eng-  
 land has recently seen so disgusting an example.  
 The lofty indignation with which Lord DENMAN  
 spoke of the treatment to which the sheriffs of  
 London have been subjected, well became his  
 high character and lofty position.

"The LORD CHIEF JUSTICE then dealt most  
 forcibly with the pretended 'necessities' which  
 are said to justify the privilege of unrestricted  
 publication by the House of Commons. 'We  
 are told,' exclaimed his Lordship, 'that that  
 power is essential to the exercise of legislative  
 functions! How is it essential? We are told,  
 in the first place, that the privilege in question  
 is essential—because it is desirable that the  
 House of Commons should lay before the public  
 the grounds of their legislation. To this I an-  
 swer, that the grounds of their legislation can  
 never be assumed to be, a mass of *ex parte*  
 statements, of libellous charges, of unsustained  
 attacks on private character. Again, we are  
 told, that members of the House of Commons  
 must justify themselves to their constituents—and  
 that, in the exercise of their functions as the  
 grand inquest of the nation, they must exercise  
 the privilege in question. Again I answer, that  
 out of such materials as I have described, men

bers of the House of Commons can neither find the means of justifying their conduct to their constituents, nor, of exercising, with advantage their inquisitorial powers.

"Lord DENMAN pointed out, in a manner most befitting the subject, the insolent attempts of the House of Commons to interfere with the administration of justice—and to browbeat and overbear the judges. The famous 'resolutions' of the House were, in fact, nothing but an outrage on the dignity of the judicial bench.

"The history which the LORD CHIEF JUSTICE furnished of the whole transaction is admirably illustrative of the nature of the tyranny which the majority of the House of Commons desires to establish. In the first instance, the Attorney-General pleaded the truth of the alleged libel—and was successful. Then the Attorney-General tested his defence on the ground of unlimited privilege—and was beaten. Then commenced the war against the judges. Then the cases were left altogether undefended—no writ of error was issued—no appeal against the judgment of the court was hazarded. No—the constitutional course adopted by the Attorney-General was, to vilify the authority of the Court of Queen's Bench—to calumniate the judges—and to treat the sheriffs with greater brutality than is exhibited towards many convicted felons."

*Morning Herald.*

Lord DENMAN said that it was perfectly well known and understood that it was lawful to print for the use of the members. The law being understood, the printers defended themselves before him by an order to sell also for the use of members. That was so far an indiscriminate publication. The sale had taken place, by order of the house, for a great number of years. He wished for entire publicity, and he did not think that the circumstances of the sale would make any material difference. He must say that he thought they ought to give publicity to all papers that should be really and bona fide prepared by Parliament.

The bill was read a second time.

The LORD CHANCELLOR said, as the bill was intended to put a stop to certain proceedings at law, and Wednesday week was the first day of term, it was necessary that it should go through all its stages this week.

The Duke of WELLINGTON had been told by Lord Lyndhurst that he wished to take a part in the debate; he should submit that they should go into committee on it on Friday.

The LORD CHANCELLOR was ready to go into committee on Friday; but in that case their lordships should be prepared to sit on Saturday.

Lord ELLENBOROUGH proposed that they

should sit on to-morrow (Tuesday) for going into committee, on the understanding, however, that if Lord Lyndhurst wished to express his opinions in committee rather than on the bringing up of the report, they should postpone going into committee till Friday.

The LORD CHANCELLOR acceded to this suggestion.

"What is called 'The Printed Papers Bill' involving the new privilege claimed by the House of Commons, is now on its way through the House of Lords, and will be discussed in detail as soon as Lord Lyndhurst is able to take his seat. For our own parts, we retain the opinion which we first gave on this subject—that neither House has a rational right to any privilege whatever, but that of deliberating and deciding without impediment, hindrance, or future responsibility, on the public matters which are subject to its consideration. If physically obstructed they may remove the obstruction by summary imprisonment during the session. If libelled the courts are open to them, they may prosecute by the law officers. With these privileges, the whole duty of legislation may be fully and effectually performed. And what right can a legislative body have to more?"—*Times.*

## PRINTED PAPERS OF THE HOUSE OF COMMONS.

### EXTRACT FROM THE REPORT OF THE SELECT COMMITTEE.

"There is no publication by order of the House which is not checked by the previous responsibility of some authority competent to supply. The speaker, the senior clerk at the table, persons appointed by act of parliament or by the crown to situations of trust, committees selected by the House itself, and especially the chairs of such committees, are the authorities on whom respectively, according to the nature of the documents, the House relies.

"Whether these checks are sufficient, or whether they would admit of improvement, it must be for the House to decide. Your Committee conceive that they shall best discharge their duty by abstaining from expressing an opinion up to that point; it only therefore now remains for them to point out what means of obtaining redress are open to individuals to whom injury may be done by any publication by order of the House. In the event of such injury being sustained, the course which might be adopted by the party aggrieved is that of appealing for redress to the House itself by petition. To

petition, if well founded, it is not reasonable to suppose that the House would refuse to listen; and whenever a wrong shall appear to have been really sustained, there would be no difficulty making such reparation as the circumstances the case might appear to demand. Let it be supposed, for instance, that the inspectors of prisons had been mistaken in the character they gave of the work published by Stockdale, and that it had really been a scientific work, which had been properly permitted to come into the possession of a prisoner, either the court of aldermen which was responsible for the management of the prison where the alleged abuse had existed, the publisher of the book to which an obscene character was imputed, would on their petition readily obtained an inquiry into the truth of the statement they complained of, and, if disproved, the contradiction would have obtained the same circulation with the statement itself. A similar course might be adopted with respect to any unjust reflections on private character contained in papers published by authority of the House, and it would likewise be in the power of the House, if satisfied that such reflections were false, to declare its opinion to that effect by resolution, at the same time putting a stop to the further circulation. But although an injury of this description might thus be redressed, your Committee must repeat that too much pains cannot be taken to avoid giving in the first instance ground for complaint, and they therefore think it important to remark, that persons who would make their evidence before committees of the House the vehicles of calumny against others could not calculate upon doing so with impunity. The House has always been in the habit of punishing, as a contempt, any wilful departure from the truth by a witness, and this punishment would naturally and properly be more severe if the deception of which a witness had been guilty should appear to have been prompted by a malignant motive. The same principle may be applied to the case of a malicious falsehood contained in a petition.

Your Committee do not desire to offer any opinion as to whether the remedy thus attainable by individuals for any injury sustained by them by publication by order of the House is insufficient or otherwise, but, as an impression seems generally to prevail that if the privilege conferred for by the House is maintained, no such remedy whatever would exist, they have thought it right to show the idea to be unfounded, and to point out in what manner redress for injuries of this description might, consistently with parliamentary usage, be obtained.

March 18, 1840."

## Law Reports.

### COURT OF CHANCERY.—Feb. 1.

ATTWOOD v SMALL.

*Appeal from Vice-Chancellor—PRACTICE—  
DEMURRERS for want of Equity and want  
of Parties.*

This was an appeal from the order of the Vice-Chancellor. (a)

The LORD CHANCELLOR said, he was of opinion that the bill was good, but good only as an ordinary bill for specific performance, and therefore to be enforced only against those persons who were parties to the contract, Small, Shearn, and Taylor. The result of the decision of the Vice-Chancellor appears to me to be that the plaintiff would have no remedy at all, because it is part of the contract that those persons shall not be personally liable. There are now no persons before the Court, but those three persons, and they only as being parties to the contract. But if the contract is to be performed in the way in which it was arranged between the parties, and if no equity has arisen from the subsequent transactions, to give a better remedy to the plaintiff, why then (being the owner of the whole, and the estate being in the possession of the purchasers, and they not having paid the purchase-money) the Vice-Chancellor's judgment appears to me to have left the plaintiff in this situation—that he is only to prosecute his suit for the purchase-money against the three persons, who are not personally liable for it. So that the plaintiff would have no remedy at all, provided the contract is to be performed as it appears on the face of the bill, and that nothing has happened since to give the plaintiff any new equity. Therefore his only remedy is upon the written contract. The bill states that the plaintiff was owner of property of mines of very great magnitude; that he entered into a contract with certain persons, on behalf of the company, in their own names; that the effect of which was to give those persons (the defendants) the property in the mines, for which he was to be paid by certain instalments; that they were not to be personally liable; that the instalments were to be paid at certain stipulated periods; and the plaintiff was to look to the estate for payment. That in fraud of that contract, they instituted a suit, containing a variety of false charges, which at one time were supposed to be well-founded, but which, by the ultimate decision of the House of Lords, have been declared to be ill-founded, and that by those means, and by undertakings in the cause when it was pending in the Court of Exchequer,

(a) See this case, fully reported ante vol. i. p. 373.



they have protracted the day of payment, (the last payment was to be in 1827,) and that the result has been that, during the whole of this period, they were continuing to work the mines and exhaust the property to which the plaintiff was to look for the purpose of working out his security; and that the result of that has been that 300,000*l.* remains due, the property itself having, by the working of the company in the meantime, become an inadequate security for that sum. My opinion is, that upon this statement in the bill, there is a remedy for the plaintiff. Whether the facts are made out or not, of course is not now to be considered; but if he makes out his case as stated on the face of his bill, this Court will find the means, so far at least as the circumstances enable the Court to do so, to restore the plaintiff, as far as possible, to the situation in which he ought to have stood, looking at the contract now established between the parties, as a valid contract, as that which is to regulate the rights of the parties. In the first place, I take it to be quite clear that, according to the contract itself, he has a right to look at his remedy against the property as it remains. There is another part of the case which I don't allude to, because, if the other parties ought to have been parties to the suit—I mean in respect of the other property which the company are said to have possessed, and which is not part of the property comprised in the contract—it is quite sufficient for the present purpose if the case shows a right in the plaintiff to pursue his remedy against the property itself. Now, with regard to those persons who were directors at the time the contract was entered into, if the case be as is stated, there is abundance of authority to shew that persons who have interposed between the party and his rights shall in some way or other be liable to make compensation for the injury of which they have been the authors. I think there is quite enough stated in the bill to shew that those, who took upon themselves in the other suit to interfere with the plaintiff's right under his contract, cannot be permitted now to state that they are not parties to the transaction, and that they ought not now to be made parties to a bill in which the plaintiff asks compensation for the unquestionable injury which he has sustained. Being of that opinion, of course it follows that the general demurrer cannot be maintained, the demurrer for want of equity. It applies as well to those who were directors and plaintiffs to the original suit, as to those who are now demurring parties, being representatives of persons who were in that situation, but who are now dead. As to the demurrer for the want of parties, it is said that assuming the suit to be properly constituted in other respects, there are three descriptions of persons who are not brought before the Court.

The one set of persons are all the shareholders of the company; the second are those who were directors of the company at the time the bill was filed; and thirdly, it is stated that one of the old directors being dead, that his representatives are not brought before the Court, and that there is not sufficient stated upon the bill to explain the reason why they are not brought before the Court. Now with regard to the first, what is stated in the bill, looking at the authorities upon this question, there is no ground upon which the objection can be maintained. The bill alleges that there are 600 shareholders, and that they are constantly varying, the shares being transferable, and states a case, therefore, that makes it utterly impossible that the plaintiff could pursue his remedy, if he must pursue it by bringing before the Court, and keeping before the Court, all persons who are shareholders. The cases of *Adair v. The New River Company*,<sup>(a)</sup> and *Meux v. Maltby*,<sup>(b)</sup> have saved me the necessity of doing that which I certainly should have done, if I had not found authorities already standing, of adopting the rule which it was necessary to adopt in order to prevent the grossest injustice being practised by companies of this description. To say that they are to be permitted to sue on behalf of themselves and others, because they are so numerous that they cannot be brought before the Court; and then to say that persons by whom they are said are not to be at liberty to bring those who are plaintiffs against them before the Court without bringing all the shareholders, would enable them to commit any injustice which they pleased, without the possibility of being made responsible for it. I am of opinion that it is not necessary to bring the shareholders before the Court as such.

The plaintiff now avers that, the contract being contracted to be carried into execution, he wants that remedy which the contracts and the subsequent transactions which have taken place, give him in order to obtain the consideration money. But I have nobody here representing the company. I have only those who may be said to have represented the company at a period long past, when the original bill was filed in the Court of Exchequer, but who are stated to have ceased to hold that situation, and to have handed over the possession of the property which as directors they then held, to other persons who have subsequently become directors of the company. The partnership deed puts the directors in the place of the company, and makes the defendants for the purpose of any litigation between themselves and others, in my opinion, proprietors of the company. I have said, that the six hundred shareholders are not necessary parties to the

(a) 11 Ves. J. 429.

(b) 2 Swanst. 377.

but if they are not necessary parties as defendants, there must be some persons whom the contest with the company are at liberty to make.

The only other persons held out by the bill as owners of the property of the company, competent to deal with individuals who may have transactions with them, are the directors. If the directors, who held the property at the time this litigation commenced, were to be made parties to the suit, they must be considered as parties to the contest with any other persons, as the owners of the property, and persons with whom this contract was made; they are not made parties to the suit, and no persons are made parties to the suit, can be considered in any sense as representing the company, or as against whom a remedy can be enforced, except the trustees: they are not, but then there are no *custis que trusts*—except so far as they are trustees for themselves. I don't find, therefore, on this record, persons defendants who represent the interests of the company, or as against whom any remedy the plaintiff may have against the company can be enforced. My opinion is, therefore, that the bill cannot upon this bill proceed, and the plaintiff cannot get what he asks, and which, according to the case he makes, no doubt he is entitled to, (if he makes out the case), to a decree for the consideration money unpaid against each of the property which remains now liable for that purpose. I find no person representing the interest, and no person against whom such a right can be enforced. I think, therefore, that the actual proprietors of the company are necessary parties to the suit, and that the bill makes it unnecessary.

Dismissed for want of equity—over-ruled. Decree for want of parties—allowed. Liberty for the plaintiff to amend.

## VICE-CHANCELLOR'S COURT,

March 19.

### KEYMER v. PERRING.

**MARRIAGE SETTLEMENTS.**—*Power of the Court to alter a Settlement where not prepared according to the intention of the parties.*

There was a suit instituted on behalf of a married woman by her next friend, to have a settlement executed on her marriage rectified, so as to give her an absolute power of appointment over the trust property comprised in the settlement, which only a life-interest had been secured to her, and to have an account taken of what the trust property consisted at the time of the settlement, and how it had been disposed of; and that she might be at liberty to make her election

whether she would adopt certain investments of the trust fund which had been made. The bill stated that on the marriage of the plaintiff, Alice Perring, with Mr. Keymer, a treaty was entered into on behalf of the intended husband, by which it was understood and agreed by all the parties that the trust property should be so settled as that the lady should have a full and absolute power of appointment over the whole; and in default of appointment, that it should be in trust for her during her life to her separate use, and after her decease to the issue of the marriage, as she and her husband or the survivor should appoint, and in default of appointment to the children equally; but if there should be no child, then to be distributed among the lady's next of kin; and that Mr. Allen Perring the brother, who had formerly been a solicitor, but who was not then in practice, having been intrusted with the preparation of the settlement, had caused a deed to be prepared and ultimately executed, in which no power of appointment was given to the wife, but in which every other part of the arrangement was given effect to. The lady was about 40 years old at the time of the marriage, which took place in Feb. 1825, and her husband about 20 years older.—There was no issue of the marriage in existence, and though Mrs. Keymer had made a will eight days after her marriage, appointing all her property to her husband, the defect in the settlement was not discovered until a very short time ago. The bill, without imputing any wrong intention directly against Mr. Allen Perring in the preparation of the settlement, set forth all the circumstances connected with the transaction in such a manner as to make it appear to the Court that the events which had occurred by which he would become entitled to a distributive share of the lady's property on her death were not unforeseen by the brother, and that the omission of the power of appointment was not in fact an accident. The evidence on the part of Mr. Perring entirely rebutted the imputation, by showing the omission had occurred entirely through inadvertence in the preparation of the draught by a young conveyancer, and friend of the family, and that on its discovery Mr. Perring at once admitted the intention to have been to give his sister an absolute power of appointment, and offered himself to bear the expense of having the settlement rectified by the Court. The other allegations in the bill related to improper investments of the trust property in houses on Tulse-hill, Brighton-terrace, Brixton, and at Norwood, and sought an account against the trustees of the marriage settlement. Mr. Colesworth by his answer stated, that he had never acted in the trusts, and was anxious to be discharged, and that the sole management of the trust property had been intrusted to Mr. Perring, with the ap-

probation of the plaintiff, who had never applied to him to have any part of the property transferred into his name, or to act in the management of the trusts. The evidence in support of the allegations of mismanagement, and that given in reply to disprove the charges, and show that proper accounts had been rendered, and that the plaintiff was fully aware and approved of what was done, was very voluminous, and with the arguments of counsel has occupied the Court four whole days.

The VICE-CHANCELLOR said the settlement was plainly wrong. It was admitted to be so, and it was manifest upon the face of it something else was intended. It appeared to have been understood on all hands that Mrs. Keymer was to have a general power over the whole fund, so as to dispose of it in any way she pleased. What instructions were given to the conveyancer did not appear. He said (speaking from his recollection of what took place 16 years ago) the settlement was prepared according to the instructions which were given him. He could not but think, though the instructions were not produced, it was to be inferred from the aspect of the draught that the instructions did contain a direction there should be that general power of appointment given to the wife which was stated in the bill. His Honour then examined different parts of the draught, many sheets of which he apprehended were originally blank forms of common clauses in settlements, which it was the practice of conveyancers to keep ready written, and that an intention appeared to have introduced a general power of appointment, which was afterwards, by some gross mistakes, passed over. So far, therefore, as the draught furnished any evidence, he was of opinion instructions were given to the conveyancer to draw a settlement with a general power of appointment. There was other evidence afforded from the manner in which the parties themselves had acted. Mrs. Keymer's will, made eight days after the settlement, supposed it to contain that general power, and the responsibility which Mr. Pering had brought upon himself personally by his mode of dealing with the trust property, if there was no such power, clearly showed that he had acted on the assumption that there was. However, the parties went on dealing for several years, and at last the error was discovered, and then it was said Mr. Pering ought to bear the costs of rectifying the mistake.

His Honour could not look upon it as a professional act of Mr. Pering, as he had ceased to be a solicitor in 1806. The settlement must, however, be rectified, and Mrs. Keymer might have it done in what manner she pleased, but she must bear the expense of rectification. Upon the other parts of the case there had been a

great deal of discussion and time taken up, which his Honour was astonished at, when he looked at what it was the bill asked. With regard to the investments of the trust fund, he could not think they were wrong, and that it would turn out the mode of dealing between the parties showed such a knowledge and concurrence on the part of the plaintiff as would afford sufficient protection to the trustee for all he had done. There could, therefore, be no objection to directing an account, with liberty to the Master to state special circumstances. The cost of this part of the suit must be reserved. His Honour could not help observing, from the manner the plaintiff had shaped the case, she was aware of all that was going on; but he was sorry to see that the whole was conducted with a view to run down the character of Mr. Pering. He had, therefore, gone the more carefully through the whole of the charges, to see if there was any ground for the attack; and his mind was free from any impression which it was intended to create by the imputations of improper conduct on the part of Mr. Pering with regard to any of the subjects mentioned in the bill. His Honour then directed the terms of the reference to the Master to approve of a proper settlement.

#### ROLLS COURT, Feb. 17.

STEPHENSON AND WIFE, v SMITH AND OTHER EXECUTORS—*Their liabilities for the Accounts of each other.*

Mr. Pemberton stated this case for the plaintiffs. The suit was instituted by Mr. Stephenson and Rhoda his wife, one of the daughters of Robert Lyford, who died in 1834, and by his will, after giving an annuity of 30*l.* a year to his wife *durante casta viduitate*, divided his property among his children; his daughters to receive one-third less than his sons, and appointed the defendants Smith, Tyrrel, and Windiate executors. The real estates of the testator, who was a landowner in Berkshire, were put up to sale by auction and Tyrrel, one of the trustees and executors, himself became the purchaser of three of the lots. The amount of the purchase-money was 311*l.* The crops of the farm were also put up to sale, and the conditions of sale were, that 20 per cent of the purchase-money should be paid by way of deposit, and security be given for payment of the remainder at six months. A portion of the crops was purchased by a Mr. Collingwood for 170*l.*, but no security was given, and at the end of six months became bankrupt. Windiate employed Collingwood as a puffer at the sale, and he exceeded his authority, and was allowed to take the purchase on himself. Differences arose

the testator's daughter, Rhoda, having married Stephenson, they filed their bill praying that all of the testator might be established and costs carried into execution; that the trustees be charged with all monies which they had but for their wilful default, have received; they might make good the purchase-money of crops sold to Collingwood, and account for the sum of 29*l.* which ought to have been received from Mr. Barrett, a purchaser of part of the real estate.

Mr. Kindersley, for the defendant, said the testator or himself was in treaty to sell to Tyrrell the land he had afterwards purchased; and not only the widow of the testator, but all his sons and children, expressed their concurrence in the sale, and were satisfied that Tyrrell had given full price; Rhoda, before her marriage, appeared of the sale, but the plaintiffs, after their marriage, prayed that the sale might not stand. Collingwood did not adhere to the directions of the testator, the executor, by whose desire he attended the sale, and the lots were knocked down at prices exceeding what Windiate had offered him to bid. The purchase-money of the land was not paid to the auctioneer; Windiate afterwards went to America, and Collingwood took the crops were delivered, had become bankrupt. They submitted that Smith and Windiate were not personally liable for Collingwood's default, as trustees had sold a portion of the testator's land to Mr. Barrett, and had let him into possession. The agent of Barrett who attended the sale would not have done so unless the conditions of sale were relaxed as to payment of interest on the purchase-money, and it was agreed such interest was only paid in the event of the completion of the sale, being impeded by the fault of the purchaser. Doubts arose respecting the possession of the land by Barrett, and 29*l.* was deducted from the sum. It was on the alteration of the conditions that the agent of Barrett was induced to attend the sale.

Mr. Langdale said, as to the land purchased by Tyrrell, it should be put up again at the same price paid for it by Mr. Tyrrell. The three trustees had permitted the sale of the crops to be made by one of them; they must be personally answerable for everything that took place in conformity with the commission they gave. Windiate was the person, and he employed Collingwood to bid up to a certain sum; he exceeded his authority, bid more, and became a purchaser on the same conditions as would be imposed on other parties. He ought to have been, but was not, required to make a deposit, and he became bankrupt. Inquiry must be made if the money was lost from the wilful default of the trustees, and there must be a similar inquiry as to the 29*l.* (1).

(1) One trustee shall not be liable for the acts or defaults of his co-trustee, whether a proviso to that effect be inserted in the original settlement or not. This was established by the decision of the Judges in *Townley v. Sherborne* (Bridg. 35.) A. B. C. and D. were trustees of some leasehold premises. A. and B. collected the rents during the first year and a half, and signed acquittances; but from that period the rents were uniformly received by an assign of C. The liability of A. and B. during the first year and a half was undisputed, but the question was raised whether they were not also chargeable with the rents which had accrued subsequently, but had never come to their hands?

"The LORD KEEPER COVENTRY considered the case to be of great consequence, and thought not to determine the same suddenly, but to advise thereof; and desired the Lords the Judges' Assistant, to take the same into their serious consideration, whereby some course might be settled that parties, trustees, might not be too much punished, lest it should dishearten men to take any trust, which would be inconvenient on the one side, nor that too much liberty should be given to parties, trustees, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side. And the Lord Keeper, and the Lords the Judges' Assistant, afterwards conferring together, and upon mature deliberation conceiving the case to be of great importance, his Lordship was pleased to call unto him also Mr. JUSTICE CROOK, Mr. JUSTICE BARCLEY, and Mr. JUSTICE CRAWLEY, for their assistance also in the same, and appointed precedents to be looked over, as well in the Court of Chancery as in other Courts, if any could be found touching the point in question; whereupon several precedents were produced before them, some in the Court of Chancery, and some in the Court of Wards, where parties, trustees, were chargeable only according to their se-

veral and respective receipts, and not one to answer for the other; but no precedent to the contrary was produced to them. Whereupon his Lordship, after long and mature deliberation on the case, and serious advice with all the said Judges, did this day in open Court declare the resolution of his Lordship and the said Judges:—That where lands or leases were conveyed to two or more, upon trust, and one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his co-trustee shall not be charged or be compelled, in the Court of Chancery, to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing, appear to have been in them to prejudice the trust; for they being by law joint tenants, or tenants in common, every one by law may receive either all or as much of the profits as he can come by. And it being the case of most men in these days that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate, to make up the same, either by the sale or the perception of the profits thereof; and if such of their friends who carry themselves without fraud, should be chargeable out of their own estate for the faults and deficiencies of their co-trustees who were not nominated by them, few men would undertake any such trust. And if two executors be, and one of them wastes all or any part of the estate, the *devastavit* shall by law charge him only, and not the co-executor. And in that case *æquitas sequitur legem*, there being many precedents resolved in Chancery, that *one executor shall not answer nor be chargeable for the act or default of his companion*. And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt

of the profits. And albeit, in all presumption, this case had often happened, yet no precedent had been produced to his Lordship or the Judges, that in any such case the co-trustee had been charged for the act or default of his companion; and therefore it was to be presumed that the current and common opinion had gone that he was not to be charged; it having not till of late been brought into question in a case that by all likelihood had often happened. But his Lordship and the said Judges did resolve, that if upon the proofs or circumstances, the Court should be satisfied that there had been any *dolus malus* or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing."

LORD HARDWICKE, in *Leigh v. Barry* 3 Atk. 584. said—In the case of trustees though there are *not negative words* in a deed that *they shall not be liable for the acts of one another*, yet the Court of Equity will not make them liable for more than each has received, and that the Court has even gone further; for when they all join in a receipt for money, it will make that *trustees* liable only who received it, for they are all obliged to join in the receipt; *otherwise as to executors*,—for there is no necessity for their joining, but may act severally if they think fit.

The rule is general that *executors* joining in a receipt, shall all be answerable. See *Fellows v. Mitchell*, 1 P. Wms. 81. *Exp. Belchier*, Ambl. 219. *Sadler v. Hobbs*, 3 Bro. Ch. Rep. 116.; but see *Churchill v. Hopson*, 1 Salk. 318. *Scurfield v. Hooke*, 3 Bro. Ch. Rep. 94. where the rule was held to be universal.

SIR JOHN LEACH, M.R. in *Davis v. Spelling*, 1 Russ. and My. 66. held that where an executor, possessing assets of his testator, hands over those assets to a co-executor, and they are misapplied by that co-executor, then, the executor, who so hands them over, shall be answerable for their misapplication.

use he had a legal right to retain them, might have preserved them; and it was only to do so, unless, indeed, they were added over for the express purpose of a final administration by the co-executor, as to the payment of a particular debt.

In all the cases it appears to be clearly established that where, by any act done by one executor, any part of the estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had enabled to receive it: but where one executor places the property in the hands of the other, and the act is not an improvident one, he shall *not* be answerable for loss.

MR. J. ELDON, in *Chambers v. Minchin*, 7 Jur. 197, 198. thus explained the result of his investigation of all the cases. Executors were by the old law contradistinguished from trustees thus far.—It was laid down as a general rule, that, where executors joined in a bequest, both having the whole power over the fund, both were chargeable. Where executors were joined, each not having the whole power, and the joining being necessary, only the person receiving the money was by the general rule chargeable. It is impossible to say that the rule as to executors has been laid down in some degree by some of the authorities; and I will add, in a much greater degree by those authorities than by precedents, to which they refer: for with regard to some of those cases, where executors were not charged for joining, it might be maintained, that if a sole executor had, under the same circumstances, put the money into the hands of the banker or of a stranger, the sole executor would not have been chargeable; and then, if one executor puts the property into the hands of the other, who happens to be the banker, or in such a situation, the act is not improvident, those authorities upon such circumstances, cannot afford a fair distinction.

EDITOR.

#### IN RE BOORD. SOLICITOR.

COUNTRY ATTORNEYS and their LONDON AGENTS.—*Whether the Bill of Costs of a London Agent, upon the application of the Country Solicitor, is or is not taxable; and if so, whether as of course or upon terms.*

The decision of the Master of the Rolls in this case (a) is under appeal before the Lord Chancellor, which will probably be heard next term.

#### COURT OF COMMON PLEAS—Feb. 3. (Sittings at Nisi Prius.)

STUART v. CARROLL, Knt. and ANOTHER.

SHERIFF LAW.—*Liability of Sheriffs for negligence in the execution of their duty—False return to Writ of Ca. Sa.*

This was an action against the late Sheriff of Middlesex, for a false return to a writ of *ca. sa.*

It appeared that the plaintiff had recovered a judgment against a person of the name of Hardiman, and issued an execution against him for £25. The writ was put into the hands of a sheriff's officer, and after the lapse of a considerable period the sheriff was ruled to return the writ, in obedience to which he returned that the defendant was not to be found in his bailiwick; whereas it was proved, on the part of the defendant, that Hardiman, who was an omnibus driver, was seen frequently in the course of several months, sometimes acting as driver and sometimes as conductor of his omnibus, plying along the New-road between Paddington and the Bank.

Verdict for the plaintiff—Damages, £12.10s.

#### QUARTER SESSIONS, MIDDLESEX. April 5.

CHARGE OF MR. SERGEANT ADAMS TO THE GRAND JURY.

*As to the possession of Stolen Goods.*

The CHAIRMAN said, that the labour they would have to perform at the present session, he regretted to say, would be very heavy. There were already 50 cases of felony in the calendar; but, at the same time, it was satisfactory to a certain extent to know that most of the offences were of a trifling character, and had been very properly brought back from another tribunal to this court, where they were originally intended to be tried. He then referred to the establishment of the grand jury, and the nature of the duties it was called upon to perform, and remarked that it was for those gentlemen he was then addressing to stand between the malignant passions of some

(a) See ante, p. 340.

and the erroneous judgments and officiousness of conduct of others, who might be induced to accuse parties of crimes without reasonable or probable cause, and determine whether there was sufficient to send them before that court for trial. He next alluded to Parkhurst prison in the Isle of Wight, which had been established for the reclaiming juvenile offenders, and giving them a tough education, in addition to rendering them industrious and useful artizans, and observed that the experiment had been tried most successfully. He hoped the day was dawning upon them when the law would be so improved as to empower the criminal tribunals of this country, in the administration of it, to distinguish between the adult, the adept in crime, and the uneducated and unpractised offender, and he need hardly say that the justices of this country would rejoice when such a period arrived. There was one point to which he wished to draw the attention of the jury, as some misconception occasionally existed respecting it:—the time that stolen goods remained in possession of the accused was quite immaterial, it was sufficient that the owner had parted with them, if it was only for a few minutes. For the purpose of laying down a principle for their guidance, he would mention two cases. A thief once tore an ear-ring out of a lady's ear, and he dropped it in her curl, the judges in that case, held that the accused had had sufficient possession, although but for two or three seconds, to convict him of the robbery. The other case came before him at the Warwick assizes, about two years ago:—a shopkeeper, who had been several times robbed, at length adroitly placed some string round his cheese, which he fastened to the counter. The thief came in, and popped the cheese, into a basket, and off he ran; but, before he had got far, the cheese jumped out of the basket, and inasmuch as it was fastened to the prosecutor's counter, the court held that it was never out of his possession, and the accused was acquitted. The learned sergeant added that, absurd as these distinctions might appear, it was necessary for the ends of justice that some defined and correct principle should be laid down.

### Spring Assizes.

#### MIDLAND CIRCUIT.

NORTHAMPTON, Mar. 4.

REGINA v. MOULD:

**MASTER and SERVANT.**—*Whether a Servant taking his Master's goods for his Master's use shall be held guilty of stealing and be punished accordingly.*

J. Mould was indicted for stealing some wheat from his master. It appeared that the prisoner took the wheat to give it to his master's horses,

because they were out of condition. **LEWIS DENMAN**, after referring to 1 or 2 reported cases on the Home Circuit, told the Jury, that if a prisoner took the wheat without his master's permission even to give it to his master's horses, this constituted a felony. Guilty of stealing wheat to give it to his master's horses.

Sentence one month's hard labour. (1)

(1) For illustrations upon the fluctuation of the Common Law, and the adoption of subtle distinctions, and the difficulties which result from the mere want of certain rules for defining offences. See *Western's Commentaries*, 2d Ed. pp. 227, 228, 422.

#### NORTHERN CIRCUIT.

LIVERPOOL, April 7.

GAY v. MARTIN.

Special Jury.

**Innkeepers.**—*Their liabilities for property belonging to Travellers.*

This action was brought by the plaintiff, a traveller for a jeweller's house, to recover from the defendant, the landlord of the Saddle Lane, Dale-Street, the value of a large amount of jewellery alleged to have been stolen from the plaintiff while the plaintiff was stopping there as a guest.

Mr. *Wightman*, for the plaintiff, stated that an arrangement had been come to which would render it unnecessary for the case to proceed. The plaintiff although a loser to a large amount (nearly 1,700*l.*), felt the hardship of making Mr. Martin pay the full loss, although he was liable, and had therefore consented to an arrangement by which he would lose two-thirds of the value of his property.

Mr. *Cresswell*, on behalf of the defendant, said he was well aware the law was against a client in the absence of any previous intimation that he would not take care of the property. He had told him so, although the facts might be in his favour; Mr. Martin had, therefore, consented that a verdict should be found for the plaintiff.—Damages, 500*l.*

**Innkeepers** are clearly chargeable for goods of guests stolen or lost out of the inns, and this without any contract or agreement for that purpose: for the law makes them liable in respect of the reward, as in respect of their being places appointed and allowed of by law, for the benefit and security of traders and travellers. See *Ab. tit. Innkeepers, c. 4.* See also *D. 266. 8 Co. 32 n.*

## THE EDITOR OF THE LEGAL GUIDE.

—In the last number of your valuable edition is inserted an answer to Problem vol. 3. of the question, "When a contract is to be performed?" by J. A. M., in a prefatory letter, states that he has a different view of the subject from ALPHONSO; whose answer, according to J. A. M.'s dictum, does not appear to exactly meet the problem. Now it will follow that because J. A. M. takes a different view of your problems than your correspondents, that he is to be infallible; for when you state a problem, name you intend in the answer that the law on the subject should be stated; more especially that a rule of equity, or a different rule on the same point prevail at law, ought to be noticed as well as the other; and, therefore, I apprehend that you will agree with me, that before J. A. M. speaks by a side-wind to cast a slur upon the production of ALPHONSO, he ought to be told that *his own* production is free from appearance of inattention which at present seems to possess. The paragraph in J. A. M.'s reply which I would call your attention to, is doubtless "intended" as a direct extract from the valuable work he has written, and which I must say he seems to have on this occasion abused. It is, "where the contract is to be delivered, or a conveyance executed, on or before a certain specified time fixed is considered to be of the essence of the contract; and the vendee may rescind the contract if the vendor be not ready before or on the exact day, although the vendor has not in the interim to insist on a strict execution of the contract." If the verbal sense of this passage was clear, one might have less trouble in dealing with the law of it; but as I find, I will take it, and inform J. A. M. through your paper, that this rule, if he had read the subject, would only presume to write but to criticise what he would find, does not prevail in the law (and does not J. A. M. know that

place is where these contracts are mostly called into question), for there it is considered equally incumbent on the purchaser to ask for the abstract as for the vendor to deliver it; and if the abstract be not delivered in time, or objections arise to the title, although the vendee may bring an action at law for non-performance of the agreement, yet the vendor, if he can insist on the contract being specifically performed, may file a bill for a specific performance, and an injunction to restrain proceeding at law; and the vendor may file his bill for a performance in *specie*, although the vendee may have recovered his deposit at law; and this interference of the court of equity, be it known to J. A. M. and all those whom his sublime hallucinations may have misled, can only be prevented (where the title cannot be made out within the time limited) by expressly declaring in the agreement that the contract shall be void if the title cannot be made by a stated time. In conclusion, as J. A. M. does not seem to understand or notice the difference between rules of law and rules of equity, I would advise him before attempting to criticise the productions of others to clear his own vision, and make himself master of his subject.

I am, Mr. Editor,

Your obedient servant, E. A.

## TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—Your correspondent E. A. has answered Problem VI. vol. 3, p. 338, "What is an estate tail by implication?" and has supported the view he has taken of the subject by several examples or cases which have been decided, but not one authority has he given for what he has advanced. The object of the present therefore is (through the medium of your valuable journal) to request that E. A. will be good enough to furnish the references to the several cases he has quoted, as I wish to examine the same; and by so doing he will oblige, Sir,

Your obedient servant,

H. D. M.



chattels to somebody who is to carry them, or do something about them *gratis*, without any reward for such his work or carriage.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me; where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you will keep your own. But (b) my Lord COKE has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law upon which it is grounded, and therefore it is incumbent upon them that advance this doctrine to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show, that there never was any such resolution given before *Southcote's case*. The 29 Ass. 28. is the first case in the books upon that learning, and there the opinion is,

(b) Lord Raym. 655.

that the bailee is not chargeable if the goods are stole. As for 8 Edw. 2. Fitzh. *Detinue*. 59. where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should answer for the goods; that case they say differs because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest; for the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them as when they are in a chest, and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4. 40. b. was but a debate at bar, for *Danby* was but a counsel then, though he had been Chief Justice in the beginning of Edw. 4.; yet he was removed, and restored again upon the restitution of Hen. 6. as appears by *Dugdale's Chronica Series*. So that what he said cannot be taken to be any authority, for he spoke only for his client; and *Genny*, for his client said the contrary. The case in 3 Hen. 7. 4. is but a sudden opinion, and that by half the Court; and yet that is the only ground for this opinion of my Lord COKE, which besides he has improved. But the practice has been always, at *Guildhall*, to disallow this to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice PEMBERTON's time and ever since, against the opinion of this case. When I read *Southcote's case* before, I was not so discerning as to disallow that case at first; and came not to be this opinion till I had well considered and digested that matter. Though, I must confess, reason is strong against the case to charge a man for doing such a friendly office for his friend; but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. I think if he keeps the goods bailed to him but as

ps his own, though he keeps his own but  
ligerly, yet he is not chargeable for  
n; for the keeping them as he keeps his  
is an argument of his honesty. A for-  
i, he shall not be charged where they are  
en without any neglect in him. Agree-  
to this is *Bracton*, lib. 3. c. 2. 90. b.  
apud quem res deponitur re obligatur,  
ea re, quam accepit, restituenda tene-  
et etiam ad id, si quid in re deposita dolo  
niserit; culpæ autem nomine non tenetur,  
et desidie vel negligentie, quia qui neg-  
ti amico rem custodiendam tradit, sibi  
et propriæ fatuitati hoc debet imputare.”  
suppose the bailee is an idle, careless,  
ken fellow, and comes home drunk, and  
as all his doors open, and by reason  
of the goods happen to be stolen and  
own; yet he shall not be charged, be-  
cause it is the bailor's own folly to trust such  
le fellow. (a) So that this sort of bailee,  
e least responsible for neglects, and  
r the least obligation of any one, being  
d to no other care of the bailed goods  
he takes of his own. This *Bracton* I  
cited is, I confess, an old author; but  
is his doctrine is agreeable to reason,  
to what the law is in other countries.  
civil law is so, as you have it in *Justi-*  
s Inst. lib. 3. tit. 15. There the law  
further; for there it is said, “*Ex eo*  
*tenetur, si quid dolo commiserit: culpæ*  
*et nomine, id est, desidie ac negligentie,*  
*tenetur. Itaque securus est qui parum*  
*inter custoditam rem furto amiscrit, quia*  
*negligenti amico rem custodiendam tradit,*  
*sed suæ facilitati, id imputare debet.*”  
that a bailee is not chargeable without an  
rent gross neglect; and if there is such  
ss neglect, it is looked upon as an evi-  
e of fraud. Nay, suppose the bailee  
rtakes safely and securely to keep the  
is, in express words; yet even that

would not charge him with all sorts of neg-  
lects: for if such a promise were put into  
writing, it would not charge so far even  
then. *Hob.* 34. a covenant, that the cove-  
nantee shall have, occupy, and enjoy certain  
lands, does not bind against the acts of  
wrong doers. *3 Cro.* 214. acc. 2. *Cro.* 425.  
acc. upon a promise for quiet enjoyment.  
And if a promise will not charge a man  
against wrong doers, when put in writing, it  
is hard it should do it more so when spoken.  
*Doot. & Stud.* 130. is in point, that though a  
bailee do promise to re-deliver goods safely,  
yet, if he have nothing for the keeping of  
them, he will not be answerable for the acts  
of a wrong doer. So that there is neither  
sufficient reason nor authority to support the  
opinion in *Southcote's case*. If the bailee be  
guilty of gross negligence, he will be charge-  
able, but not for any ordinary neglect.

(To be continued.)

#### THE DUBLIN LAW INSTITUTE.

We have received another communication  
from *TRISTRAM KENNEDY*, Esq. the PRIN-  
CIPAL of this Institute, whose meritorious  
and unceasing exertions in its behalf are  
beyond all praise, and command the warmest  
gratitude from all connected with it.

We are much pleased to observe the  
opinions given by the PROFESSORS of LAW in  
LONDON as to the great utility of this Insti-  
tution, and the advantages it would derive  
from having a Charter of Incorporation,  
which should extend its influence and utility,  
and by such extension promote the object it  
has in view, viz.—to cultivate the study of  
Law as a Science. LAW like POLITICS, con-  
sidered as an exact Science, that is to say—  
as a Science capable of actual demonstration  
—is infinitely deeper than many suspect.  
To seek for the demonstration, a system of  
legal education, based upon the *origin of law*,  
must be established, and such appears to be  
the plan of this excellent Institute. Virtue  
and vice, approbation and disapprobation,

<sup>1</sup> But see *Doorman v. Jenkins*, 2 Adol. & Ell.

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"The abolition of lectures by the Incorporated Law Society, was one step towards the attainment of this object, but as these lectures are principally designed to assist articled clerks in preparing for their examinations, previously to their being admitted as attorneys or solicitors, they cannot well be made to meet the wants and wishes of the student for the bar, and the attorney actually in practice.

" Your institution takes a wider range, it admits indiscriminately, students in either branch of the profession, and affords them facilities for acquiring a knowledge of law, which they would seek in vain to obtain

1. NAME \_\_\_\_\_  
 2. ADDRESS \_\_\_\_\_  
 3. CITY \_\_\_\_\_

[illegible]

PREPARED BY T. L. H.

**IN RE**

IN THE SUPREME COURT OF THE UNITED STATES

IN THE COURT OF THE DISTRICT OF COLUMBIA

## SYNOPSIS

ANSWER TO THE FOLLOWING

Sir, — In consequence of the loss of the  
 M. J. 953 representing me through the loss  
 of your valuable journal, as furnished the  
 foreman at the several cases which I set  
 in support of the view I had taken in con-  
 sidering this problem, I make the earliest op-  
 portunity of doing so, and the references I  
 give are intended to apply to the verbal  
 the illustrations in my Answer.

First, I refer H. D. M. to Lord Thelow's decree in Knight v. Ellis, 21 C. C. 570.

Second—1 Roll. Ab. 837.; 1 Barrow.  
15. S. 564.; 4 Russ. 283.; 2 Sim. 2  
3 Ves. 99.; 1 Russ. 262.

**Third—Ibid.**

Fourth—5 Bing. 243.; 4 B. and A. 4

**Fifth—Walter v. Drew, C. R. 372.**

**Sixth—Freem. C. R. 40.**

**Seventh—2 Atk. 307.**

**Eighth—Cro. Jac. 427.; Amb. 893, 4**

Ninth—Cro. Jac. 448.

**Tenth—Cro. Jac. 290, 695.; 7 T. R. 57**

**17 Ves. 479.**

E. A.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XIX. VOL. 3.  
TERMS OF YEARS TO ATTEND THE INHERITANCE.

What is the nature of a term to attend Inheritance?

By the known rules of law, an estate for years confers a title to the possession of land, distinguished from, and independent of, the freehold, and which entitles the termor, during the continuance of the term, to such possession of the land against the person in whom the freehold remains, and persons claiming under him subsequently to the creation of the term, notwithstanding the fee (subject to the interest of the termor), the rights of the freeholder and those claiming under him as such continue in their full force.

Terms for years did not receive such protection from Courts of Law as freehold estates, they being then created for long periods only, in order to give the occupant some certain interest, independent of the freeholder, though not interfering in the slightest degree with the latter's relation as tenant to the lord. But it being discovered that such terms, when extended in their duration, might be applied with advantage to mortgage transactions, and in settling and managing real property according to the necessities or notions of an advancing state civilization, they were commonly introduced for various purposes, such as raising money for the payment of debts, securing charges, and jointures, for raising portions for younger children, or daughters, or for money for the benefit of parties having no estate, or only a particular estate in the premises.

The beneficial interest in a term of this nature, where the person has no higher interest in the estate, is treated as a chattel, and is on that account transmissible to personal representatives. But in order to

preserve the more important interest which the freeholder has as owner of the fee, courts of equity hold that his beneficial interest in a term, the purposes of which have been satisfied, shall be attendant upon the higher estate of which he is seised, be consolidated with the fee, follow it, and be charged with all incumbrances subjected to by the owner of the fee.

The consequence is that this last mentioned equitable interest in the term is not treated as a chattel, and therefore it will not become liable to be forfeited if the owner of the fee commits felony; it was not previously to 3 & 4 W. 4. c. 104. liable to his simple contract debts, but was together with the fee on which it was attendant real assets. It does not, as against the heirs or devisees of the *cestui que* trust, prevent the attachment of dower or courtesy, and if the inheritance escheat, the term retaining its indissoluble quality will accompany it.

Long terms of years thus becoming in frequent use, an important consequence beyond the first objects of their creation was that of making them attendant upon the freehold and inheritance of the estates out of which they were carved, a term of years will become so attendant,—upon an express declaration providing and declaring that it shall be so,—where the same person is beneficially entitled both to the term and the fee, whether his interest in the former be equitable and in the latter legal, or *vice versa*, so that a merger would take place if the legal interests in both were united in the person beneficially entitled to them, or if such merger would not take place on account of intervening legal estates, yet if the same person is also beneficially entitled to those intermediate estates, or if they were created by him, or raised only for securing mortgages or other charges, the term is in all such cases attendant; where a termor purchases the inheritance, and takes a conveyance of the fee in the name of a trustee,

the term in himself will be attendant upon his equitable fee simple.

The nature of the beneficial interest in terms attendant upon the inheritance having thus become settled, the advantage of preserving and assigning them from time to time, with an express declaration that they should be so attendant, became apparent, such assignment and acknowledgment of them as subsisting preventing the legal presumption of their having been surrendered. Through his trustee of a term the freeholder is in many instances enabled to deduce an earlier and more satisfactory title to the possession than he can to the inheritance; and if his title to the latter should be found defective or charged, he would still be entitled in right of the term to the possession of the land during its continuance, freed and absolutely discharged of and from all rights, dispositions, charges, or incumbrances whatsoever, made subsequent to the creation of such term, which is the grand object now sought for by conveyancers, in obtaining the assignment of a term to attend the inheritance.

The assignment of an outstanding term protects only purchasers for a valuable consideration, without notice *at the time* of their purchase of the incumbrance against which they seek to be protected. There are, however, two exceptions to this rule regarding notice, one of which is in the case of dower, against which a purchaser with notice is allowed to protect himself, if he takes an actual assignment of the term; and the other is in the case of specialty debts due to the crown, against which a term will not protect a purchaser even without notice. But it is not necessary that the person endeavouring to take the benefit of an attendant term should be without notice at the time he procures the assignment of it, so that he was clear of notice at the time of his purchase.

It will thus be seen that the advantage secured by the assignment of an outstanding term is the protection of the estate from

being defeated or injured by prior titles and charges, of which the purchaser is unacquainted at the time of his purchase; however valid they may be, or by any subsequent disposition by the vendor. By neglecting to take such assignment, he exposes himself to the risk of some other person, whose interest may be acquired subsequently to his own, getting the benefit of, and using the term to his detriment.

In practice, it is now a rule, for the purchaser to require an assignment or surrender of all terms which have been previously assigned to attend, and an assignment or surrender of any outstanding terms, even when they have never been so assigned. (a)

A general declaration in a conveyance that a term left in the old trustees should be held by them in trust for the purchaser, will not protect against a title of dower, and is considered a very unsafe way of disposing of an attendant term.

Sometimes it is necessary to assign more than one term in the same estate, by reason of the uncertainty of which of them would be available for the protection of the owner. But where there is a term sufficiently old, and of which every step of the title can be easily traced and indubitably proved, it is sufficient to assign that one only, and surrender the others (if any.)—E. A.

## Imperial Parliament.

HOUSE OF LORDS.—April 13.

### FRIVOLOUS SUITS AT LAW.

LORD DENMAN moved the second reading of this Bill. (b) His Lordship observed that the object was to prevent attorneys from bringing actions for small amounts, with the view merely of making costs. As, however, it might be very necessary to take legal proceedings for trespass upon land, although the damage might not be a greater amount than 40s., these cases would be exempted from the operation of the bill.

The bill was read a second time.

(a) See Western's Conveyancing, Vol. 4, p. 188, seq.—ED.

(b) See ante, p. 261.

HOUSE OF COMMONS.—April 15.

PRIVILEGE QUESTION.

STOCKDALE v. HANSARD.

Sir R. INGLIS moved that the order of the 10th instant, for the attendance of Mr. Sheriff Evans on Wednesday, the 6th of May, be discharged.

Lord J. RUSSELL seconded the motion.

The motion agreed to.

Sir R. INGLIS also moved, "that Thomas Howard, the younger, son of Thomas Burton Howard, attorney in the case of 'Stockdale v. Hansard,' be forthwith discharged without payment of fees."

Motion agreed to.

Sir R. INGLIS then moved, "that Thomas George Johnston Pearce, clerk of Thomas Burton Howard, the attorney in the cause of 'Stockdale v. Hansard,' be forthwith discharged without payment of fees."

Motion agreed to.

Sir R. INGLIS said, he had now to move another resolution, that Thomas Burton Howard be discharged.

The ATTORNEY-GENERAL said, if Mr. Howard exhibited any signs of submission to the cause, or have tendered any expression of regret, he should himself at once have seconded the motion for that gentleman's discharge. On the contrary, the course pursued by Mr. Howard is most contumacious, and the case had been argued by the Hon. Baronet and others who supported him on grounds which would be subversive of the rights and privileges of the House.

The House divided on the motion :—

For the motion . . . . . 22

Against it . . . . . 42

Majority against the motion —20

Sir R. INGLIS proposing a similar motion with respect to Stockdale, which was negatived without a division.

party. The Vice-Chancellor allowed the demurrer, and, by an order, gave leave to amend the bill, and to strike out the name of the agent.

Mr. Wakefield moved to discharge the order. Such an order was erroneously supposed to be matter of course. It was never granted except for special reasons. In this case every possible reason was against allowing the amendment; indeed a suit between those parties should not be at all instituted in this country. They were all Spanish subjects; the dispute between them regarded a contract made in Spain, and which could be decided only by Spanish law, of which that court could obtain a knowledge for adjudicating on the question by sending out a commission to Spain.

Mr. Wigram opposed the motion, submitting that these orders to amend were always in the discretion of the court, in allowing demurrers. They saved time and expense to the parties, who could, of course, file a new bill at greater expense. The defendant had waived his objection to the order to amend by appearing to the amended bill and accepting costs of appearance. The object of first making the party in this country a co-plaintiff was for securing his costs to the defendant.

The LORD CHANCELLOR said he always understood it to be a matter in the discretion of the court to grant leave to amend after allowing a demurrer. He thought in this case the party ought to have leave to amend. The matter was not regularly brought before this court. These orders to amend the bill, and to strike out the name of one plaintiff, were made in December, and not until the month of March did the party come to complain of them. The defendant allowed the party to amend, and accepted costs for appearing to the amendment, and now gave no explanation of the delay. His Lordship could not perceive on what grounds he was asked to go out of his way to deprive the plaintiffs of the benefit of an order, to grant which was in the discretion of the court.

Application refused with costs.

March 20.

*In re BOORD a Country Solicitor, and Messrs. MORRIS and VERBEKE, his Town Agents.*

APPEAL FROM THE ROLLS. (a)

COUNTRY ATTORNIES & their LONDON AGENTS.

—Whether the Agency Bill of Costs of a London Agent, upon the application of the Country Solicitor, is or is not taxable, and if taxable, whether as of course or upon terms? whether the Court has jurisdiction?

Mr. Cooper opened a petition of appeal from

(a) See the case at the Rolls reported ante p. 340.

Law Reports.

COURT OF CHANCERY.—March 4.

HERN v. REINA.

PRACTICE.—As to the discretion of the Court to grant leave to amend a Bill after allowing a Demurrer.

This was a bill filed by the agent resident here of two Spanish women residing out of the jurisdiction, against the Marquis Reina, a Spaniard, residing generally in France, but occasionally coming to this country. He demurred to the bill generally, and also on the ground that the agent had no interest in the subject of the suit, and, therefore, ought not to be made a

the Rolls in this matter; the question is, whether the court has jurisdiction to order an agent's bill to be taxed. The parties litigant were Mr. Boord, a Country Solicitor, and Messrs. Morris & Verbeke, London Agents.—The MASTER OF THE ROLLS acting on the authority of the case of *Jones v. Roberts*, 8 Sim. 397, (b) decided in favour of the jurisdiction. He now contended that the decision in the case of *Jones v. Roberts*, was contrary to all the authorities on the subject from the passing of the Stat. of the 2 Geo. 2. c. 23, which regulated the taxing of bills of costs down to the present time. That decision was also contrary to the decisions of the courts of common law, where the question after much discussion had been at last set at rest by a denial of the jurisdiction. It appeared that some doubt was entertained whether his Lordship, when Master of the Rolls, did not give an opinion in favour of the jurisdiction, and it now became necessary to have the question decided by the Lord Chancellor.

April 1st.—Mr. Dixon followed on the same side, and submitted that the authorities on which the case of *Jones v. Roberts* professes to be decided, are by no means to the effect there stated: and that the subsequent act 12 Geo. 2. c. 13. s. 6, was in effect a legislative declaration, that an agent's bill is not taxable.

April 3rd.—Mr. Dixon having concluded,

Mr. Wigram for Mr. Boord submitted that the question of law that had been so fully discussed by the other side did not necessarily arise, as the bills were admitted to be partly for business, as between solicitor and client, and no settlement had ever taken place.

The LORD CHANCELLOR seemed inclined to take that view of the case, but as part of Mr. Morris' affidavit, as to an agreement touching the earliest part of the bill relating to *Earl Manvers* had not been answered, his Lordship, on Mr. Wigram's request, allowed the further consideration of the petition to stand over to obtain an affidavit in explanation of that part of the case. (c)

(b) In that case, in 1835, *E. Jones*, the plaintiff's solicitor, employed Messrs. *H. Jones & J. Fay* of *Ruthin*, in *Denbighshire*, solicitors, as his country agents in the cause. *Jones & Fay* received from the defendant in the cause £250. of which they retained £70. on account of their bill of costs, and delivered their bill to *E. Jones*; who obtained an order in the cause, that it might be referred to the Master, on receiving proof of payment or tender by him to *Jones & Fay*,

of £73. 4s. 8d. the amount of their bill, to tax the same as between solicitor and client. This order was made on an *ex parte* motion, supported by an affidavit stating as above, and adding, that *E. Jones* was ready to pay to *Jones & Fay* the remaining £3. 4s. 8d. of their bill.

*Jones & Fay* moved to discharge that order as being irregular on four grounds: first, that it was obtained not by the plaintiff, but by her solicitor; secondly, that it was an order for the taxation of an agent's bill; thirdly, it ought to have been made, if at all, on special motion, and on payment of the money into Court; fourthly, it was an order for the taxation of an agent's bill, as between solicitor and client.

The VICE CHANCELLOR said,—For a series of years, it has been the established practice of this Court, to direct the taxation of an agent's bill on the application of the solicitor who employed him. That practice was recognised, as established, by Lord Thurlow in the case of *Corner v. Hake* (a) in 1789; and it is plain, from the mode in which Lord Eldon treats the subject in *Ostle v. Christian*, (ante p. 342), that, in his opinion, it was the undoubted practice of this Court to direct the taxation of an agent's bill. If then I find that this practice has prevailed in this Court for a long series of years, it appears to me that I am bound to adopt and follow it, notwithstanding the opinion expressed by the Judges of the Court of Common Pleas in *Weymouth v. Knipe*.

The only question then is, whether the order sought to be discharged is wrong on the face of it, inasmuch as it leaves the Master at liberty to receive proof of the payment or tender of the £3. 4s. 8d. in the absence of the party whose bill was to be the subject of the taxation. Now I cannot but think that the order is erroneous in this

(a) Stated in the report of *Weymouth v. Knipe*, 3 Bing. N. C. as *Innes v. Hake*, see ante 341.

pect; and consequently, it must be discharged with costs.

*Edward Jones* afterwards presented a petition which was entitled in the cause, and in the matter of Messrs. *Jones & Fay*; and after stating, amongst other things, that on the 28th of April last, the petitioner tendered the £3. 4s. 8d. to the town-agent of *es & Fay* for their use, it prayed that the tender might, under the circumstances mentioned in the petition, be deemed to be a valid and sufficient equitable tender to *Jones & Fay*; or, in case the court should judge otherwise, then that, on the petitioner bringing the £3. 4s. 8d. into court, it might be referred to the Master to tax *Jones & Fay's* bill.

Counsel for the petitioner, relied on *Binsted v. Barefoot* (1 Dick 112. See Beam Costs, 306, 307), in which an order was made by the M. R. for the taxation of an agent's bill; and on the 17th of July, 1746, Lord *Hardwicke* C. refused to discharge the order. *Lees v. Nuttall*, (ante p. 342), and *Barber*, 6 Sim. 476, were also cited. Counsel for *Jones & Fay* said, that the order in *Corner v. Hake* was erroneous, (Beam Costs, 308,) and that Dickens's order in *Binsted v. Barefoot*, and the entry in that case in Reg. Lib. were at variance with each other; that *Ostle v. Christian*, *Lees v. Nuttall*, were distinct authorities, that an order for taxing an agent's bill could not be obtained without bringing the amount of the bill into Court: but that, in *Agent v. Nicholson* (Beam Costs, 361), in *Binsted v. Barefoot*, the amount of the bill was not directed to be paid into court. In *Thorne v. Bryan*, (8 Pri. 677) was decided.

The VICE CHANCELLOR, in giving judgment said, If I find from a series of orders, and from the opinions expressed by Judges in this court, that it is the practice of the court to interfere in cases like the present, my opinion is, that I am bound by what

has taken place here; and that it is of little importance to inquire how the jurisdiction was first assumed.

Now we have, first, the order made by the Master of the Rolls in 1745; and then, in 1746, an attempt was made before Lord *Hardwicke* to discharge that order, but the attempt did not succeed. That, therefore, was a recognition by Lord *Hardwicke*, that the order at the Rolls was right. Then setting aside the case before Lord *Thurlow*, which seems to be incorrectly reported, we find Lord *Eldon* stating in *Ostle v. Christian*, that a solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court. It would have been quite frivolous for that great Judge so to state, if his opinion had been that the bill could not be taxed, whether the money was brought into court or not. We are therefore warranted in concluding, that it was his Lordship's opinion, in the abstract, that the court had jurisdiction, on the application of a solicitor, to tax his agent's bill. Then, in *Lees v. Nuttall*, the latter part of the judgment of the present Lord Chancellor when Master of the Rolls, necessarily shows that it was his Lordship's opinion that this court had jurisdiction to direct an agent's bill to be taxed on the application of the solicitor, provided the amount of the bill was brought into court: and his lordship discharged the order in that case, not on the ground that the court had no jurisdiction, but on the special circumstances and merits of the case. That opinion unquestionably binds me.

I can easily understand that this court might have assumed a larger jurisdiction than the courts of common law, as it has often taken the lead and suggested to the legislature what ought to be done. As for instance, in cases of set off and of landlords taking advantage of breaches of covenants for payment of rent, this court did interfere long before there was any statutory inter-



ference. It is reasonable therefore to suppose, that before either of the Statutes of Geo. 2 were passed, this court had the jurisdiction which it is now called upon to exercise: and there is nothing in either of those statutes to take away that jurisdiction. When the court says that the taxation is to take place on the amount of the bill being brought into court, it is taking a course which is quite independent of either of the statutes.

I am of opinion, therefore, that the jurisdiction does exist; and, consequently, on payment or tender to Mr. Williams, the town-agent of Messrs. Jones & Fay, of the amount of the bill remaining unpaid, (such payment or tender to be verified by affidavit,) let the bill be taxed, and reserve costs.

EDITOR.

“(c) If his Lordship should finally dispose of the case without deciding the important question raised, and so fully discussed, by Mr. Dixon, viz. the non-taxability of an agent's bill, the profession will have considerable cause of regret; particularly as the court below decided the case on the authority of *Jones v. Roberts*.—The case will probably be mentioned again early in the term.

REPORTER.

## VICE-CHANCELLOR'S COURT,

Jan. 29.

MANNERS v. ROWLEY, & OTHERS.

JOINT STOCK COMPANIES.—*Construction of 7 Geo. 4. c. 46. in connection with 1 & 2 Vict. c. 93.—Whether the Registered Officers of a Joint Stock Company may sue in Equity, a Member of the Company jointly with a person who is not a Member.—DEMURRER for want of Equity.*

Mr. K. Bruce appeared in support of this demurrer. The suit was instituted by the directors of a joint-stock banking company, with a view of fixing certain individual members of the company (jointly with other persons not members of the company) with a personal responsibility for a sum of about 1,400*l.*, which had been withdrawn from the company's funds for the purpose of establishing a newspaper “upon liberal principles of extensive reform,” and which had been

lost by the failure of the newspaper. The bill set forth the deed of settlement of October, 1835, constituting a public joint-stock bank in the city of Lichfield, entitled the *Lichfield, Rugeley, and Tamworth Banking Company*, and appointing Dr. Rowley, Jeremiah Ginders, and William Knight, the first directors, and Richard Eales Barrow manager of the company. The deed also contained the usual provision that the directors should have full power to prosecute and defend in the name of any of the registered public officers of the company appointed in pursuance of the provisions of 7th George IV., c. 46. any actions or suits against any person whatsoever, whether a proprietor of the company or not, for the purpose of enforcing any claim due to the company, or for any matter relating to the company's concerns. In the month of April, 1836, it was proposed and agreed by Rowley, Mottram, and several other shareholders of the company, to establish a newspaper, to be published at Lichfield and to enter into a joint undertaking for the purpose. In furtherance of this proposal a list of subscriptions was opened, headed “The list of donations to the *Staffordshire Examiner and Lichfield, Walsall, Tamworth, and Burton Advertiser*,” and by the authority of the defendants their names and the names of several other persons were included in the list as subscribers, and a meeting was held on the 6th of April, 1836, at the George Hotel, at which the following minutes were drawn up:—“At a meeting of the subscribers to the *Staffordshire Examiner, and Lichfield, Tamworth, Walsall, and Burton Advertiser*; present, the Mayor, (the defendant Rowley) in the chair, Mr. Hitchcock, Mr. Webb, Mr. Brassington, Mr. Cato, Mr. Simpson, Mr. Barrow, Mr. Sultzer, Mr. Sharp—we, the undersigned, agree and determine to start the newspaper immediately, and for this purpose we will call upon all the subscribers to pay their subscriptions into the Lichfield, Rugeley, and Tamworth Bank; and seeing that the subscription, not at present, nor is likely to be, sufficient to commence the paper, with a prospect of giving a fair trial, we pledge ourselves to use every exertion to obtain support, and, in the mean time being anxious to establish the paper upon liberal principles of extensive reform, without further delay, we undertake to pay, in addition to our respective subscriptions, the different sums attached to our names, as a guarantee for the expenses incurred in the undertaking, under the management of the whole of us, five of whom shall be competent to act in the absence of the others; it being distinctly understood that the guarantee is not to endure beyond such expenses or liability as may be incurred in two years from the first publication, also understood that our call upon us will be in proportion to the sum

which we now make ourselves responsible for." Then followed a list of the names alluded to, with the sum subscribed set against every individual's name, written in their respective hands. The newspaper was published on the 14th of May, 1836, an account was opened with the *Lichfield, Macclesfield, and Tamworth Banking Company*, in respect of the newspaper by the defendants, who, as proprietors and copartners of the newspaper, caused the banking business relating to it to be transacted with the banking company at their banking house, and that from time to time large sums of money were improperly and without the knowledge or consent of the other copartners in the banking company withdrawn by under the authority of Rowley, Barrow, Brasterton, Adie, Sultzer, Hitchcock, Mottram, Rowley, and Dorrington, as shareholders in the bank, out of the funds of the company, and applied for the purposes of carrying on the newspaper. The publication of the newspaper was continued, when it appeared that there remained due to the banking company from the defendants, in a balance of accounts a total of 1,411*l.* 2*s.*, with interest and commission. The suit was instituted by three of the directors of the company, in the name of the registered officer, and they submitted that the defendants, who were members of the company, ought to be held responsible jointly with the other proprietors of the newspaper, who were not members of the company, for the amount of this deficiency in the funds of the bank, and prayed an account against the defendants, and a declaration that the shares of the defendants were subject to a lien in the funds of the company for what should be found due from them. The defendant *Mottram* demurred to the bill on the ground that the plaintiff had a complete and effectual remedy in a court of law. The learned counsel contended, that if the sum alleged to be due was really owing, it was nothing more than an ordinary legal debt on a balance of account for advances made by the bank to the defendants, and ought to be sued for under the provisions of 1 and 2 Victoria, c. 96, and if it did not fall within the meaning of that statute, then the suit was for a debt due to the company, in which the plaintiff had no right to represent. His Honour, without hearing the counsel in support of the bill, thought there was sufficient authority on the face of it to sustain it as against *Mottram*. By the articles of partnership it was provided that the directors for the time being should have full power to commence, institute, prosecute, and to defend in the name of any of the public officers for the time being of the company as the nominal plaintiffs or defendants, and on behalf of the company, any actions and suits against any person or persons whatever, whether a proprietor of the company or

not, for recovering or enforcing any claims or demands due to the company or for any other matter relating to the concerns of the company, and to discontinue, abandon, release, or become nonsuit in any such action, suit, or proceeding, as the directors for the time being should think fit, and the money to be recovered in any such action, suit, or proceeding, should be brought into and deemed part of the capital of the company. Then it was expressly stated by the bill that large sums of money were from time to time improperly, and without the knowledge or consent of the other copartners in the banking company, withdrawn by, or under the authority, or with the concurrence of *Mottram* and the other defendants. *Prima facie*, that was quite equity enough to sustain the bill as against him. The only question was as to the form of the proceeding.

Mr. *Jacob* then proceeded to contend that the suit had been properly instituted by the directors in the name of their public officer, under the provisions of 7th George IV., c. 46. The 9th section of that act declared that all actions and suits in equity instituted on behalf of any copartnership against any person or persons, whether members of such copartnerships or otherwise, should be commenced in the name of the public officer nominated in the manner prescribed by the act. For some reason or other, in consequence of technical difficulties at law, it was necessary to pass the 1st and 2d Victoria, c. 96, which expressly provided for the case where some of the plaintiffs or defendants (members of a company) were suing jointly with persons who were not; but, as no such difficulty had ever arisen in equity, the statute of Victoria could have no application. The suit was therefore properly framed under the 7th George IV., where the remedy in equity remained.

Mr. *K. Bruce* insisted that the case was one for which a full remedy was given at law by the 1st and 2d Victoria, c. 96, and that the intention of the Legislature to exclude suits in equity as already within the previous statute would not have been expressed by the words "be it enacted," &c., if it had been enacted before.

The VICE-CHANCELLOR thought there was nothing in the objection, for it did not follow that because a remedy was expressly given at law there had not been a previous remedy in equity. His Honour should have thought the construction of the 7th of George IV. perfectly plain, that the Court would allow the registered officer of the company to sue a person who was a member of the partnership of which he was the public officer jointly with a person who was not. His Honour then read the words of the 9th section of the statute, 7th George IV., c. 46. There might possibly have been some difficulty in ap-

plying the statute at law, but for the purposes of a suit in equity all that was required was expressed in a few words. The only question was, whether the Court was forbid to put a construction on the 7th of George IV., because the 1st and 2d of Victoria contained the words "be it enacted." He thought he was not. His Honour, after referring to the words of that statute, observed, it was very odd it took no notice of the very case for which it professed to provide, because it applied to the case of members of a company suing jointly with persons who were not members, but it did not point out the very case on which the amendment was constructed.

Demurrer overruled, but without costs.

**COURT OF COMMON PLEAS.—April 16.**  
(*Sittings in Banco.*)

**THE SERGEANTS' PRIVILEGES.**

The *Solicitor-General* said that he believed there was some doubt, on the part of the gentlemen of the bar, as to the course intended to be pursued by the court with reference to new trials; the doubt was, whether the court was open for new trials to all.

TINDAL, C. J., said that he found the rule laid down by the court was expressly this—that the only reservation was that all barristers, not of the degree of the coif, were, nevertheless, to proceed with those cases, until they had been heard and brought to a termination. That spoke for itself.

**PREROGATIVE COURT.—March 17.**

**WILL OF JANE RICHARDS, Deceased.**

**NEW WILL ACT.—Attestation Clause.—Evidence of Attesting Witnesses.**

The testatrix, Jane Richards, died in last year, leaving a will apparently duly attested, but one of the attesting witnesses, in his deposition on the *condidit*, stated that they had signed their names not in the presence of the testatrix, but in the parlour below. The other witness deposed to the attestation having been signed in the room and presence of the testatrix. Upon the publication of the evidence, the former witness retracted his statement, and joined in an affidavit with other persons to the same effect as his fellow witness, stating that on mature recollection he was satisfied that the paper was subscribed by both witnesses in presence of the testatrix, and that he had confounded the circumstances of the witnesses having gone through the formality of "delivering as their act and deed," at the suggestion of one of the party with the act of subscription.

Sir H. JENNER refused to permit the re-examination of the witness to supply a deficiency of proof discovered after publication. The parties might apply at a future stage to have the conclusion of the cause rescinded, in order to examine other witnesses on this point. He did not, however, bind himself to comply with that application.

**COURT OF CHANCERY.—SITTINGS IN EASTER TERM, 1840.**

Wednesday	Apr.	15	-	-	Appeal Motions and Adjourned Petitions.
Thursday	"	16	-	-	Petition Day.
Friday	"	17	-	-	} No Sitting.
Saturday	"	18	-	-	
Monday	"	20	-	-	
Tuesday	"	21	-	-	} Appeals.
Wednesday	"	22	-	-	
Thursday	"	23	-	-	
Friday	"	24	-	-	} Appeal Motions and ditto.
Saturday	"	25	-	-	
Monday	"	27	-	-	
Tuesday	"	28	-	-	} Appeals and Causes.
Wednesday	"	29	-	-	
Thursday	"	30	-	-	
Friday	May	1	-	-	} Appeal Motions and ditto.
Saturday	"	2	-	-	
Monday	"	4	-	-	
Tuesday	"	5	-	-	} Appeals and Causes.
Wednesday	"	6	-	-	
Thursday	"	7	-	-	
Friday	"	8	-	-	} Appeal Motions and ditto.
Saturday	"	9	-	-	
Monday	"	11	-	-	
Tuesday	"	12	-	-	} Appeals and Causes.
Wednesday	"	13	-	-	

Such days as his Lordship is occupied in the House of Lords excepted.

VICE CHANCELLOR'S COURT.

Wednesday	Apr.	15	-	-	Motions.
Thursday	"	16	-	-	Petition Day.
Friday	"	17	-	-	} No Sitting.
Saturday	"	18	-	-	
Monday	"	20	-	-	
Tuesday	"	21	-	-	
Wednesday	"	22	-	-	} Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Thursday	"	23	-	-	
Friday	"	24	-	-	} Motions.
Saturday	"	25	-	-	
Monday	"	27	-	-	} Short Causes and Unopposed Petitions previous to general Paper.
Tuesday	"	28	-	-	
Wednesday	"	29	-	-	} Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Thursday	"	20	-	-	
Friday	May	1	-	-	} Motions.
Saturday	"	2	-	-	
Monday	"	4	-	-	} Short Causes and Unopposed Petitions previous to general Paper.
Tuesday	"	5	-	-	
Wednesday	"	6	-	-	} Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Thursday	"	7	-	-	
Friday	"	8	-	-	} Motions.
Saturday	"	9	-	-	
Monday	"	11	-	-	} Short Causes and Unopposed Petitions previous to general Paper.
Tuesday	"	12	-	-	
Wednesday	"	13	-	-	} Pleas, Demurrers, Exceptions, Causes, and Further Directions.
			-	-	

ROLLS' COURT.

Wednesday	Apr.	15	-	-	Motions.
Thursday	"	16	-	-	Petitions in General Paper.
Wednesday	"	22	-	-	} Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Thursday	"	23	-	-	
Friday	"	24	-	-	} Motions.
Saturday	"	25	-	-	
Monday	"	27	-	-	} Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Tuesday	"	28	-	-	
Wednesday	"	29	-	-	} Motions.
Thursday	"	30	-	-	
Friday	May	1	-	-	} Pleas, Demurrers, Causes, Further Directions and Exceptions.
Saturday	"	2	-	-	
Monday	"	4	-	-	} Motions.
Tuesday	"	5	-	-	
Wednesday	"	6	-	-	} Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Thursday	"	7	-	-	
Friday	"	8	-	-	} Motions.
Saturday	"	9	-	-	
Monday	"	11	-	-	} Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Tuesday	"	12	-	-	
Wednesday	"	13	-	-	Petitions in General Paper.

AT THE ROLLS.

Thursday " 14 - - Short causes after swearing in the Solicitors.  
 Short causes, Consent causes, and Consent petitions, every Tuesday at the sitting of the Court.

COURT OF EXCHEQUER.—Sittings in Easter Term, 1840.

				<i>Banco.</i>	<i>Equity.</i>
Wednesday	Apr.	15	-	-	Lord Abinger.
Thursday	"	16	-	-	Lord Abinger.
				Peremptory Paper	

Monday	„	27	-	-	Special Paper	
Tuesday	„	28	-	-	-	Lord Abinger.
Wednesday	„	29	-	-	Special Paper	
Friday	May	1	-	-	-	Lord Abinger.
Saturday	„	2	-	-	Crown Cases	Lord Abinger.
Monday	„	4	-	-	Special Paper	
Tuesday	„	5	-	-	Errors	Lord Abinger.
Wednesday	„	6	-	-	Special Paper	
Saturday	„	9	-	-	-	Lord Abinger.
Monday	„	11	-	-	-	Lord Abinger.

## COURT OF COMMON PLEAS.

## IN TERM.

Middlesex.				London.			
Wednesday	.	.	.	April 29	Friday	.	May 1
Wednesday	.	.	.	May 6	Friday	.	May 8

## AFTER TERM.

Thursday	.	.	.	May 14	Friday	.	May 15
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The Court will sit at ten o'clock in the forenoon on each of the days in Term, and at half-past nine precisely on each of the days after Term.

The causes in the list for each of the above sitting days in Term, if not disposed of on those days will be tried by adjournment on the days following each of such sitting days.

On Friday, May 15th, in London, no causes will be tried, but the Court will adjourn to a future day.

## TO THE EDITOR OF THE LEGAL GUIDE.

SIR,

## PHILLPOTTS v. WILLIAMS.—EXCHEQUER.

Action for assault and battery. Defendant allowed judgment to go by default. On writ of inquiry before Sheriff of Monmouth, the jury assessed the damages at £5.

A. and B. (law students and subscribers) differ on the following point: A. contending that had the jury assessed the damages under 40s. the plaintiff would have no more costs than damages, under the 23 Chas. 2. c. 7. & 9.

B. contra contends that the defendant, by allowing judgment by default, precludes himself the benefit of the Act, and cites the case of *Johnson v. Northwood*, 1 Moore, 420. & 7 Taunton, 689. wherein defendant was debarred the benefit, having admitted the assault and battery, and pleaded justification, and the jury gave some minor damages (under 40s.)

Will you, in your next number, oblige by deciding this point. NEWPORTIENSIS.

By 22 & 23 Car. 2. c. 9. in all actions of

trespass, assault, and battery, and other personal actions, wherein the judge at the trial shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land was chiefly in question, (*Littlewood v. Wilkinson*, 9 Price 314. See *Tyler v. Bennett*, 5 Ad. & Ell. 577.) in case the jury find the damages to be under the value of 40s. the plaintiff shall not recover or obtain any more costs than the damages so found shall amount to. But this statute, as also the 21 J. I. c. 16. only restrains the Court from awarding more costs than damages; and the jury not being restrained thereby, may give what costs they please. (*Watkinson v. Sanger*, Cas. Prac. C. P. 45. Pr. Reg. C. P. II S. C.; *Brown v. Gibbons*, 1 Saik. 262. This statute extends only to actions for assault and battery, and to such personal actions as relate to the freehold, or to things fixed to the freehold; that is to cases where the freehold may come in question. (*Bennett v. Phillips*, 1 Saund. 500. n.) It extends to trespass for man-

ofits, (*Doe v. Davies*, 6 T. R. 593.); and trespass for throwing stones at and breaking the windows of plaintiff's house. (*Adams v. Grenaway*, 6 T. R. 281.); but it does not extend to inquisitions upon writs of *viary* in any case; therefore, if judgment by default, the plaintiff will be entitled to costs, though the damages be assessed at more than 40s. (Bull N. P. 329.) See 2 *Chabold's Prac. Q. B. by Chitty*, 1142.

EDITOR.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—In answer to a letter inserted in the number of the Legal Guide by E. A., and begging that you will excuse my troubling you with the following observations in reply, I beg to say that I never intended by a side-wind, E. A. states to be the case, to cast any slur on the answer previously inserted by ALPHONSO to Problem II. Vol. 3, which probably is more correct answer of the two, nor do I think that the letter which I addressed to you in connection thereto conveys any such idea upon the subject of it. To determine between ALPHONSO and myself as to which is right in his interpretation of the question above referred to is for you. I confidently submit that each correspondent is right, and is bound to express his opinion upon any particular question—bearing, in his present two interpretations, without being censured for so doing, and having motives imputed to him which never had any existence in his mind.

My answer would certainly have been more correct had I stated what the rule of Equity was on the subject of "Time being the essence of the contract;" but considering that as this was not the question principally involved in the Problem, and formed but a part of my answer, I referred to the work where the subject is admirably treated, trusting that by so doing nobody could possibly be misled. If your correspondent, E. A. will refer to Mr. Chitty, Junr's. work on Contracts, 248, he will there find the passage, of which he says,—"that its verbal sense is not at all correct, and that so far from being 'intended' the words are those of Mr. Sugden, and he also see that I did not cite Sugden's Vendors and Purchasers, but referred to it as bearing on the subject. Mr. Chitty, at page 248 of his work on Contracts, is considering the very point,—"When a Contract is to be performed?"

Does your correspondent mean to say that, because one man differs from another on any particular subject, he thereby hold out his own opinion as infallible? I beg leave to inform E. A. that I am not a Roman Catholic, that I altogether disclaim the doctrine of infallibility, and that in my answer I neither expressly, or by implication, stated such to be my belief.

J. A. M.

We wish to inspire our correspondents with a spirit of rivalry and emulation, but we cannot encourage a want of that courtesy between rivals, which is due from one gentleman to another. E. A. has not expressed himself in the most courteous manner. We have removed a few remarks on the subject made by J. A. M. in his letter to us, in addition to the above (which we entirely approve), that would only lead to another reply, which we could not admit. This paper is for *legal discussion* only, and where parties are unknown to each other, *personal discussion* (we would suppose) cannot arise. We have classed J. A. M. among the best of our correspondents, and are satisfied with his Answer. We would call to the mind of E. A. the passage of QUINTILLIAN.—*Non sapientem se, sed studiosam sapientiae vocari voluit*, as applied to PYTHAGORAS.—ED.

TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—The number of your subscribers who wish for a double number once a month being very many, and as the present volume is almost drawn to a close, I beg to offer a few suggestions upon the same, viz.: that the Editor of this paper be good enough to state the minority which those favourable to the double number are in, and that subscribers be allowed until the 1st number of the ensuing volume be published, to express their opinion upon the subject, so that if those favourable to the change are then in a majority (which I doubt will not be the case), the first double number can be published on the 30th of May. I am sure that subscribers must see the necessity of the change, for without a double number much useful information must necessarily be rejected.—I am, Sir,

Your's obedient,  
S. A. W.

### EXAMINATION AT THE LAW SOCIETY. EASTER TERM, 1840.

This Examination is appointed to take place on Wednesday, May 6, at 10 o'clock in the forenoon.

Testimonials of qualification must be left in or before Wednesday next.—Beware defects.

### NEW POSTAGE.

#### PREPAYMENT OF POSTAGE.

We understand that Mr. Hill's plan of transmitting letters free, without actual cash payments of postage, is likely to come into operation very shortly, and that the three modes of carrying it into effect which were proposed last summer, and led to a good deal of discussion and controversy, are all to be brought into operation, viz :

1. Paper may be sent to the Stamp Office, and prepared for passing free by the post by the application of a stamp.
2. The public will have the opportunity of purchasing small adhesive labels, which they can stick on to their letters.
3. They may purchase stamped covers or envelopes printed on a paper manufactured by Mr. Dickinson, with lines of thread in the interior of the sheet; and it is stated that "by causing part of the lines to be nearest to one surface of the paper, and part to the other, he has super-added a great protection against forgery."—*Times*.

### LEGACY DUTY.

A return has been made to the House of Commons showing the amount of capital on which the several rates of legacy duty have been paid in Great Britain in the year 1839, and also an abstract of the total amount of legacies which paid duty since 1797. The latter amounts to the enormous sum of £1,081,468,000; the total amount of capital on which legacy duty was paid in 1839 was £42,052,297; and of that more than four millions sterling paid the ten per cent. duty, and £21,504,065 paid the one per cent. duty; the former being the per centage payable by distant relatives or strangers in blood, and the latter by children or parents, or any lineal descendant or ancestor. The total legacy, probate, and other duties of this description paid into the public treasury since 1797 was about fifty-eight millions sterling.

### NOTICE TO CORRESPONDENTS.

A COUNTRY SUBSCRIBER—*Newport*.—Your letter does not come within our rules.

E. C. R.—We have no reason to doubt the authority of Marshall's case.

Any person who has served under articles of clerkship in order to his admission in the courts

of Great Sessions of Wales, or of the Counties Palatine of Chester, Lancaster, or Durham, or in any other court of record in England (not being one of her Majesty's courts of record at Westminster), holding pleas where the debt or damage amounts to 40s. may, upon payment of £120. have his articles of clerkship stamped, and be admitted an attorney or solicitor in any of the courts at Westminster, provided the articles have been properly stamped before the time of the application.

W. M.—We have nothing to add to our former notice.

Our many Correspondents during the week shall have due attention.

*Just published, price 4s. to be continued Monthly, Vol. IV. Part III.*

**PRECEDENTS IN CONVEYANCING**  
Adapted to the Present State of the Law Illustrated with Notes, Practical and Critical, by THOMAS GEORGE WESTERN, Esq. F.R.A.S. of the Middle Temple; Author of "The Commentaries on the Constitution and Laws of England" &c. in continuation of the PRECEDENTS by S. VALLIS BONE, Esq.

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# The Legal Guide.

Vol. III.]

SATURDAY, APRIL 25, 1840.

[No. 26.]

## ESSAY III.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 367.)

§ 8 to the second sort of bailment, viz. *commodatum*, or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so that if the bailee be guilty of the least neglect he will be answerable: as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be said if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned by Bracton, his words are, (a)—*‘Is autem res aliqua utenda datur, re obligatur, sed commodata est, sed magna differentia inter mutuum et commodatum; quia in mutuum rem mutuum accepit, ad ipsam restituenda tenetur, vel ejus pretium, si forte in-*

*cendio ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alias eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio, amiserit, non est dubium quin ad rei restitutionem teneatur.’* I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put his horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable-doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care; but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the 3rd sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expended. And here again I

(a) See Just. Inst. lib. 3, tit. 15, text. 2.



must recur to my old author, fol. 62, b. (b.) ' *Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.*' From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the 4th sort of bailment, viz. *vadum*, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge; and, secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them: but then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is *Ow. 123*. But if the

pawn be of such a nature as the pawnee is at any charge about the thing pawned to maintain it, as a horse, cow, &c. then the pawnee may use the horse in a reasonable manner, or milk the cow, &c. in recompence for the meat. (c) As to the second point, *Bracton*, 99 b. gives you the answer:—*Creditor, qui pignus accepit re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impeditur creditum petere.* (d) In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28. and *Southcote's case*. But, indeed, the reason given in *Southcote's case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use ordinary care for restoring the goods. But indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnor, by detaining them after the tender of the money, is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. As a man that keeps goods by wrong must be answerable for them at all events; for a detaining of them by him is the reason of the loss. Upon the same difference as the

(b) Just. Inst. lib. 3, tit. 25, text 5.

(c) See 3 Salk. 208. Holt, 528. Salk. 522.

(d) See Just. Inst. lib. 3, tit. 15, text 4. *De Pign.*

is in relation to pawns, it will be found stand in relation to goods found. As the fifth sort of bailment, viz. a delivery carry, or otherwise manage, for a reward be paid to the bailee, those cases are of sorts; either a delivery to one that exercises a public employment, or a delivery a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods in all events. And this is the case of the common carrier, common hoyman, master of ship, &c.; which case of a master of a ship is first adjudged 26 Car. 2. in the case of *res v. Slew*, Raym. 220. 1 Vent. 190-238. The law charges this person thus entrusted, to carry goods against all events, but acts of God, and of the enemies of the King. For though the force be never so great, as if an insupportable multitude of people should rob him; nevertheless he is chargeable. And this is a politic establishment, contrived by policy of the law, (e) for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for these carriers might have an opportunity of doing all persons that had any dealings with them, by combining with thieves, &c., yet doing is in such a clandestine manner as would not be possible to be discovered. This is the reason the law is founded on in that point. The second sort are bailment factors; and such like. And though a person is to have a reward for his management, yet he is only to do the best he can; if he be robbed, &c. it is a good account. The reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving money and selling corn, &c. And yet if he gives his master's money, and keeps it mixed up with a reasonable care, he shall be answerable for it though it be stolen.

But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, further than the nature of the thing put it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a Factor.

(To be continued.)

## PROBLEM XXVI.

### ILLUSORY APPOINTMENTS.

What is deemed an Illusory Appointment?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XVII. VOL. 3.

WHO MAY BE MADE A BANKRUPT?

The 6 G. 4. c. 16. s. 2. enacts "That all bankers (a), brokers (b), and persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody (c), and persons insuring ships or their freight, or other matters against perils of the sea (d), warehousemen (e), wharfingers (f), packers (g), builders (h), carpenters (i), shipwrights (k), victuallers, keepers of inns, taverns, hotels, or coffee houses, dyers, printers, bleachers, fullers, callenderers, cattle or sheep salesmen (l), and all persons using the trade of merchandize by way of bargaining, exchanging, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who either for themselves, or as agents or factors for others, seek their living by buying and selling (m), or by buying and letting for hire (n), or by the workmanship of goods or commodities (o), shall be deemed traders liable to become bankrupt: provided that no farmer, grazier, common labourer, or workman for hire, receiver general of the taxes, or member or subscriber to any incorporated commercial or trading companies established by charter or act of Parliament, shall be deemed as such a trader liable by virtue of this act to become a bankrupt."

And it is enacted by sec. 135, that the act "shall extend to aliens, denizens, and women (p), both to make them subject thereto, and to entitle them to all the benefits given thereby."

(a) Bankers were by the 5 G. 2. c. 30. s. 39. made liable to the bankrupt laws; and

See Just. Inst. lib. 4. tit. 4. text 3.; and lib. 3. tit. 11, s. 2.

it has been held that in order to constitute a person a banker, it was not necessary for him to keep an open banking-house, or to keep his books and conduct his business in a manner exactly the same as that usually adopted by bankers, but that all persons were to be deemed bankers who acted as such (*Ex Wilson*, 1 Atk. 218). But an army or navy agent is not to be deemed a bankrupt. (1 Mont. B. L. 2.)

(b) Brokers were made subject to the bankrupt laws by the 5 G. 2. c. 30. s. 39. The word "brokers" here includes not only brokers concerned in the purchase and sale of merchandize, but also stock-brokers (*Cullen*, 48), ship-brokers (*Pott v. Turner*, 4 Moore 651; 6 Bing. 702), and pawn-brokers (*Higmore v. Molloy*, 1 Atk. 206; *Hawkinson v. Pearson*, 5 B. & A. 124); and a pawnbroker who has ceased to receive pledges, but continues to sell those that remain in his hands unredeemed may be a bankrupt. (*Ibid.*) An assurance broker is within this clause of the statute. (See *Ex Stevens*, 4 Mad. 256, and *Pott v. Turner*, *supra*.) But a person not a bill-broker by trade, will not bring himself within the pale of the bankrupt laws by merely discounting bills, and procuring bills to be discounted for friends, especially if he does not hold himself out as a bill-broker. (*Ex Harvey*, 3 Mon. & A. 503.)

(c) With respect to who may be deemed a scrivener within the 6 G. 4, we may have recourse to the cases decided on the stat. of James the First (21 Jac. 1. c. 19. s. 2.), by which it was enacted, that scriveners should be liable to the bankrupt laws; and it is to be observed that the words used in that statute, and in the 6 G. 4, are precisely alike. In order to constitute a person a scrivener, so as to bring himself within the act, it was and is necessary that he should be entrusted with the money for the purpose of lending it out to others at an interest payable to his principal, and for a commission or bonus to himself, whereby he seeks to gain his livelihood. Therefore a man who possesses other persons' money with which he discounts bills for his own emolument, is not a scrivener. (*Harrison v. Harrison*, 1 Esp. 555.) Nor is an attorney who purchases and sells estates, negotiates loans, &c. for his clients in the common course of his profession, for which he makes only the regular professional charges for the conveyance, &c. a scrivener within the statute of Jac. 1. (*Ex Malin*, 1 Rose, 406; 2 *id.* 27, 28; *Re Lewis*, 2 *id.* 59; *Hurd v. Brydges*, 1 Holt, 654.) But if money were usually lodged in

the hands of an attorney, by his client and others, for the purpose of being invested in securities, and upon his so investing the money, he charged not only for the conveyance, but also a certain bonus or commission for himself, and he were a conveyancer as well as an attorney, he would be deemed a scrivener within the above statute. (*Hutchinson v. Gascoigne*, 1 Holt, 507; *Ex Bath*, Mont. 82.)

(d) This does not extend to insurance brokers. (See *Ex Stevens*, 4 Mad. 256.) But see ante (note 2).

(e) This is a term well understood in the city of London, and means persons who buy and sell linens, muslins, silks, and woollen goods by wholesale; and does not, it should seem, include in it every person who owns or keeps a warehouse, and who is not otherwise a trader within the words or meaning of this statute. (Arch. B. L. p. 37. 7<sup>th</sup> edit.)

(f) This also is a term well understood in London, and means the proprietor of waterside premises, who land, warehouse and ship goods, either foreign or coastwise for reward. (*Ibid.*)

(g) In London, packers are understood to be persons employed by merchants to receive, and, in some cases, to select goods for them, from manufacturers, dyers, calenderers, &c., and pack the same for exportation. (*Ibid.*)

(h) A builder is one who builds houses for sale, whether on lands purchased or leased for that purpose, or builds for other persons by hire or contract. (*Ex Neirich*, 2 Mont. & A. 384; 1 Dea. 78.)

(i) A carpenter is a person who purchases timber and other materials, which he works up as a carpenter, and not a person who merely works at the trade. (See 3 Mad. 155; 1 Cook, B. L. 49.)

(k) This seems not to mean a person who only works at the trade, but one who also purchases and furnishes the materials. (Arch. B. L. 37, 7<sup>th</sup> edit.)

(l) A farmer who is in the habit of buying half as many more sheep as are necessary to stock his farm, and of selling the surplus at a profit, is a trader within the section. (*Re Newall*, 3 Dea. 333.)

(m) Upon the words "buying and selling," contained in the statute of Jac. 1. (21 Jac. 1. c. 19. s. 2.), it has been held that to bring a person within the bankrupt laws under this section, it is necessary that he should buy and sell, or act with intent to sell; for buying alone, without an intent to sell, (1 Com. Dig. Bankrupt, A.) as a seller

lone without a buying (*ibid.*) will not constitute a trading within the meaning of this clause of the statute. (See Arch. B. L. 7 edit. p. 39, 40, 41, where all the cases on this subject will be found collected.)

(n) A livery-stable keeper, who buys horses for the purpose of letting them out, and occasionally lets them out, without having obtained a proper licence, is within this section. (*Martin v. Nightingale*, 11 Moore 55.) But the shareholders of steam-packets are not traders within this clause. (*Ex v. Widdow*, Mont. 302.)

(o) A person who purchases raw materials, and makes it into a vendible article for the purpose of sale, and with a view to profit, was, under the former statutes, held to be within the bankrupt laws; and it made no difference that part of the gain was to be derived from bodily labour. (*Dally v. Smith*, Burr. 1448, 3 Mod. 380; *Crampe v. Burne*, Cro. Car. 31; *Stanley v. Osbaston*, Cro. Eliz. 208; *Parker v. Wells*, Cooke 56.) But if the manufacturer did not buy the raw materials, he was held not to be within the bankrupt laws. Thus, where a person made cider from apples, which he grew, he was held not to be a trader within the former statutes. (*Per Lord Mansfield in Parker v. Wells*, 1 T. R. 84.) But *query*, whether this is the law now, for the present act provides that "all persons who seek their living by the workmanship of goods or commodities, shall be deemed traders, liable to become bankrupt."

And in order to render a person liable to the bankrupt laws under this section, it will be sufficient to prove a single act of buying and selling by him, (*Ex Blackmore*, Ves. 8; *Ex Bowes*, 4 Ves. 168; *Hankey Jones*, Cowp. 748.) unless it can be shewn that he had an intention to continue it. (*Patman v. Vaughan*, 1 T. R. 572; *Baronemero v. Sherwood*, 1 T. R. 578; *Holroyd v. Gwynne*, 2 Taunt. 176; *Ex Wilks*, Mont. & A. 667.) And in proof of this intention, a declaration by the party of the object of his buying; (*Gale v. Halfknight*, Stark. 56.); or his representing himself a dealer, and buying goods and offering them in exchange, is admissible evidence (*Millikin v. Brandon*, 1 Car. & P. 380.) The legality or illegality of the buying and selling is of no importance. (*Sawnderson v. Bowles*, 4 Burr. 2008; *Martin v. Nightingale*, supra; *Ex Maymot*, 1 Atk. 169; *Jobb v. Symonds*, 1 D. & R. 111; 5 B. & A. 16.)

(p) A married woman is not a trader within the bankrupt laws, unless she carry

on trade free from the control of her husband, and he is not liable for the debts contracted by her in such business. (See *Ex Preston*, Green 8; *Cooke* 40; *Ex Mear*, 2 Bro. 266.) And for the instances in which it has been held that the wife may be made a bankrupt, see the following cases—(*Ex Franks*, 1 M. and Scott, 1; 6 M. & P. 1; 7 Bing. 762; *Lavis v. Phillips*, 3 Burr. 1776; *ex parte Carrington*, 1 Atk. 206.)

A second fiat in bankruptcy against an uncertificated bankrupt is a nullity, because his property, as well after-acquired as otherwise, is already assigned under the first fiat. (*Martin v. O'Hara*, Cowp. 824; *Ex Martin*, 15 Ves. 114; *Till v. Willson*, 7 B. & C. 684.) But it is discretionary with the Great Seal, whether or not it will supersede such second fiat. (See 16 Ves. 236, 472.)

C. B.

We have another Answer to this Problem, by R. H., who, after stating the enactments of the 6 Geo. 4, c. 16, s. 2, thus proceeds:—

The chief difficulty being to prove a decisive act of trading, in order to ground the opening of a fiat in bankruptcy, it is provided by the last part of the clause, that those whom it might be difficult to class under any particular denomination of traders, are yet subject to the bankrupt laws, if it can be proved in evidence, that they are buying and selling mere personal goods, with a view to profit; and are proceeded against as "dealers and chapmen:" care must however be taken at the same time to shew a repeated practice of such buying and selling, or a commencement coupled with an intention to continue it; for a single act of bankruptcy, unaccompanied with such intention, will not be sufficient, (*Ex p. Blackmore*, 6 Ves. 9; *Ex p. Bowes*, 4 Ves. 168; *Hankey v. Jones*, Cowp. 478.)

## Law Reports.

### VICE-CHANCELLOR'S COURT, Nov. 27.

#### BEADLES v. BURCH.

ATTORNEYS—PRACTICE—*Whether in Cases where Bills are filed to impeach Deeds on the ground of fraud, the Attorney who prepared them may be properly made a party to the suit as a party to the fraud, to obtain a discovery.*

In this case a deed of compromise had been prepared to terminate a former suit, the draft of which, as settled by counsel, had been sent to

the solicitors of a defendant in the former suit to be ingrossed by them. The bill charged the solicitors, who were defendants to it, with having, without plaintiff's knowledge, introduced into the deed a passage that was not in the draft, and it prayed costs against them. They demurred to the bill for want of equity, as they had no interest in the subject-matter of the suit, having been only solicitors for one of the defendants, for whom also they might be examined as witnesses. Another demurrer was put in to the bill for want of parties. The original suit related to the administration of the estate of an intestate named Knightley Adams, to whom a prerogative administration had been taken out. Mrs. Robinson, one of his next of kin, dying, after executing the deed compromising that suit, her husband took out letters of administration to her in the diocesan Court of Peterborough, within which jurisdiction she had lived, and she was a plaintiff in this second suit. The ground of the second demurrer was, that Mrs. Robinson was not duly represented, and that a prerogative administration was necessary to constitute Mr. Robinson her proper legal representative.

The present bill was filed to rectify the deed.

The VICE-CHANCELLOR said, that he had read the bill, and was of opinion that such a case was stated as required an answer. It appeared to him, as to the first demurrer, that there could be no doubt of the propriety of filing such a bill, if what was stated by Lord Redesdale in his book on pleading was correct. "Where bills have been filed to impeach deeds on the ground of fraud, attorneys, who have prepared the deeds, and other persons concerned in obtaining them, have been frequently made defendants, as parties to the fraud complained of, for the purpose of obtaining a full discovery: and no case appears in the books of a demurrer by such a party, because he had no claim of interest in the matter in question by the bill." That was stated by Lord Redesdale without giving any authority. Then he went on: "Indeed, an attorney under such circumstances, being brought as a party to the suit to a hearing, has been ordered to pay costs." (Mist. Pleadings, 189, 4th ed.) For this Lord Redesdale did give authority. His Honour said he could not suppose that a person of Lord Redesdale's experience would have declared in his book that attorneys had been made parties to such bills, if there could be any doubt such had been the case. In the case of *Le Texier v. the Margravine of Anspach*, the opinion of Lord Eldon was thus expressed. (15 Ves. 164). "Where an attorney or other agent is so involved in the fraud charged by the bill, that, though a reconveyance or other relief cannot be prayed against him, a Court of Equity will, rather than that the plaintiff shall not have his costs, order

that agent to pay them; if he is made a party, the plaintiff must pray that he may pay the costs, otherwise a demurrer will lie." It was clear from this passage Lord Eldon took it for granted the practice was as Lord Redesdale had laid it down. In *Bowles v. Stewart*, (1 Sch. and Lef. 227.) Lord Redesdale himself acted on what he stated in his book, for there he said, "as to Mr. Bowles's solicitor, he was acting, for his client, but his duty as a solicitor did not bind him to assist his client in an act of injustice, &c. His zeal for his client has led him too far, he has properly been made a party. He was an acting party in the transaction, and properly brought to a hearing, and ought to be chargeable with the costs, so far as they relate to the release, in case they cannot be recovered from Richard Bowles." Here was a judicial recognition of the doctrine stated by Lord Redesdale. His Honour wished it to be understood that he was proceeding upon the footing of the statements contained in the bill; and that Messrs. A. B. would not suppose he had the least suspicion of the purity of their intentions in acting as they had done. He had known them too long to suppose they would be guilty of any impropriety of conduct. But from what was stated in the bill, he thought they had been properly made parties, and that what was prayed against them was properly prayed.

The point stated by the second demurrer was more important. It appeared to his Honour a strong proposition that, in no case, was a person, who had obtained a diocesan probate or administration, capable of being a plaintiff in equity. He always thought it was a rule that such a party could bring what action he chose; and if he could bring any action, of course equity, which followed the law, would permit him to file a bill. The case of *Willert v. Cox* clearly proved that a diocesan administrator could support an action at law. There the parties, being unable to demur, were driven to a special plea, to show the diocesan administration was wrong. But then it appeared that there had been a diocesan administration taken out at Oxford, whereas it should have been in Berkshire; and if in the present case it appeared on the face of the pleadings there could not properly have been an administration from the Court of Peterborough, it would have been a ground of demurrer. But the case stood differently. Here Knightley Adams died intestate, and after some contest prerogative administration was granted to Sarah Cole (afterwards Robinson), who was represented as his next of kin, who had a right to see for her portion of the clear residue after all the property had been turned into money and the debts and funeral expenses of the intestate satisfied. It was of very little importance to state whether the first intestate was possessed of property in which

rent diocese, as the right of the next of kin was not to the specific property, but to a clear share of the surplus which would be produced by it after payment of all the demands upon it. There was nothing on the face of the bill to show that Sarah Cole was not residing in the diocese of Peterborough, and his opinion on that part of the bill was, that it might very well stand that the diocesan administration granted to Robinson as administrator to Sarah, his wife, was properly granted. Then the ground of demurrer was wrong, and must be overruled with costs.

### ROLLS' COURT—Jan. 23.

**MATTELL AND OTHERS v. SIMONS AND WIFE.**

**VENDOR AND PURCHASER—SOLICITORS—**  
*Imprudence of a Solicitor acting for Vendor and Purchaser—Necessity for the authority of the client employing the Solicitor, being in writing—Whether a purchaser shall be allowed to have possession of his purchase, and the purchase money also.*

Mr. Kindersley, on behalf of the plaintiff (the vendor), moved that Thomas Harris, who had been reported by the Master to be the best bidder, might be ordered to pay into Court the purchase money, and also to pay the costs of the application.

Mr. Pemberton for the defendant Harris (the purchaser), moved also that an order of the 7th of December, 1838, for him to pay in the purchase money might be discharged, and that his costs might be paid by Mr. Wardle, the solicitor of the plaintiffs.

Lord LANGDALE stated the facts of the case in delivering his judgment. His Lordship said, Harris was the purchaser, in August, 1838, of property sold under the direction of this Court. He was confirmed purchaser, and by an order of the 7th of December, 1838, was to be at liberty to pay in the purchase-money, and he had since entered into possession of the estate. The motion was, that this order might be discharged with costs. On the other side the motion was, that Harris should pay the amount of the purchase-money into Court. The questions raised were, whether Harris was to be deemed to have accepted the title, and whether he ought to be at liberty to remain in possession of the property, and also of the purchase-money. Mr. Wardle being the solicitor of the plaintiffs had a communication with Harris soon after he became purchaser, in which it appeared that Harris gave him (Wardle) liberty to proceed for him, at least to the extent of confirming the purchase, and Harris was confirmed purchaser by the Master's report of the 23d of November, and of that con-

fimation there was no complaint. The next step was that of the greatest importance. Harris being the purchaser had a right to be satisfied that the seller could make a good title. Wardle acted for him, but whether with authority in that respect was the question, and Wardle was also solicitor for the plaintiffs. *He would have acted with more prudence if he had not been the solicitor of both parties. Without imputing misconduct to him, he had placed himself in a situation in which it was difficult to do entirely right.* As solicitor for Harris it was his duty to get everything as to the title perfectly satisfactory. He obtained the order of the 9th of December, 1838, which declared that Harris was content with the title, and therefore leave was given him to pay the purchase-money into Court on the 22d of December. Before that day Wardle having intimated to Harris that the purchase-money was to be paid into Court, Harris said he wished to have Mr. Burton to be his solicitor, and Wardle sent the abstract of title to Burton, and also his (Wardle's) bill of costs as solicitor, which contained an account of the acts he had done as solicitor for Harris. That bill therefore contained a statement that Wardle had procured the Master's report, had got it confirmed, and had obtained the order for paying the money into Court, and it must be assumed that from its delivery Harris had notice of what Wardle had done. *When a solicitor acted for a client, and it afterwards became a question whether he acted for him or not, the client had a right to call upon him for his authority in writing, but that was a rule not without exception, for the conduct of the client might be such as to show authority either at the time or by the acquiescence of the party afterwards.* The acts done were communicated to Burton, Harris's solicitor, on the 4th of February, 1839. He must, therefore, consider that Harris was informed of them on that day, but it was a different question whether he knew the effect of them. Many of these parties seem to have thought that Harris was precluded from examining the title by the order of the 7th of December. The abstract, however, was delivered to Burton, who, on proceeding to examine it with the deeds, found some of them missing. Expectations were, however, held out that they would be forthcoming, but they had not been produced. Whilst these things were in progress Harris took possession, on the faith that a good title would be completed, and exercised acts of ownership. *It was a rule that the purchaser was not to hold the property and the price of it at the same time, and Harris was not exempt from the payment of the purchase-money, although he was exempt from the admission of the title.* He had been in a situation in which the

ought not to be placed, and in which he was entitled to relief, which could not be obtained without application to the Court. He ought, therefore, to be exempt from payment of costs. Wardle's conduct appears to have been entirely supported by the plaintiffs, and he ought not to be put to the costs from which Harris was exonerated. His Lordship's present impression was that these costs ought to come out of the funds in Court. Harris must be exonerated from the costs of the application he was obliged to make. He must pay the purchase-money into Court, and he might investigate the title. He ought not to be exempt from the costs of the order to confirm the purchase, but he must be exempt from all other costs.

### COURT OF QUEEN'S BENCH.

#### Sittings in Banco.

#### HATCH v. TRAVES.

#### WATSON v. KEIGHTLEY.

**BILLS OF EXCHANGE.**—*Whether an action of debt can be maintained between the immediate parties to a Bill of Exchange or Promissory Note, without the words "value received" appearing upon the Bill or Note.*

These two cases arose upon the same point—an action of debt brought by the payer against the drawer, in the first action, of a promissory note, and in the second action against the acceptor of a bill of exchange, neither of which contained the usual words, "for value received." The defendants demurred to the declarations upon the ground that an action of debt would not lie. These demurrers now came on for argument.

Mr. Watson appeared to support the demurrer to the first action, and cited *Comyns' Digest* (a) that in such a case debt will not lie. He contended that a promissory note or a bill of exchange is not necessarily given in payment of an existing debt; each is often given for the accommodation of a particular party, and often for collateral engagements, to meet some demand which is not a debt. It is only where the instrument is given for a positive debt, acknowledged upon the face of it, that such an action as the present can be maintained, and even then it must be between the immediate parties, *Priddy v. Hendry*, (b) That a promissory note does not constitute a debt is shown by *Ruddy v. Price*, (c) where it was held that an action of debt could not lie on a promissory note, payable by instalments, until the last day of payment was

past. *Randle v. Rigby* it was held that a defendant could not be sued in debt to pay a sum of money unless such sum was charged upon land, which shows that where a covenant is collateral, debt will not lie. *Cresswell v. Gripp* (d) the Court would not set aside, as frivolous, a demurrer to a declaration in which the ground of demurrer was, that in debt on a promissory note it did not appear that the words "value received" were in the note, and the same rule was acted on in *Lyons v. Cohen*. (e)

COLERIDGE, J.—Under the new rules the same forms are applicable both to debt and assumpsit. If that is so, it is difficult to say that debt will not lie.

Mr. Butt, against the demurrer, contended that it is not now necessary in any case to insert the words "value received" in a bill of exchange, either in assumpsit or in debt. *Stratton v. Hill* (f) was an action by the first indorser against the first indorser of a bill, and the contract there was consequently a contract to pay if the acceptor did not. A direct privity was held to exist there. A covenant and a promise to pay both import consideration, (g) In *Rainball v. Bell* (h) an action of debt was brought upon a note. The words there were, "I acknowledge myself indebted to" such a one.

LITTLEDALE, J.—These words necessarily import consideration. There is nothing in the words "value received" to show that there was a consideration moving between the two parties; but even if there were, no such words are used in the present instrument.

Mr. Bramwell appeared in support of the demurrer in the second action, and cited *Compton v. Taylor* (i), which he said determined two points (\*) the first point was, that the word "promised" does not prevent a count from being a count in debt. The other was that the demurrer to the whole declaration was too large; and had even on the assumption that debt would not lie on the bills in question. But if it decided this on the authority of the rule T. T. Wm. 4. debt would lie now, where it would not before those rules, then it was decided on an untenable ground. For it was clear, that when those rules were made, the judges had no power to alter the law that had been admitted by the courts. There are many authorities in *Comyn's Digest* (j) to show debt will not lie in this case. It has been supposed that the general proposition there had

(a) 2 Dowl. P. C. 635.

(e) 3 Dowl. P. C. 243.

(f) 3 Price, 253.

(g) Com. Dig. Debt. pl. 1. Bayley on Bills, 4 Ed. p. 40.

(h) 10 Mod. 38.

(\*) The marginal note in the report of that case is incorrect.

(i) Com. Dig. Action on Assumpsit, a. 2. Mercurt. f. 12—13. Debt; b.

(a) In this Digest it is said that debt will lie in the City of London.

(b) 1 Barn. & Cres. 674. (c) 1 Hen. Bl. 547.

own, that debt would not lie on a bill, could not be relied on as law, having been at least qualified by subsequent cases. But in *Priddy v. Hendry*, (4) and *Bishop v. Young*, (5) the judges not only did not dissent from the older authorities, but quoted them, and founded their judgments on them. The authorities therefore are in conflict, but amount to this, that debt will not lie on a bill of exchange, but will for the consideration apparent on the face of it. Here it is not the case, for there is no consideration on the face of the instrument, there being nothing but a bare promise to pay.

LORD DENMAN.—We have considered these cases, and think that an action of debt may be maintained between the immediate parties to a bill of exchange or a promissory note, even if the words “value received” are not found upon the instrument. And in coming to this decision, we are happy to follow the authority of the Court of Exchequer, which we consider to have determined this question.

(1) 4 Mee. & W. 138. In that case the declaration was on two bills of exchange;—the first two counts were upon promises in the form prescribed by the Rules, T. 1 W. 4. the 3rd, 4th, and 5th counts were in debt for goods sold, interest and account stated and concluded as usual in a declaration in debt. The defendant demurred specially on the ground that there was a misjoinder of counts.

In support of the demurrer *Cloves v. Williams* (3 Bing. N. C. 868.; 5 Scott, 68.), and *Yelv. 20.* case were cited—the latter as an authority that every bill implies a promise.

PARKE, B.—*Cloves v. Williams* is precisely in point. I was anxious to find an authority for what seemed so consistent with common sense. There is no substantial difference between promising and agreeing.

ALDERSON, B.—I see that the forms given by the rules of T. T. 1 Will. 4, which apply to both assumpsit and debt, make no difference in the cases; and this declaration follows the form precisely. One form is given for both, and this is that form.

The Court concurred, and judgment was given for the plaintiff.—ED.

(4) 1 Barn. & Cress. 674. (5) 2 Bos. & Pul. 78.

Feb. 20.

Sittings at Nisi Prius.

DREW AND ANOTHER v. KNIGHT.

PILOTS.—*Their liabilities for negligence.*

This was an action brought by the plaintiffs to recover compensation from the defendant, a pilot, who, while in the execution of his duty, in conducting the Braganza steam-vessel, burdened 700 tons, carrying her Majesty's mails for Lisbon, had run down the defendant's vessel, the Phoenix, a Deal hoy, off Gravesend.

It appeared that, on the 29th of November last, the plaintiff's vessel was proceeding to Deal, laden with a general cargo; but, on proceeding as far as Gravesend, from the appearance of the weather, the captain thought it prudent to cast anchor opposite to the Thames and Medway Canal, that portion of the river where small craft usually came to anchor. The Phoenix came to her berth about three o'clock in the afternoon, the weather being then squally, and it blowing a fresh gale. About two o'clock in the morning, the Braganza steamer was seen coming down the river, and, nearly abreast of the Phoenix, she shifted suddenly round, and ran against the Phoenix, and carried away her topmast, bowsprit, and stern; at the same time she broke from her anchor, and drifted down the river for four miles, where she cast her bower anchor, but on the next day was obliged to return to London to be repaired, which cost £72.

The foregoing facts were proved by the crew of the Phoenix. It was further proved that the defendant had admitted that the owners of the Phoenix ought to be compensated for the injury she sustained, and he hoped that the owners of the Braganza would do so.

For the defendant it was contended that he could not be held liable, as the injury which the Phoenix sustained was owing to a sudden squall of wind, and not to the want of any skill of his as a pilot. He was at his post at the time of the accident, standing on the larboard paddle-box, and the captain on the starboard, while the second mate was on the poop; they did not observe the Phoenix until within a ship's length of her, and they hailed her. The engines were immediately stopped, and even an attempt was made to back, so as to avoid coming in collision with her. The anchor of the Braganza was parted, and her mainstay set, so as to come to anchor, when a sudden squall drove her against the Phoenix. The foregoing facts were proved by the captain and crew of the Braganza.

LORD DENMAN addressed the jury, and said that, before he would proceed to sum up the evidence, he would make one observation; and it was that the defendant, as a pilot of considerable experience, ought to have known where in the



river small craft, such as the plaintiffs' vessel, were likely to anchor, and he should not have attempted to bring a vessel of 700 tons, on such a night, to anchor amongst such craft. He would read the evidence over to them, if they pleased. Verdict for the plaintiffs for the amount claimed.

### COURT OF EXCHEQUER.

RE LORD CARDROSS, AND MESSRS. HODGSON AND BURTON, ATTORNEYS.

**ATTORNEYS.**—*Jurisdiction of a Court of Law for calling upon an Attorney to deliver his Bill of Costs where no business has been done in the Court in which the application is made.*

Messrs. Hodgson and Burton had been Attorneys for the late Lord Cardross, whose life they had insured to secure the payment of their bills of costs, and upon his Lordship's death they had received the amount of the policy.

A rule had been obtained calling upon the Attorneys to shew cause why they should not deliver a bill of costs, and give credit for all monies received, and upon payment of what should be due, to deliver up the life policy.

Mr. Erle shewed cause against the rule, upon upon two grounds—first, that the affidavits on which the rule had been obtained were bad, as not being entitled in any cause; and, secondly, that none of the business having been done in the Exchequer, this court had no jurisdiction to order the delivery of a bill.

PARKE, B. said, they may be compelled to account for the balance of the money received by the policy, in an action for money had and received.

Mr. Kelly, in support of the rule, cited the case of *Aitkin*, (a) to shew that the Court had power to interfere in a summary way, and in that case no business had been done in the Court in which the application was made.

PARKE, B.—With respect to calling on an attorney to deliver his bill, the Courts have jurisdiction for that purpose under the stat. 2 Geo. 2. c. 23. s. 23. only when an action has been brought on the bill, and the greater part of the business is done in the Court to which the application is made. The Courts have, by construction, got rid of the latter branch of the qualification, and now hold that if part of the business be done in the Court it will suffice. But it is imperatively requisite that some portion of it be done there, and the affidavit upon which such application is founded must be entitled in the cause. Now, here there is no business done in

this Court, and consequently these affidavits are wrong. The next question is, have we power here by virtue of the general jurisdiction of the Courts over their officers? The rule is that laid down by Lord Tenterden *In re Aitkin*, that where an attorney is employed respecting deeds or conveyances, or any other business properly belonging to the profession of the law, the obligation to discharge which faithfully arises out of the duty imposed on him in that character, and he receives money in that capacity, he must account with his principal for it. The only foundation of a claim in the present case is, that there is a policy of insurance remaining in the hands of these attorneys. But when called on to account, they deny that Lord Cardross or his representatives have any interest in it. But, suppose it even did belong to Lord Cardross, is the party to be called on to give an account merely because he takes a security? Such a position would go far beyond the case of *In re Aitkin*. On the contrary, there is a case of *Ex parte Schwalbanker*, (1 Dowl. 182.) where Patteson J. refused to call on an attorney to account for a party for whom he had discounted bills, and refused to give an account of the balance. Rule discharged, with costs.

Jan. 15.

CHAMBERS v. BIRCHAM.

**ACT for abolishing ARREST for DEBT-PRACTICE.** *Whether the hearing of a cause will be stayed upon production of the vesting Order of the Insolvent Court until the Assignee of the Insolvent should appear in the cause.*

Mr. Barber, upon this cause being called, objected to its matter being proceeded with, on the ground that the plaintiff had become an insolvent. The plaintiff had been compelled, under the provisions of the act passed for the relief of insolvent debtors, to take the benefit of that act, whereby the whole of his property had been vested in the person of the provisional assignee for the benefit and advantage of his creditors. Unless, therefore, the provisional assignee consented to file a supplemental bill, it would be impossible that the plaintiff in this suit could proceed with the bill then before the Court. He held in his hand the usual order of the Insolvent Court, which proved that the plaintiff had taken the benefit on the 19th of December, 1839, and he now had to pray that his Lordship would allow the cause to stand over, with a view of ascertaining whether the provisional assignee would file the supplemental bill. Supposing that the party were to decline or refuse to take that course,

(a) 4 Barn. and Ald. 4.

en it would be necessary, as he would undoubtedly be entitled to do, that he should come once more to the Court, and pray the dismissal of the present bill without costs.

Mr. Temple, for the plaintiff, admitted it to be true that the plaintiff had remained unfortunately so long in prison as to give a right to his creditors to call upon him to take such a course. A copy of an order had been obtained by Mr. Harrison from the Insolvent Court, which declared him under the provisions of the 1st and 2d of Statute the plaintiff had in fact taken the benefit thereof. Now, he was instructed that certain competent legal authorities had intimated to the plaintiff that the order in question did not of necessity make him an insolvent.

Lord ABINGER inquired whether the late act would enable creditors to oblige parties who were indebted to them, who had been arrested, who were in prison, to take the benefit without specific time?

Mr. Barber replied in the affirmative.

Lord ABINGER thereupon said, it was clear that the Court was bound to receive the order which had been produced by the learned counsel for the defendant, as a proof that the plaintiff, under the particular circumstances which had been adverted to, taken the benefit.

Mr. Taylor then said, that after hearing the opinion of his Lordship on the point, he should abstain from any further interference upon the present occasion.

The case was then ordered to stand over.

#### SITTINGS IN BANCO.—Jan. 23.

##### STOCKDALE v. DUNLOP.

**FRANCE ON PROFITS.**—*In order to effect an Insurance upon Profits, the Goods insured must be such as the Assurer has an actual present Interest and a vested Right in.*

A rule had been obtained in this case by the plaintiff, an underwriter, for the purpose of bringing before the Court the question whether the plaintiff had such an interest in certain quantities of palm oil as would entitle him to insure its safety. The plaintiff had entered into a verbal contract with Messrs. Harrison, who were shipowners and merchants concerned in the African trade. The terms of this agreement were, that Messrs. Harrison promised to buy and sell the oil in question, if it should arrive in certain vessels of the firm then engaged in the trade. The plaintiff then insured the oil, the vessels being lost in the homeward voyage. The principal questions raised for the consideration of the Court were, whether this was a

contract which ought to have been reduced into writing, and whether, the insurance having been effected before all but a very small quantity of oil had been shipped, the plaintiff had an insurable interest therein.

Mr. Wightman showed cause against the rule, and contended that there was a part performance of the contract sufficient to take it out of the operation of the statute, and also that there was an insurable interest vested in the plaintiff, inasmuch as though he had not possession or actual interest in the oil, yet, as the contract was one from which he might expect to reap profit, he had an interest therein which would entitle him to insure its safe arrival. Besides these, there were other points regarding the manner in which the various issues should be entered; but the main features of the case may be gathered from the following judgment, which was delivered without hearing the counsel for the defendant.

Lord ABINGER.—The chief question in this case is, whether the plaintiff had an insurable interest in the oil on the species of contract which is proved to have been entered into between the plaintiff and Messrs. Harrison. I have no hesitation in stating it to be my opinion, that he had not such an interest therein as would entitle him to insure the goods. The case has been likened to that of an insurance for freight, but the cases are not analogous, for there is an actual interest in the amount of freight, and here there is neither an inception of the risk nor a part performance of the contract at the time of insurance, which alone could entitle the plaintiff to enforce the promise of the Messrs. Harrison. If it were to be held that the plaintiff had an insurable interest in this oil, though he had no actual interest in it, all that a man would require to give such an interest to him would be, that he should lay a wager that certain goods would arrive, and then insure that wager, a state of things which it would be very dangerous to admit. This is only a contract *in futuro*, a contract to sell, if the oil should arrive in certain vessels; and as the oil did not arrive, it is clear that the contract is void: that being so, how can the plaintiff insure the profits?

Mr. Baron PARKE.—I am of the same opinion; all the cases in the books on this subject show, that in order to effect an insurance on profits, the goods insured must be such as the assurer has an actual present interest and a vested right in. The profits in that construction of the term are the additional value of the property of the assurer. Here, however, the plaintiff has no possible interest in the oil at the time of the insurance being effected, and was wholly dependent upon the honour of Messrs. Harrison, who might or might not choose to keep their

promise, which was one to sell the oil if it arrived in certain vessels, thus placing their liability to perform their bargain upon a double condition. This, moreover, is not a contract which the plaintiff could enforce, as it was not in writing, and that being so could confer no actual interest in the oil upon him.

The other Barons concurred.

Judgment for the defendant.

Feb. 3.

Sittings at Nisi Prius.

MUZZ V. SEWELL AND OTHERS.

LANDLORD AND TENANT—DISTRESS—TRESPASS.

This was an action of trespass brought by a tenant against her landlord, a broker, and his men, who had distrained upon her goods in an unlawful manner, as the entry into the house had been effected by means of a ladder put up to a window at the back of the house. Having thus obtained admission, the broker produced a paper bearing the signature of Sewell, the landlord, as his authority, and proceeded to levy for £4. 4s. due, for which purpose goods to a much larger amount than was necessary were taken, and ultimately sold at a sacrifice.

There being no evidence against Mr. Sewell, the judge directed a verdict to be taken for him, and the case proceeded as against the broker and his assistants.

Mr. Thesiger contended, that though the entry at the window might be admitted to have been somewhat irregular, yet the plaintiff could not complain, as she had refused admission to the defendants by the door.

Mr. Platt then replied, that as Mr. Sewell had been withdrawn from the case, it must follow that there was no authority from him to the other defendants to enter the plaintiff's house to make a distress, in which case the whole proceeding would be a trespass on their part without any pretence at a justification, and they ought to be made to pay handsomely for their conduct.

Mr. Justice COLERIDGE said, that as the defendants now in question had failed to connect themselves with the landlord, it must be taken that all their proceedings were without justification in point of law, though there could be no moral doubt that they did commit the trespasses with which they were charged under colour of a right to do so. It had been most properly admitted, that the mode by which they had effected their entry was in itself an act of trespass, for which they would have been answerable, even if they had succeeded in showing that they had the authority of the landlord's warrant for taking a distress. The case therefore was one purely for the jury to say what amount of compensation

they would give, always bearing in mind that there did not seem to have been any wilful oppression on the part of the broker and his men, against whom all that could fairly be charged was, that they had committed several irregularities in their proceeding, for which they were liable to the plaintiff in this form of action.

Verdict for the plaintiff, damages £25.

February 12.

Sittings in Banco.

REYNOLDS V. SHERWOOD.

PRACTICE—JUDGE'S ORDER for staying proceedings on payment of debt and costs within a limited time—Whether the Judge have a compulsory jurisdiction.

This was an action on a bill of exchange, and before declaration had been delivered, the defendant had obtained an order of Gurney, B. *ex parte*, that on payment of the bill, interest and costs, within a limited time, proceedings should be stayed; in default of such payment the plaintiff to be at liberty to sign final judgment. The debt and costs was not paid by the defendant at the time specified by the order, and Mr. Barstow had obtained a rule nisi to set it aside, contending, that should a bankruptcy or insolvency take place, great inconvenience must arise from such a course.

Mr. Chandless showed cause against the rule, and submitted that the Court or a judge of chambers has always power to stay proceedings where the justice of the case requires it.

LORD ABINGER, C. B.—A judge has power to make an order of this kind, except either where the party is already under terms to plead, or with the consent of the opposite side.

ALDERSON, B.—There could be no doubt the power of the judge to stay proceedings, the money had been paid. Cases like this frequently present themselves at chambers, and it is usual for judges to endeavour to settle them on reasonable terms. But they can go no further than recommend a particular course to be adopted by the parties; they have no compulsory jurisdiction.

ROPER, B., concurred.

Rule discharged on terms.

Sittings in Banco.

April 10.

HALL V. STANLEY.

WRIT OF CAPIAS—PRACTICE. Whether Plaintiff, in giving time generally to Defendant for payment of his demand.

*hinders his taking any step to prevent the Defendant leaving the country before the time arrives for payment.*

Mr. Humfrey shewed cause against a rule to rescind an order of Mr. Baron PARKE, and to set aside a writ of *capias* which had been issued in pursuance thereof. It appeared that an action having been brought against the defendant, an arrangement was made during its progress, by virtue of which a judge at chambers made an order, by consent of both parties, by which, on the defendant agreeing to pay down the costs and the debt, £300. within six months from that time, all further proceedings would be stayed on the part of the plaintiff. As, however, the defendant was about to leave the country, the plaintiff applied to Mr. Baron PARKE, under the recent act, for an order to arrest him, which being granted, a writ of *capias* was issued, and the defendant forthwith arrested. The consequence was, that he paid into the hands of the sheriff the amount of the debt, and moved this Court to rescind the order under which he had been so arrested, on the ground that the step taken by the plaintiff was in violation of the original order, in the pursuance of which all further proceedings were to be stayed on certain terms, one of which the defendant had punctually performed, and was still ready to comply with the other, when the proper time should arrive. It was now urged, in opposition to this rule, that the arresting the defendant was not a step or proceeding in the cause; that the writ of *capias* was now a step out of the cause rather than in it, and wholly disconnected from its regular course under the new rules of practice. The true definition of a proceeding in the cause was any step which was necessary towards arriving at its conclusion, which a writ of *capias* was not now, and could not therefore be called a proceeding the adoption of which could be termed an infraction of the order in question.

PARKE, B. said — Certainly, his first impression was, that this was not a proceeding in the cause, but that had been removed by the learned counsel when the rule was obtained, and there was a necessity for a repetition of the arguments then used. The issuing of a *capias*, though not necessary to the final judgment, is yet a proceeding which is collateral in the cause, and is only obtained on affidavits which must be made in the cause wherein the application is made: when, therefore, a plaintiff agrees to give up generally to his debtor, as here, he ties up his hands from taking any step to prevent his going out of the country; so that if he should have cause for suspicion, it would be proper in the future to insert a special clause in the margin reserving to himself leave to issue a *capias* if necessary. This was not done here, and the

rule must therefore be made absolute with costs, on the condition that no action shall be brought for the arrest.

Judgment for the defendant.

### Spring Assizes.

OXFORD CIRCUIT.—GLOUCESTER, Apr. 7.

DAVIS v. BLACK, Clerk.

*LAW OF MARRIAGE.—Whether a Clergyman of the Established Church can refuse to marry a Party on producing the regular License, for insufficient reasons.*

The plaintiff is a carpenter, living at Turley, in this county, and the defendant the rector of the adjoining parish of Blaisdon. It appeared that in the early part of last year, a young woman, named Mary Ann Hogg, was living in the service of the defendant as housemaid. She had for some time previous been intimate with the plaintiff, who was her acknowledged lover, and in the course of March last year, the rector, having discovered that she was far advanced in pregnancy, discharged her from his service. She was ashamed to return to the house of her father, a respectable farmer in the neighbourhood, and accordingly went to lodge at the house of a neighbour named Dobbins, till Davis should redeem his promise to make her his wife. He was anxious to lose no time in doing so, and accordingly they went together to Gloucester, where he purchased a license, to avoid the delay which the publication of banns would occasion, and where they also purchased some wedding clothes. They returned to Blaisdon, and on Sunday, the 7th of April, the plaintiff applied to the parish clerk in the usual way, requesting him to ask the defendant to perform the ceremony on the following day. This the defendant refused to do; and in answer to repeated applications persisted in that refusal, but without giving any reason for it. The plaintiff then complained to the registrar of the diocese, who wrote to the defendant to request an explanation of his conduct. The letter of the defendant in reply was read. It charged the young woman and the plaintiff with improper conduct in defendant's house, while the former was in his service, but defendant declined entering into particulars, considering himself accountable for his conduct to his diocesan only.

In consequence of this answer, Dr. Maddy, the Chancellor and principal Surrogate of the diocese, was applied to, and he wrote to the defendant, explaining to him that the grounds he had stated for his refusal to marry these parties were insufficient, and calling upon him for any additional reasons for his conduct which he

might have to offer. To this letter Mr. Black, on the 21st of April, wrote the following reply:—"Reasons, my dear Sir, as Falstaff says, 'are plenty as blackberries; but I will give no man a reason on compulsion.' I refer you to Canon 101—'No license shall be granted but to such persons as be of good state and quality.' The parties alluded to in your letter do not answer this description. Ergo, the license is illegal. Licenses are not compulsory, but only an exemption from certain penalties. They do not control the power of the clergyman, which is and ought to be discretionary." The refusal being still persisted in, the plaintiff caused the banns between himself and the young woman to be published in Turley church; they were read for the third time on the 19th of May. On the 21st of May, within a few hours before the intended celebration of the marriage, labour came on, and the young woman was confined with a female child, which is still living, but the mother died the same evening. The plaintiff now brought this action to recover compensation for the loss he had sustained by the defendant's refusal to marry him. No attempt was made to justify that refusal; it was admitted by his counsel, and laid down distinctly by the learned Judge, that he had no right so to refuse. If a clergyman thinks a license improperly obtained, he may delay the celebration of the marriage in order to ascertain the fact, but he is not entitled, on reasons evidently insufficient, to deny to his parishioners that which is a common law right. The learned counsel pressed strongly on the jury that the power of legalizing a marriage by going through, *a. form, before, a lay registrar, does not the less entitle parties to the sanction to the marriage ceremony, derived from its being also an act of religious worship.*

Mr. Justice PATTERSON left it to the jury to say what damages the plaintiff was entitled to, observing that it was an action such as he had never heard of before, and that the right to sustain it would probably be matter for decision before a higher tribunal.

Verdict for the plaintiff—Damages £100.

SOLICITORS IN CHANCERY.

#### NEW ORDER for Examination of Candidates at the Rolls.

I do hereby order and appoint that Joseph Bicknell, Richard Mills, George Gatty, and John Wainwright, Sworn Clerks in Chancery, together with John Teesdale, Thomas Metcalfe, Thomas Adlington, Robert Riddell Bayley,

William Loxham Farrer, George Frere, James William Freshfield, Bryan Home, William Lowe, Edward Rowland Pickering, William Tooke, and Richard White, Solicitors of the Court of Chancery, be Examiners, until the last day of Easter Term 1841, to examine every person (not having been previously admitted an Attorney of the Courts of Queen's Bench, Common Pleas, and Exchequer, or one of them) who shall apply to be admitted a Solicitor of the said Court of Chancery, touching his fitness and capacity to act as a Solicitor of the said Court: And I do hereby direct that the said Examiners shall conduct the examination of every such applicant as aforesaid, in the manner and to the extent pointed out by the Order of the 27th day of July, 1836, and the Regulations approved by me in reference thereto, and in no other manner and to no further extent.

LANGDALE, M. R.

#### A BILL,

[WITH THE AMENDMENTS MADE BY THE LORDS]

INTITLED,

An Act to give summary Protection to Persons employed in the Publication of Parliamentary Papers. (1)

[*N.B.*—The words and clauses printed beneath a black line were struck out, and the words and clauses printed in *Italics* were added by the Lords.]

Whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes or proceedings of either House of Parliament, as such House of Parliament may deem fit or necessary to be published:

And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes or proceedings: By reason and for remedy whereof, it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned:

(1) and to persons employed in the execution of certain warrants granted by the Speaker of the House of Commons.

(2) Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for any person or persons who now is or are or hereafter shall be a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes or proceedings by such person or persons, or by his, her or their servant or servants, by or under the authority of either House of Parliament, to (3) *bring before the Court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any Judge of the same (if one of the Superior Courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords for the time being, or of the Clerk of the House of Commons, or of the Clerk of the House of Commons, or of the Clerk of the House of Commons, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, as published by such person or persons, or by his, her or their servant or servants, by order or under the authority of the House of Lords, or*

*of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and (5) such Court or Judge shall thereupon immediately stay such civil or criminal proceeding, and the same and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue of this Act.*

(6)

*And be it enacted, that in case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, it shall be lawful for the defendant or defendants, at any stage of the proceedings, to lay before the court or judge such report, paper, votes or proceedings, and such copy, with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally*

(5) from and after the delivery of such certificate and affidavit, every

(6) And be it further enacted, that in every such civil proceeding as aforesaid, within forty-eight hours after the delivery of such certificate and affidavit as hereinbefore is provided, the defendant or defendants in such civil proceeding shall cause a notice in writing to be delivered at the residence, office or lodging of the plaintiff or plaintiffs, or of the attorney or attorneys, of the plaintiff or plaintiffs, as the same may be in the particular case indorsed upon the writ or process by which such civil proceeding shall have been commenced, in which notice it shall be stated that such civil proceeding is stayed pursuant to and by virtue of this Act.

And be it further enacted, that all and every action or actions heretofore brought or prosecuted by any person or persons for or in respect of any trespass or trespasses alleged to have been committed in or under colour of the execution of, or in or under colour of the endeavouring to execute any warrant or warrants granted or issued by the Speaker of the House of Commons, by authority of the said House, since the commencement of the present session of Parliament, shall be and are stayed, put an end to, finally determined, discharged and made void by virtue of this Act; and that no action, suit or prosecution shall hereafter be brought or commenced for, on account, or in respect of any such alleged trespass or trespasses as aforesaid, but that all proceedings in any such action, suit or prosecution shall be null and void to all intents and purposes.

(7) And whereas an action hath been brought, and is now depending, against certain persons employed in the execution of a warrant granted and issued by the Speaker of the House of Commons, during the present Session of Parliament, for taking into custody the person therein named, and it is expedient that such action should be put an end to, and that no other action should be allowed to be brought or prosecuted in respect of the execution of any such warrant which has been so granted or issued by the said Speaker as aforesaid, during the present Session of Parliament;

(8) deliver and leave or cause to be delivered and left at the office of the Court or Jurisdiction wherein any such civil or criminal proceeding shall have been commenced, or is or shall be depending or prosecuted, in which office the judgment in such matters is or may be signed or entered, or with the officer, clerk or person whose duty it may be to sign or to enter such judgments, to make up, prepare or receive, or file the rolls or records of such judgments.

(9) Parliament,

put an end to, determined and superseded by virtue of this Act.

And be it enacted, that it shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes or proceedings, to give in evidence under the general issue such report, paper, votes or proceedings, and to show that such extract or abstract was published *bona fide* and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants.

Provided always, and it is hereby expressly declared and enacted, that nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever.

Amendments of the Lords agreed to by the House of Commons, 13th April, and Bill received the Royal Assent by Commission, 14th April, 1840. Ed.

#### NEW POSTAGE REGULATION.

The Lords of the Treasury have fixed the 6th May as the day when the postage stamps shall come into use. The issue of the stamps will in the first instance begin in London, and be extended as speedily as practicable throughout all the kingdom; but letters properly stamped, posted in any part of the kingdom, will pass free.

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#### NOTICE TO CORRESPONDENTS.

J. A. M.—E. A. has made the *amende honorable*.

E. A.—The subject, we are quite aware, is somewhat capacious.—Observe *Lord Bacon's 15th Ordinance*—proceed as you have begun.

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THE  
**LEGAL GUIDE.**

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**VOL. IV.**

**FROM MAY 2, 1840, TO OCTOBER 31, INCLUSIVE.**

---

**LONDON:**

**PUBLISHED FOR THE PROPRIETORS, BY**

**JOHN RICHARDS & CO.**

**LAW BOOKSELLERS AND PUBLISHERS, 194, FLEET STREET.**

**1840.**

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**G. NORMAN, PRINTER, MAIDEN LANE, COVENT GARDEN.**





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# The Legal Guide.

[VOL. IV.]

SATURDAY, MAY 2, 1840.

[No. 1.]

Price Sixpence.

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## ESSAY III.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from Vol. III. page 403.)

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood that there was neglect in the management. But thirdly, it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. If a drunken man had come by in the night, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee being undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor,

which is the case in question, what will you call this? In *Bracton*, lib. 3, 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. *Vinnius*, in his Commentaries upon *Justinian*, lib. 3, tit. 27, 684, defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. *Bracton*, *ubi supra*, says, "*Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis.*" I do not find this word in any other author of our law, besides in this place in *Bracton*, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

B



The reasons are, first, because in such a case, a neglect is a deceit to the bailor. For when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10, 2 Hen. 7. 11. a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if, after, he does not look to them, an action lies. For here is his own act, viz.—his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man (a) will do that, and miscarries in the performance of his trust, an action will be against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6, 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4, 38. this difference is

clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the Court,—What if he had built the house unskillfully?—And it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A, and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them, and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed; and, according to that reversal, there was judgment afterwards entered for the defendant in the like case.—Yelv. 128. But those cases were grumbled at; and the reversal of that judgment, in Yelv. 4, was said by the Judges to be a bad resolution; and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667. Tr. 21 Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in the case, but the having the money in his possession and being trusted with it, and yet that was held to be a good consideration. And as a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors v. Sea* was drawn by the greatest drawer in England in that time; and in that declaration, it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ where the writ is by original.

It is said that this case of *Coggs v. Bernard* is one of the most celebrated ever decided in Westminster Hall, and the judge

(a) Just. Inst. lib. 3, tit. 27, text 11.

ment of Lord Holt, which we have now given, contains the first well-ordered exposition of the English Law of Bailments, which distributes into the following classes:—

1. *Depositum*; or a naked bailment of goods, to be kept for the use of the bailor.

2. *Commodatum*.—Where goods or chattels that are useful, are lent to the bailee *gratis* to be used by him.

3. *Locatio rei*.—Where goods are lent to the bailee, to be used by him *for hire*.

4. *Vadium*.—Pawn.

5. *Locatio operis faciendi*.—Where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.

6. *Mandatum*.—A delivery of goods to somebody, who is to carry them, or do something about them, *gratis*.

SIR WILLIAM JONES raised an objection to the distribution (b), but it is considered at this day that Lord Holt's classification is the correct one. The whole of the divisions are borrowed from the Civil Law.

(To be continued.)

## PROBLEM I.—VOL. IV.

### OYER OF INSTRUMENTS.

What is the import of the term Oyer?

In what cases, and how is it demandable?

In what cases will an inspection of Instruments be granted to a plaintiff, and in what cases to a defendant?

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XX. VOL. 3.

### BANKRUPTCY.

What are the different Acts of Bankruptcy?

An act of bankruptcy may be defined as being anything which a trader does to defraud his creditors.

Acts of bankruptcy are very numerous, the first and foremost is *departing the realm*.

It must be done with intent to defraud or to prejudice creditors, if it appears that there was no such intention, it will not be a departure within the meaning of the statute, *Fowler v. Paget*, 1 R. 509.

And, *Being out of the realm shall remain out*. This is a provision introduced by the

statute, 6 Geo. 4, c. 16, and was certainly very requisite, as it removes all doubts that were formerly entertained with regard to the first act of bankruptcy. As the law stood before this present act, if the trader had gone abroad without the intent to delay his creditors, but having when abroad discovered the embarrassed state of his affairs, had solemnly announced his determination never to return to England, this was not an act of bankruptcy. At present, if the intent to delay can be ascertained, either in the departing the realm or in the remaining abroad, an act of bankruptcy will be proved.

3rd. Departing from his dwelling-house.—Such departure must be with intent to *defraud and delay* his creditors, for the departure with an intent to delay, without an actual delay of some creditors, has been held insufficient,—*Str. 803*

4th. Voluntary arrest. This was introduced by the 13th Elizabeth, c. 13, s. 1, and the 1 Jac. 1, c. 15, s. 2. It is immaterial if this be for a fictitious debt or a just one, so that if a man suffers himself to be arrested for a just debt when he has money sufficient to pay it, chose rather to go to prison for the purpose of forcing his creditors into a composition, it was holden an act of bankruptcy,—*Ex parte Barton*, 7 Vin. Ab. 61.

5th. Suffering outlawry. The statutes last mentioned were also the means of introducing this.—An outlawry suffered without the intent mentioned in the statute, is not an act of bankruptcy, *Radford v. Bloodworth*. (a) It was formerly laid down, that if the outlawry be reversed before the commission issue, or for default of proclamation after the commission, that it will not be an act of bankruptcy—but see *Co. B.L. 96*.—An outlawry in Ireland will not make a man a bankrupt in England.

6th. Procuring his goods, money, or chattels, to be attached, sequestered, or taken in execution. So much of this act of bankruptcy as relates to attachment and sequestration was introduced by the 1 Jac. 1, c. 15, s. 2. It was contended that a fraudulent execution was within those words, but the Court decided in the negative, (b) *Harman v. Spottiswoode*. (c) This defect is now supplied by the new statute.

7th. To make, or cause to be made, either within the United Realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels.

8th. To make, or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels.

(a) 1 Lev. 12. The outlawry must be in England or Wales.—EDITOR.

(b) *Clavey v. Hayley*, Cowp. 427.—ED.

(c) *Cooke*.—ED.

(b) Treatise on Bailments.

The former of these is from the 1 Jac. 1, c. 15, s. 2. It has been altered by the 6 Geo. 4, c. 16, inasmuch as deeds executed *abroad* are now made acts of bankruptcy. The latter owes its origin to the same statute, and comprises those assignments which not being in themselves fraudulent or void when made by a person *not* a trader, are considered when made by a *trader* to be a fraud upon the policy of the bankrupt law. Both the grant and assignment must be by deed.

9th. Fraudulent surrender of copyhold lands, and tenements. This owes its origin to Lord Henley, who introduced it in his statute to remedy the defect which Lord Thurlow considered to exist in the 1 Jac. 1, c. 15. He (Lord Thurlow) thought that copyhold could not be taken in execution, and that the statute in speaking of an intent to defraud creditors, meant not an intent to defraud creditors under a commission, but creditors where a commission does not issue.

10th. Lying in prison for debt for six months was made an act of bankruptcy by the 1 Jac. 1, c. 15, that period was afterwards reduced to *two* months by the 21 Jac. 1.—The 6 Geo. 4, c. 16, make a still farther reduction to 21 days.

11th. Escape out of prison. The 21 Jac. 1, c. 19, s. 2, made this an act of bankruptcy. The original words have been altered, that statute requiring that the debt for which the trader was arrested should be of the amount of £100., by the 6 Geo. 4, c. 16, it is immaterial what the amount of debt is.

12th. Declaration of insolvency filed at the bankruptcy office. The object of this provision which was introduced by Lord Henley into the bankrupt law, is to enable the honest trader, who believes himself insolvent, or who has not the present means of paying his debts, to effect an equal distribution of his property among his creditors. The 6th section of the new act directs that if the trader shall file such declaration in writing, attested by an attorney, in the bankrupt office, the secretary or his deputy shall sign a memorandum that such declaration has been filed, which shall be authority to the printer of the Gazette, to insert an advertisement of such declaration. The declaration, *after the advertisement is inserted*, is an act of bankruptcy from the time of filing.

13th. Compounding with petitioning creditor. This was first made an act of bankruptcy by the 24th section of the 5 Geo. 2. The clause was very obscurely penned, and besides giving room for great doubts, did not fully reach the evil it was intended to repress. By the 8th section of the present act,—If a trader pay to the person striking the docket, money, or deliver satisfaction or security for his debt, whereby such person *more in the pound than the other*

creditors, such payment, satisfaction, or security for payment, is an act of bankruptcy. If a commission shall have issued, the Chancellor may either declare it valid, and order it to be proceeded with, or may direct it to be superseded, and a new one issued. The creditor compounding shall forfeit his whole debt, and also repay the consideration he received.

“ALIIQUIS.”

#### TO THE EDITOR OF THE LEGAL GUIDE. ANSWER TO PROBLEM XXI. VOL. I.

##### POWERS.

In what cases will a Defective Execution of Power be supported?

In modern times it has been contended that whatever is an *equitable* ought to be a *legal* execution of a power (*Zouch v. Woodston*, Burr, 1136), but which doctrine is at the present day completely exploded, as equity alone will relieve against a defective execution of a power, and that only where there is a meritorious consideration in the person applying for the aid of the Court. 2 H. Blackst. 139.

In *Chapman v. Gibson*, 3 Bro. C. C. 117 Ves. Jr. 297, Lord Alvanley laid it down that the execution of a power and a surrender of a copyhold go hand in hand; and on the same ground, consequently, the same relief is to be granted in cases of a defective execution of a power and of the grant of a surrender of a copyhold.

Equity always aids a defective execution of a power voluntarily executed in favour of a wife or child, as depending upon natural obligation.

The rule is now settled (I believe), that there be a good consideration, the party to whom the estate is not permitted to rely on the defect, but the Court will effectuate the intention of the settlor; and, speaking generally, this equity is enforced, not against the settlor himself, but in his favour, that is, in the execution of his intention, and at the expense of a third party.

Thus, then, the jurisdiction stands, and I now endeavour to point out what amount of such a consideration as will enable equity to interpose its aid in favour of a defective execution of a power.

The aid of equity then will be given to a mortgagee, which term includes a mortgagee and a lessee (*Fothergill v. Fothergill*, 2 Freem. & Cowp. 267, *Reid v. Shergold*, 10 Ves. 370, *Jennings v. Moore*, 2 Vern. 609), and to a creditor (*Bixley v. Eley*, 2 Bro. C. C. 2 Dick. 698.)

The like aid will be afforded to a wife (*Clifford v. Earl of Burlington*, 2 Vern. 609) and to a legitimate child (*Sarah v. Lady*

tray, Gilb. Eq. Rep. 166), for wives and children are in some degree considered as creditors by nature, Barnard C. C. 107; and although to constitute a valuable consideration for a settlement on a wife or child, it must be made before marriage, yet the marriage and blood are meritorious considerations, and claim the aid of a Court of Equity in support of a defective execution of a power in their favour (*Hervey v. Hervey*, 1 Atk. 561), although the power was executed after marriage.

The like equity is extended to a charity. Lord LORTHINGTON laid it down that the uniform rule of Court before, at, and after the statute of Elizabeth, was, where the uses are charitable, and the person has in himself full power to convey, to aid a defective conveyance to such uses (*Attorney General v. Tancred*, 1 Eden, 10; *Attorney General v. Sibthorpe*, 2 Russ. and Vel. 107.)

The character of purchaser, wife, creditor, &c., must be borne by the party claiming relief, in relation to the donee of the power, and not by the person creating the power. Lord Hardwicke indeed supported a defective execution of a power by a wife, for the payment of her deceased husband's debts as well as her own (*Wilkie v. Holmes*, 9 Mod. 465; 1 Dick. 165). The power was created by their marriage settlement, and the survivor of them by will to raise a sum of money for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for the younger children of the marriage. He said it had been objected that the debts which were to be paid by means of this power were the debts of the husband, whereas the estate was originally the wife's; but these debts were expressly provided for by the deed of settlement. This seems to introduce a new principle. If the power had been general, the execution of it in favour of her husband's creditors, if defective, could not have been supported in equity; for there was no contract or consideration, and the creditors had no claim upon the wife. If the naming of the object or party in the power varies the case, then the principle of the rule is not followed. Unless the power would authorize the appointment if duly made, no defect can be aided. (1)

R. J. T.

(1) SIR W. GRANT, in *Holmes v. Coghill*, Ves. Jun. 506, said—It is difficult to discover a sound principle for the authority which the Court assumes for aiding a defective execution in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to

be affected by the execution, that intention ought to be executed wherever it is manifested; for the owner of the estate has nothing to do with the purpose. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed? In the sort of equity upon this subject, there is some want of equality. But the rule is perfectly settled: and though, perhaps, with some violation of principle, with no practical inconvenience.

EDITOR.

## Law Reports.

### VICE-CHANCELLOR'S COURT.

BENNETT v. BAXTER.

SOLICITORS.—*The 56th Order. A Solicitor compelled under this order to withdraw from the prosecution of a Decree. Whether he shall be also compelled to give up the papers to the new Solicitor.*

Mr. Girdlestone, in this case, moved upon the 56th order, which directs that where the party actually prosecuting a decree or order does not proceed before the Master with due diligence, then the Master shall be at liberty, upon the application of any other person interested, either as a party to the suit, or as one who has come in and established his claim before the Master under the decree or order, to commit to him the prosecution of the said decree or order; and from thenceforth, neither the party making default nor his solicitor shall be at liberty to attend the Master as the prosecutor of the said decree or order. The present was a creditor's suit, and the motion was by a creditor, who had been appointed to manage the suit, that he might be at liberty to inspect all papers, &c., in the possession of the former solicitor of the plaintiff, who the Master had removed from the management of the suit.

THE VICE-CHANCELLOR said—It is admitted the point has never occurred before. I have already held, in *Heslop v. Metcalfe*, that a solicitor who voluntarily removes himself from a cause shall give up the papers to his client's new solicitor, without prejudice to his own lien for costs, so as to enable the new solicitor to carry on the suit; and that decision has been confirmed by the Lord Chancellor, (a) and I cannot in principle see any difference between that case and

(a) 5 Myl. and Craig, 183.

the present, where the solicitor has, by his own voluntary omissions, been, in effect, compelled by the court to withdraw from the prosecution of the decree. A solicitor in such circumstances ought not to be suffered to add to the expenses of the suit by rendering it necessary to take copies de novo of the proceedings.

*Order made as prayed.*

LORD COTTENHAM, C., in giving judgment in that case, adopted the rule laid down by LORD ELDON, in *Colegrave v. Manley*, (1. Turn. and Russ. 400.) who said, "Where the solicitor discharges himself, the rule is quite different from what it is where the solicitor is discharged by the client;" and afterwards he adds:—"So far as the use of papers is concerned, the suitor, when his solicitor discharges himself, must have his business conducted with as much ease and celerity, and at as little expense, as if the connection of solicitor and client had not been dissolved."

LORD COTTENHAM said it is true that in several preceding cases, where the solicitor had discharged himself, orders were made, giving to the client the right of inspection only; but it cannot be supposed that Lord Eldon, who, with all his experience, had decided *Colegrave v. Manley*, in the year 1823, was not acquainted with the prior authorities. In *Creswell v. Byron*, (14 Ves. 271.) his Lordship intimates, in the form of a doubt, his opinion, that a solicitor discharging himself cannot claim a lien; an expression which must be understood as meaning, not that the solicitor loses the lien altogether, but that he cannot set it up so as to prevent the client from proceeding in the cause. And his Lordship's language in *Lord v. Wormleighton* (Jac. 580.) is to the same effect.

Undoubtedly, that doctrine may expose a solicitor to very great inconvenience and hardship if, after embarking in a cause, he finds that he cannot get the necessary funds wherewith to carry it on. But, on the other hand, extreme hardship might arise to the

client if—to take the case, which is not uncommon in the smaller practice in the country—a solicitor, who finds a poor man having a good claim, and having but a small sum of money at his command, may go on until that fund is exhausted, and then, refusing to proceed further, may hang up the cause by withholding the papers in his hands. That would be a great grievance and means of oppression to a poor client, who, with the clearest right in the world, might still be without the means of employing another solicitor. The rule of the Court must be adapted to every case that may occur, and be calculated to protect suitors against such conduct. Now, a solicitor, if he knows that he must trust to the result of the cause for his remuneration, will, of course, be disposed to proceed with it in such a way as, while it promotes the interest of his client, is most likely to render his lien available. I have no doubt, therefore, that the existence of the lien, while it is a great protection to the solicitor against his client, is also a great benefit to the client; but the benefit would be entirely lost if the solicitor might stop short in the middle of the suit, and insist upon retaining the papers, because then no other solicitor could take up and carry on the cause.

It is admitted that, when the solicitor discharges himself, the client and his new solicitor shall, at all events, have free access to inspect and copy the papers at the office of the former solicitor. The mere giving of access, however, is, nine times out of ten, of no practical value; for if the papers are to remain, notwithstanding, in the custody of the solicitor who has discharged himself, it is obvious that they cannot be made use of in the further progress of the suit. The result would be, that the client is to be put to the expense of fresh copies, that fresh briefs must be prepared for counsel; in short, that all the costs arising from making copies of the papers and documents to be used in the

cause must be incurred over again, and so the client is to be greatly damnified.

That is entirely inconsistent with the decision of Lord Eldon, that the suitor must have his business conducted with as much ease and celerity, and at as little expense, as if the connection had not been dissolved.

On the other hand, if all that expense be, in fact, incurred by the client, what is the use of the solicitor's lien? There may, indeed, be original papers; but supposing them, as here, to be papers in the cause, the effect of the rule would only be to impose a very great hardship on the client, without any benefit to the solicitor. But if the expense is to operate so as to compel him rather to pay the solicitor's bill than to go to the expense of fresh copies, the admission of access and inspection would be nugatory, and of no value. Now that a suitor, whose solicitor withdraws himself from the further conduct of a cause, shall be permitted to have the free use of the papers held by that solicitor, so far as they may be required in the prosecution of the cause, is quite consistent with the observations of Lord Eldon, in *Commerell v. Poynton*, (1 Swanst. 1.) and *Lord v. Wormleighton*. Those observations, coupled with the express decision to that effect in *Colegrave v. Manley*, leave no doubt in my mind as to what Lord Eldon considered to be the rule in such cases, and I entirely concur in the propriety of that rule.

I think the principle should be, that the solicitor claiming the lien should have every security not inconsistent with the progress of the cause. But it is clear that there will be either be, to use the expression of Lord Eldon, the same ease and celerity, nor at as little expense, in the conduct of it, if the new solicitor is merely to have access to the papers, as where they are placed in his hands, upon his undertaking to restore them after the immediate purposes of the production have been served. (S. C. 3 Myl. & Cr. 187.)

EDITOR.

ROLLS' COURT—April 25.

In RE of THOMAS WOOD, a Country Solicitor, and Messrs. WHITE AND WHITMORE, his Town Agents.

BILLS of COSTS of LONDON AGENTS to COUNTRY ATTORNEIES.—*Whether the Court has jurisdiction to order their taxation.* (a)

This petition was presented by Thomas Wood, of Wolverhampton, in the county of Stafford, solicitor, against his late London Agents, Messrs. White and Whitmore, praying that their bills of fees and disbursements might be taxed by the master, and that they might be examined on interrogatories, and account, on oath, for all monies received, and give credit for two sums of £15. and £58. in such accounts, and also give up, on oath, all deeds, with papers and writings, books of account, and vouchers, and also for a taxation of all costs between the petitioner and Thomas White.

Mr. Stuart, for the petition, said the petitioner was admitted a solicitor in 1797, and employed Mr. Price as his agent, who afterwards took into partnership Mr. Williams and Mr. White. Williams died in 1825, Price in 1828, and White became partner with Whitmore. They all successively were employed by Wood as his London agents. They delivered their bills of fees and disbursements from year to year, and Wood paid them various sums upon account, but there was no settlement between them. In Trinity vacation, 1838, White and Whitmore delivered their bills of costs, and claimed a balance of £692. 6s 11d., and White also claimed on his separate account £48. 6s 7d., and actions at law were commenced to recover these sums. On December 19, 1838, Wood promised to give notes for both sums with interest, and to give a cognovit when the notes should become due, and White then advanced £10. for Wood's certificate for that year. White drew up the form of a cognovit, which Wood declined signing on account of the time mentioned in it for entering up judgment. White assured Wood that his bills being the bills of an agent could not be taxed, and always said taxation was out of the question. Wood in January, 1839, returned to London, and notices of trial were given, and he agreed to give judgment in the action, but White added interest on both sums. Immediate execution was no part of the agreement. Wood consented to give judgment on the condition that all errors and omissions should be open to objection. He was urged to place in the hands of White and Whitmore a certain deed relating to property called "Key Downton" property. At a meeting at White's house in

(a) See *In re Board and Messrs. Morris & Verbeke*, ante pp. 340. 391.

January last, Wood stipulated for investigation of the bills of costs. White proposed that Wood should make an assignment of his property in trust for payment of his debts, which Wood refused. On the 21st of January his (Wood's) goods were taken in execution under a *fi. fa.* issued upon the judgment entered up, and he was afterwards committed to the Fleet for contempt of Court. Another bill of costs to the amount of £212. 10s. was afterwards sent in, and there was a new action and claim of a further balance of £77. Wood was within the walls of the Fleet for contempt of the Court of Common Pleas. A sum of 15 guineas for iron hurdles paid for by him, and £58. 14s. 11d. received out of court, ought to be credited to his account. He submitted that White and Whitmore's bills of costs, although they were agents' bills, were taxable, and he denied there had been any such settlement of accounts as to preclude Wood from opening them.

Mr. Pemberton.—On a petition to open an account for errors, the errors should be stated in the petition and proved by affidavit.

Lord LANGDALE.—The petition is not to surcharge and falsify, but generally to open. There is no allegation of errors in the petition.

Mr. Stuart.—It is alleged generally that there are improper charges.

Lord LANGDALE.—You cannot charge in the petition certain errors, and then, failing in the proof, allege others in the affidavit.

Mr. Stuart.—The petition then prayed for the delivery up to Wood of deeds and documents. The petitioner required certain papers to enable him to make out his bill of costs against a Mr. Clare. He was entitled to have all his papers delivered up to him upon oath by the respondents, who had an immense number of them. Two grounds were alleged by White and Whitmore that the bills were not taxable—they were agents' bills, and they were delivered half-yearly, and no objection ever made to them. The delivery of bills of costs and part payment was no acquiescence in those bills; and as to the other point, courts of equity, in opposition to those of common law, had decided that agents' bills were taxable.

Mr. Pemberton, for the London Agents, said the petition had many different objects: first, a general taxation of all the bills of White and Whitmore from 1826, when they became partners; then, that all deeds and papers in their possession belonging to Wood might be delivered up; and that two sums alleged to be improperly omitted might be included in the account. With respect to the taxation of agents' bills, his Lordship would adhere to authorities, and not interfere with the rules of common law. He would not entertain such a jurisdiction as was attempted

to be imposed upon him; it would be to enter a writ of error from the Court of Common Pleas to the Court of Chancery. Here were bills of costs which had been delivered by the agent to his solicitor: after those bills had been delivered for years, after application made month after month, year after year, without success, for payment, an action was brought in the Common Pleas, and an application was then made for a taxation, but the rule *nisi* was abandoned because it was found against the practice of the Court of Common Pleas to allow such bill to be the subject of taxation. "*Weymouth v. Knipe*," (b) decided that they had no power to refer agents' bills to the prothonotary to be taxed. This agency having gone on from 1797 to 1837, in 1838 actions were brought in the Common Pleas to recover the balance, and Wood applied to tax the bills, but abandoned his rule. The application to this Court to tax the bills, the amount of which had been increased, was, in reality, an appeal from the Common Pleas to Chancery. He did not argue that the Court might not interfere upon equitable principles, but it would not interfere by petition in a matter in which each court was of competent jurisdiction. Mr. Pemberton then went generally through the accounts, the charges of interest, &c., to show that there was no ground for the petition.

Lord LANGDALE said, the petition prayed that the bills of costs of the petitioner's agents might be taxed, that they might be examined upon interrogatories, and account upon oath, and that the petitioner might have credits for two particular sums. Wood had for many years practised as an attorney in the country. He considered the conclusion he came to on a former occasion ought to be adhered to, and that the Court had authority to tax the bills of a London agent with his principal in the country. It was to be regretted that courts of law had come to a different conclusion. He did not depart from the jurisdiction this Court had exercised. He regretted it had not been finally determined; but until it was, he should adhere to the rule that the Court had the authority. Both White and Whitmore regularly, from half-year to half-year, sent their bills of costs to Wood in the country; they were duly received by him, and he stated (what was very extraordinary), that although they were regularly delivered for 13 years, yet he never examined, never looked at them. If so, he was guilty of breach of his own duty to himself, and White and Whitmore had a right to consider he would have done what any man of ordinary prudence would have done. Claims to a large amount were made by White and Whitmore. They were in advance. That was said

(b) Ante Vol. 3. p. 341.

to be the habit of London agents with country solicitors; but the limits were exceeded, and frequent demands of payment were made. The variations were frequent, and became more and more unsatisfactory, and at last White and Whitmore insisted on payment. His impression was, that Wood had not produced the whole of the correspondence. Wood was repeatedly dunned and payment demanded, yet he said he never looked at the bills, but depended upon his clerk, who would not perform that duty. This was one of the most absurd things he had ever heard stated. Payment or security was insisted upon, and on the 15th of November, 1838, an action was commenced, and Wood wrote that it would be well to have some gentleman to look over the accounts. This letter was answered by Mr. White, that it was not honest to wish to do that. White had delivered the bills half-yearly for many years; he had been continually demanding payment, and no payment had been made, and (Lord Langdale) did not think it very extraordinary for White to say he did not think it a very honest course of proceeding. Particulars of demand were delivered, and interest claimed in respect of the dilatory payments. In another interview Wood desired to be relieved from interest: the discussion did not succeed, notice of trial was given, a subsequent meeting was had, and in which the statements of what took place were different. The conclusion he came to was, that the judgment was to be entered up and be enforced, unless White and Whitmore were to be satisfied with security. An offer of security was made, but it could not be prudently accepted, execution was taken out upon the judgment, and White and Whitmore obtained full payment. The relief now asked was upon petition, and not upon bill; and his opinion was, that so much as sought for a reference to the master to tax the bills, and for an account, must be dismissed with costs. He was also of opinion that there was no foundation for the claim to be allowed the sums of £15. and £58. The case relating to the papers had more difficulty. He (Lord Langdale) did not know that they belonged to Mr. Wood. They belonged to the clients, but Mr. Wood might have a lien upon them, and where he continued to be the solicitor of the parties he had a right to the possession. If Mr. Wood's bills had been paid the papers belonged to the clients. There was, however, no evidence upon this point; and it was difficult to say what ought and what ought not to be given up, as some person might intervene who had a right to the possession of the papers. Without, therefore, knowing these facts, and to what Mr. Wood was entitled, he could not make any general order. There was no reason stated why Mr. Wood could not specify the papers he

required; he had only a lien on these upon which costs remained unpaid. He would, however, consider before he made any order.

Mr. Stuart pressed for a reference to the master.

Mr. Pemberton stated Messrs. White and Whitmore were willing to give up all which were specified by Mr. Wood, provided they, as agents for the solicitor of Mr. Wood's quondam clients, could not show a satisfactory reason in writing for retaining them.

The application was directed to stand till the next petition day.

# COURT OF EXCHEQUER.—Feb. 22.

## Sittings in Banco.

LEGG v. EVANS AND ANOTHER.

**BAILMENTS—LIEN ON GOODS**—*Whether a Bailee of Goods, as a security for debt, may maintain TREVOR against the Sheriff for seizing them under a fieri facias issued against the Bailee.*

This was a demurrer to a replication upon an action of Trevor against the Sheriffs of Middlesex, to recover some goods they had seized, which the declaration alleged to be the property of the plaintiff, and which the defendants had taken under a writ of fieri facias issued against him.

The replication stated that the goods were the property of David Williams, and were delivered by him to the plaintiff in the way of his trade of carver and gilder, who continued to hold them as a lien for work and labour bestowed on the said goods, and also under a special agreement as security for the amount of some bills of exchange, drawn by Williams upon and accepted by the plaintiff, who but for the conversion would still have had a lien upon the goods. Demurrer first, generally, that goods held by way of lien were not exempted from being seized in execution; and secondly, that the replication was a departure from the declaration; the latter alleging a general property in the plaintiff, and the former only setting up a qualified one by way of lien.

In support of the demurrer it was contended, that the sheriff may seize goods held in partnership, and sell the moiety belonging to the party against whom the writ was issued. *Haydon v. Haydon(a)*, *Dutton v. Monson(b)*, *Field v. —(c)*. He may also sell the moiety of an interest in chattels real, *Duffell v. Spottiswoode(d)*, or in chattels personal, *Dean v. Whittaker(e)*, without being liable in trover.

In support of the declaration it was argued,

(a) 1 Salk. 392.

(b) 17 Ves. 198.

(c) 4 Ves. 396.

(d) 3 C. & P. 435.

(e) 1 C. & P. 347.



that as a general principle of law, the sheriff can only seize such chattels as he can sell; and this principle is not interfered with by 1 & 2 Vict. c. 110, s. 12, which empowers him to seize money and other securities. A lien being merely a personal right to hold goods until a claim is satisfied, and which right is not assignable to any one else, the instant a party entitled to it gives up possession, the lien is gone. *Lickbarrow v. Mason*(*f*), *Jacobs v. Latour*(*g*), *Capper v. Dickinson*(*h*), and that the only exception to the rule was when the expence of keeping the lien is more than its value; as in the case of an innkeeper, in whose possession an horse has been left, who when the horse has eaten out his value, may sell him for his keep at a fair appraisalment.(*i*) In this respect, a lien varies very much from a common pledge by way of security, for in the latter case the latter may indemnify himself by selling the goods deposited, if the money be not repaid, *Pothonier v. Dawson*(*k*).

PARKE, B.—The question here is, can the sheriff substitute as the owner of these goods a third person, between whom and the original owner there is no privity? It is quite clear, that by the general law, a sheriff can seize nothing in execution but what he can sell; that law remains except so far as altered by statute, and the recent act of 1 & 2 Vict. c. 110, s. 12, does not at all apply to the present case. A lien is a personal right to hold the goods of another party by way of pledge, until a debt is paid. The right of the bailee is altogether personal; he cannot dispose of those goods to another, nor can the sheriff, who subsequently comes into possession of them. The right of lien continues so long only as the goods remain in the possession of the party as a pledge, pursuant to the term of the original delivery. It is a right altogether personal, and consequently differs materially from the case put in argument, where a term of years has been demised to a party, that the sheriff may sell, because it is a valuable interest, and may be the legitimate subject of a sale. But this lien is an interest which the bailee could not hand over to any one (unless, perhaps, to a servant) without being guilty of a conversion. If, therefore, these goods cannot be sold, neither can they be seized, for nothing is by law seizable that may not afterwards be sold.

The rest of the Court concurred.

Judgment for the plaintiff.

(*f*) 6 East. 21. (*g*) 1 Roll. R. 215.

(*h*) 5 Bing. 130.; 2 M. & P. 20.

(*i*) Yelv. 66.

(*k*) 1 Holt N. P. C. 383.

April 25.—Sittings in Banco.

CORNFOOT v. FOWKE, Bart.

CONTRACTS.—NUISANCE.—*Whether a house of ill-fame is a sufficient nuisance to entitle a party to relief from an agreement for taking adjoining premises, he being ignorant of such ill-fame at the time he entered into the contract.*

This action was brought to enforce the performance of an agreement for the lease of a house in York Place, Baker Street, Portman Square, to which the defendant pleaded that the agreement in question was void, on the grounds of fraud, covin, and misrepresentation on the part of the plaintiff, and others in collusion with him. The alleged fraud, it was stated, consisted in an untrue representation made by a house agent who had been employed by the plaintiff in answer to a question put to him by the defendant, whether there was any objection to the house, and to which the answer was, that there was none. It subsequently turned out, however, that the house next door was of objectionable repute; of which fact it was alleged the plaintiff was cognizant at the time of making the agreement, although his agent was not aware of it. On the trial, Lord Abinger held that the plaintiff was bound by the representation of his agent, and left it to the jury to say whether such representation had been intended to relate to intrinsic objections only, or whether it had been intended to apply to extrinsic objections also. The jury found that the representation had been understood to apply and refer to both. To the mode in which that question had been left by his lordship to the jury, no objection was made, but on the part of the plaintiff it was contended, that in order to support the plea, it was not enough to prove that the representation was untrue, but it was necessary to prove that the representation had been fraudulently made; (*a*) and last Michaelmas Term rule nisi was granted for a new trial on the ground of misdirection by the learned judge (*b*).

The Court now proceeded to give judgment: but the learned Barons were not unanimous in their opinions. PARKE, B., ALDERSON, B., and ROLFE, B., gave their opinions *seriatim*, and were unanimous that as the representation had not been embodied in the contract itself, the contract could not be effected, unless it were shown to be a fraudulent representation; that being the principle upon which the plea was founded. The simple fact, that the plaintiff had known of the existence of the nuisance, and that the agent, who was not cognizant of it, had represented

(*a*) See the case reported, *ante* vol. 2. p. 123.

(*b*) See *ante* vol. 3. p. 40.

that it was not in existence, were not sufficient to constitute fraud; each person was innocent, because the plaintiff had not made any false representation, whilst the agent who made the representation was not aware that the statement was false; it, therefore, appeared to be an untenable proposition that, if each were innocent, each could be held as having made a representation which could be regarded as a fraud. No case could be found in which such a principle had been laid down, a circumstance which had indeed been admitted in the course of the argument. It must be considered, their lordships observed, that a party who employed an agent to make a contract, and that agent, though the principal might be perfectly guiltless, knowingly committed a fraud in making the contract, not only would such contract become null and void, but the principal himself would be liable to an action. In the present case, however, it appeared that the agent had acted without any fraudulent intent, and consequently his act alone neither rendered the plaintiff liable to an action, nor vitiated the contract. At the same time it must be admitted that, if the plaintiff had not merely known of the existence of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked of him, and also believing or suspecting that, by reason of such ignorance, the question would be answered in the negative, the plaintiff would in that case unquestionably be guilty of fraud, and the contract would be void; for then the representation of the agent, which he had so intended him to make, would become the same as his own; and his own representation, coupled with his knowledge of its falsehood, would doubtless be a fraud. Whether the facts of the case warranted the inference that such a fraud had been in fact committed, it was unnecessary now to inquire; for if the facts had warranted such an inference, the question would doubtless have been submitted to the jury. On these grounds their lordships were of opinion that the rule for a new trial ought to be made *absolute*.

Lord ABINGER, was of opinion, and decided that the rule ought to be *discharged*.

Rule absolute.

### CRIMINAL LAW.

CENTRAL CRIMINAL COURT.—April 15.

**MURDER**—Where a person intending to commit a Murder, fails to do so by the means he proposed, but yet effects his object through another agency, he is guilty of the crime.

Catherine Michael, aged 23, a single woman, was indicted for feloniously administering to her infant son, George Michael, on the 31st of

March last, in the parish of Paddington, a certain deadly poison, to wit, one half-ounce of laudanum, causing a mortal sickness, of which he died, and that the prisoner did feloniously kill and murder him.

Mr. Baron ALDERSON said, he felt it necessary to make a few remarks upon the law of the case, in order that the jury might, coupled with the evidence adduced, come to a right conclusion. He held the law to be this,—that if a person, intending to commit a murder, fails to do so by the means he proposed, but yet effects his object through another agency, he is guilty of the crime. For instance, if a man is engaged in the prosecution of a felony, and intends to shoot A, instead of which the bullet kills his dearest friend B, his death is coupled with the malice against A, and the man would be equally guilty of murder as if he killed A. There was a case reported in Hale of a husband who prepared a poisoned apple, intending it for his wife, but she gave it, unconsciously to her child, whom the husband dearly loved, and the child dying in consequence, the malice of the husband towards his wife being proved, the husband was declared guilty of murder. So again in the play of *Hamlet*, the Queen drinks from the poisoned chalice which the King intends alone for Hamlet, her son. The Queen dies, and, according to the English law, the King would unquestionably be guilty of murder. Then there was the case of an apothecary who prepared a draught, into which another party put poison, intending to destroy the life of the party for whom the medicine was intended. The patient, not liking the taste of the draught, and considering that there was something suspicious about it, sent it back to the apothecary, who, knowing the ingredients of which he had composed it, and to prove that he had done nothing wrong, drank it himself and died, and, although he was the unconscious agent of his own death, it was in that case held that the party who had poisoned the draught, intending it for another, was as much guilty of the murder of the apothecary as if he had destroyed his intended victim. The jury must, therefore, in the case now before them, be satisfied, first, that there was an intention to kill her child on the part of the prisoner, and secondly, that she procured the witness, Mrs. Stephens, to administer to the infant a certain quantity of the poison, which quantity she knew would cause death. Both he and his learned brother, (Littledale J.), as at present advised, although the poison was, in fact, administered by an innocent and unconscious agent, were of opinion that the prisoner would, in that case, be guilty of murder, and ought to be convicted. If, however, the result of the trial should unfortunately render it

necessary, they would take the opinion of the rest of the learned judges upon the point. His Lordship then proceeded to sum up the facts of the case, and left it to the jury to say whether they believed the prisoner intended to destroy her child.

The jury found the prisoner *guilty*, but strongly recommended her to mercy.

Mr. Baron ALDERSON.—Upon what grounds, gentlemen?

The Foreman.—We think, my Lord, that the fact of the prisoner having been seduced and thrown upon the world is an extenuating circumstance in the case.

Mr. Baron ALDERSON.—I shall take care that the recommendation shall be forwarded to the proper quarter, should it be necessary. In the mean time let judgment be respited upon the prisoner until the point of law is decided by the judges.

### THE NEW POSTAGE STAMPS.

COPY OF TREASURY MINUTE, DATED APRIL 22, 1840.

My Lords refer to their minutes of the 26th of December, 20th of February, and the 2d inst., regarding the preparation and sale of postage stamps.

My Lords read a letter from the Commissioners of Stamps and Taxes, naming the day on which they will be ready to issue stamped covers, envelopes, and labels in London, and that on which the application of such stamps to letters may, in their opinion, commence; but adding that they are unable at present to state when the preparations will be ready for stamping the paper which the public may send in for that purpose.

Having communicated on the subject with the authorities of the Post-office, my Lords are pleased to direct as follows:—

That the issue of the postage stamps for sale to the public be commenced as early as practicable; that such issue be, in the first instance, confined to London; and that it be extended first to Dublin, and Edinburgh, and afterwards to other parts of the kingdom in such order as the Commissioners of Stamps and Taxes may determine, and as rapidly as the necessary supply can be obtained. Also, that the Commissioners of Stamps and Taxes be instructed to give due notice to the public as soon as they are ready to stamp the paper which may be sent in for that purpose.

That on and after the 6th of May next, letters written on stamped paper, or enclosed in stamped covers, or having a stamp or stamps affixed thereto (the stamp or stamps in every such case being of the same value or amount as the rates of postage now charged on such letters if prepaid), shall, if within the limitation of the weight fixed

under the provisions of the 2d and 3d Victoria, c. 52, and if the stamp or stamps have not been used before, pass by the post free of postage in whatever part of the kingdom they may be posted.

That as many parts of the kingdom cannot be supplied with postage stamps by the said 6th of May, prepayment by money as well as by stamps be continued until further directions are issued.

That unstamped letters (unless prepaid by money, as at present) be charged double postage on delivery.

That letters insufficiently stamped or insufficiently prepaid be charged on delivery double the amount of such insufficiency.

Transmit a copy of this minute officially to the Commissioners of Stamps and Taxes, and to the Postmaster-General, and desire that the Postmaster-General will direct the solicitor of the Post-office, after conferring with the solicitor of the Stamps and Taxes, to prepare the necessary warrant for authorizing the use of stamps as proposed in this minute, such warrant to be inserted in the Gazette, pursuant to the provisions of the act.

A Supplement to the London Gazette was published on Saturday, containing a "Treasury warrant," which, after reciting the powers of an "Act for the further regulation of the duties on postage until the 4th day of October, 1840," the warrant of the Lords Commissioners of her Majesty's Treasury, bearing date "the 27th December, 1830," (together with an abstract of its intent and provisions,) and also a similar warrant, dated the 31st January, 1840, proceeds:—

"Now, we the undersigned, being three of the Lords Commissioners of her Majesty's Treasury, do, in the exercise of the power or authority in us for such purpose vested in and by the said act, and of all other powers enabling us in this behalf, order and direct that this present warrant shall come into operation on the 6th day of May next. And we hereby direct, that all letters, printed votes and proceedings of the Imperial Parliament, which, on or after that day shall be posted in any town or place within the United Kingdom, shall, if written on stamped paper, or enclosed in stamped covers, or having a stamp or stamps affixed thereto (the stamp or stamps in every such case being the value or amount hereinafter expressed, and specially provided under the authority of the said act as herein-after expressed and specially provided under the authority of the said act as herein-after directed, and if the stamp shall not have been used before), pass by post free of postage as herein-after mentioned—(that is to say),

"In case any such letter shall be directed to any place within the United Kingdom, the stamp or stamps thereto shall be equal in value to

amount to the rates of postage to which such letters would be liable under the said warrant of the 27th of December last, if pre-paid.

"In case any such letters shall be addressed to any other of the British dominions or colonies, or to any foreign country, the stamp or stamps thereon shall be equal in value or amount to the rates of British postage to which such letters would have been liable under the said warrant of the 27th day of December last.

"And on all such printed votes and proceedings of Parliament the stamp or stamps shall be equal in value or amount to the rates of postage to which such votes and proceedings would have been liable under the said warrant of the 31st day of January last.

"And we further order and direct, that in all cases in which the same shall be necessary, in order to place on any such letters, printed votes or proceedings of Parliament, the full amount of stamps hereby required as aforesaid, there shall be affixed thereto such a number of adhesive stamps, as alone or in combination with the stamp on such letter or packet, or on the envelope or cover thereof, will be equal in amount to the rates of postage, to which such letters, printed votes or proceedings of Parliament, would be liable under the said warrants of the 27th day of December and 31st day of January now last respectively as aforesaid.

"That in all cases in which letters addressed to places within the United Kingdom shall be posted without any stamp thereon, and without the postage being pre-paid, there shall be charged on such letters the postage to which such letters would be liable under the said warrant of the 27th day of December last; and in all cases in which printed votes or proceedings in Parliament, addressed to places within the United Kingdom, shall be posted without any stamp thereon, there shall be charged on such votes and proceedings the postage to which the same would be liable under the said warrant of the 31st of January last.

"That in all cases in which any letters addressed to places within the United Kingdom shall be posted, having thereon or affixed thereto any stamp or stamps, the value or amount of which shall be less than the rate of postage to which such letters would be liable under the said warrant of the 27th day of December last if pre-paid, there shall be charged on such letters a postage of double the amount of the difference between the value of such stamp or stamps, and the postage to which such letter would be liable as aforesaid if pre-paid.

"And in all cases in which any votes or proceedings of Parliament addressed to places within the United Kingdom, shall be posted, having thereon or affixed thereto any stamp or stamps the value or amount of which shall be less than

the rate of postage to which such votes and proceedings would be liable under the said warrant of the 31st of January last, there shall be charged on such votes or proceedings a postage equal to the amount of the difference between the value of such stamp or stamps, and the postage to which such votes or proceedings would be liable as aforesaid.

"Provided always, that it shall in all cases be optional with the parties sending any letters, printed votes or proceedings of Parliament, by the post, to forward the same, free of postage, by means of a proper stamp or stamps thereto, in manner herein-before provided, or to forward the same in like manner as the same might have been forwarded before the signing of this present warrant.

"But in case any letters, or printed votes or proceedings of Parliament, addressed to places out of the United Kingdom, shall have thereon or affixed thereto any stamp or stamps being less in value or amount than the rates of postage to which letters or such votes or proceedings would be liable under the said warrants of the 27th day of December and 31st day of January last respectively, such letters or printed votes or proceedings of Parliament, shall not, in any case, be forwarded by post, but shall, so far as may be practicable, be returned to the senders thereof, through the dead letter-office.

"Provided also, that with reference to the existing treaties between his late Majesty King William the Fourth, her present Majesty, and his Majesty the King of the French, letters between the United Kingdom and France may be sent without being stamped or pre-paid; but in all other cases of letters sent out of the United Kingdom it shall be lawful for the postmaster-general to require either that such letters shall be duly and properly stamped as herein directed, or that the postage thereof shall be paid by the sender on the tender or delivery of such letters at the post-office, or other places appointed by the postmaster-general for the receipt of such letters, for the purpose of transmission by the post (subject, nevertheless, to the regulations and enactments in this respect contained in the act of the 1st of Vic. c. 34. s. 14).

"Provided also, that the transmission of printed votes and proceedings of Parliament by the post shall be subject to all the regulations and restrictions in force under the said act of the 1st of Victoria, cap. 34, and the said warrant of the 31st of January last.

"And we further order and direct, that in any case in which a stamp shall be placed on any letter, or printed votes or proceedings of Parliament, or affixed thereto, which shall have been used before, the same shall have no force or effect whatsoever.

" And we further order and direct the commissioners of stamps and taxes, from time to time, to provide proper and sufficient dies, or other implements, for expressing and denoting rates or duties of one penny and twopence for the purposes herein before directed.

" And we further order and direct, that the terms and expressions used in this present warrant shall be construed to have the like meaning in all respects, as they would have had if inserted in the said warrant of the 27th day of December last.

" Provided lastly, and we hereby declare, that it shall be lawful for the Lords Commissioners for the time being of her Majesty's Treasury, or any three of them, by warrant under their hands, at any time hereafter, to rescind, vary, or alter all or any of the regulations and directions herein contained, and to make, establish, and declare any new or other regulations and directions respecting the sending by the post of letters written on stamped paper, or enclosed in stamped covers, or having a stamp affixed thereto, in manner provided by the said act, made and passed in the last session of Parliament, as they shall deem expedient.

" As witness our hands this 24th day of April, 1840.

" F. T. BARING,

" THOS. WYSE,

" H. TUFFNELL."

We learn that instructions respecting the postage stamps, about to come into operation on the 6th of May, are as follow:—

#### Price of Stamps.

At a post-office, labels 1d. and 2d. each; covers 1½d. and 2½d. each.

At a stamp distributor's, as above, or as follows:—

Half-ream, or 240 penny covers, £1. 2s. 4d.; penny envelopes, £1. 1s. 9d.

Quarter-ream, or 120 twopenny covers, £1. 1s. 4d.; twopenny envelopes, £1. 1s. 1d.

At the stamp-offices in London, Dublin, and Edinburgh, as above, or as follows:—

Two reams, or 960 penny covers, £4. 7s.; penny envelopes, £4. 5s.

One ream, or 480 twopenny covers, £4. 3s. 6d.; twopenny envelopes, £4. 2s. 6d.

Covers may be had at these prices either in sheets or cut ready for use. Envelopes in sheets only, and consequently not made up. No one, unless duly licensed, is authorized to sell postage stamps.

The penny stamp carries half an ounce (inland), the twopenny stamp one ounce. For weights exceeding one ounce, use the proper number of labels, either alone, or in combination with the stamps of the covers or envelopes.

The penny stamps will be printed in black,

and the twopenny in blue ink. The above directions, with others relating to the rates of postage, are printed at either side of the designs on the covers. The peculiar marks on the paper on which the covers and envelopes are printed, consist of thin lines of blue and red thread; the red are woven at the inside, and the blue at the outside of the covers. In the envelopes a blue line is placed towards the outside, between two red lines on the inside. For the labels, or adhesive stamps, a water-mark has been employed; a crown is placed in each label, and the sheet which holds 240 labels, has the word "postage" at each side of it. Each label is marked with different letters, so that in every sheet of 240 labels each stamp will have an essential difference from the others. This is a precaution against forgery (should it be attempted), which will oblige the forger to engrave as many plates as stamps to be printed.—*Times*.

Thus, it appears, that between the purchase of a single cover and of 960, there will be an allowance of about 14 per cent. A single label may always be bought at every post-office for 1d. and a cover for 1½d. The price for a dozen or more covers purchased of a licensed vender will be left for competition; every body, however, having the opportunity of buying 960 penny covers for £4. 7s. at the chief stamp-offices, or 240 for £1. 2s. 4d. of a stamp distributor. Besides the design on the covers and envelopes, the word "postage" on an engine-turned ground, is printed on the lower fold at the back. The covers and envelopes are printed on paper manufactured by Mr. John Dickinson. The peculiarity of this paper is the insertion of lines in the woof of the paper; three red lines towards the inner, and two blue lines towards the outer side of the cover. The lines are differently placed on the envelopes; a series of lines being at either corner, each having a blue line towards the outside, between two red lines towards the inside. The labels, or adhesive stamps, have been printed on water-marked paper. Each label has the water-mark of a crown; and the sheet of labels, holding 240, has the word "postage" in each of the four borders. Certain combinations of letters of the alphabet are inserted in the two corners of the lower part of the labels; and as they are varied in every one of 240 labels, the probabilities nearly amount to a certainty that no one having a less stock than 240 will have two stamps with the same lettering in his possession. There can be no doubt that these peculiarities afford a very ample guarantee against forgery. At all events, in the case of the labels, it will not suffice that the forger engrave a single die, but he must produce several, each being identical in appearance in all respects, excepting the check lettering.—*Morning Herald*.

## STAMPS AND TAXES, April, 1840.

The Lords Commissioners of her Majesty's Treasury having authorized and directed the use of stamps for denoting the duties of postage on and after the 6th day of May next, and that the sale of such stamps shall in the first instance be confined to London, notice is hereby given, that on and after the 1st day of May next the Stamps undermentioned may be obtained at this office, and also at the Sea Policy Office, Bank Buildings, in the city of London, in the quantities and at the prices following, viz.:—

	£.	s.	d.
Two reams of 1 <i>d.</i> stamps for covers, containing 80 sheets or 960 stamps	4	7	0
Same quantity of 1 <i>d.</i> stamps for envelopes	4	5	0
One ream of 1 <i>d.</i> stamps for covers, containing 40 sheets or 480 stamps	2	4	8
Same quantity of 1 <i>d.</i> stamps for envelopes	2	3	6
Half a ream of 1 <i>d.</i> stamps for covers, containing 20 sheets or 240 stamps	1	2	4
Same quantity of 1 <i>d.</i> stamps for envelopes	1	1	9
One ream of 2 <i>d.</i> stamps for covers, containing 40 sheets or 480 stamps	4	3	6
Same quantity of 2 <i>d.</i> stamps for envelopes	4	2	6
Half a ream of 2 <i>d.</i> stamps for covers, containing 20 sheets or 240 stamps	2	2	8
Same quantity of 2 <i>d.</i> stamps for envelopes	2	2	2
Quarter of a ream of 2 <i>d.</i> stamps for covers, containing 10 sheets or 120 stamps	1	1	4
Same quantity of 2 <i>d.</i> stamps for envelopes	1	1	1
Sheet of 1 <i>d.</i> labels, containing 240 stamps, 1. per sheet.			
Same of 2 <i>d.</i> , £2. per sheet.			

To enable any persons to sell these stamps it will be necessary that they should obtain licences from vendors of stamps generally.

By order of the Board,

CHARLES PRESSLY, Sec.

## PROPOSED REMOVAL OF THE WESTMINSTER HALL COURTS.

A petition of the London solicitors is about to be presented to the House of Commons, for the removal of the courts in Westminster-hall to the neighbourhood of the inns of court. The petition, which has been already numerously signed, is for further signature at the Law Institution. The reasons for the proposed removal are stated briefly as follows:—

1. The increased discomfort and suffering endured in the courts of Westminster-hall.

2. The inadequacy of that site to afford any space for the accommodation of the proposed new equity judges.

3. Or for the three subsidiary common law courts now needed for the term *Nisi Prius*, and other business.

4. Much less for any future increase of courts or judges.

5. The unsatisfactory nature of the present plan of the equity vacation sittings, which obliges the judges, when, for the convenience of the profession, they remove from Westminster at the end of term, to occupy, by sufferance only of the benchers, the scattered halls of the various inns of court, and the difficulty of providing even such accommodation for the proposed new equity judges.

6. The necessity now pressing on the Government, of making immediate provision for existing wants, and of considering this question in reference to the designs for the new Parliament houses, and before further progress is made with those works.

7. The improvidence of laying out money except for purposes of permanent usefulness, and without due regard to the suitors' interests, which can alone be promoted by uniting all the courts in a suitable structure under one roof, in the vicinity of Lincoln's-inn, and thereby concentrating in one neighbourhood all the places of professional resort.

8. The fact (incontrovertible) that no public necessity, nor any convenience of a public nature, justifies the evils attendant on the present site.

9. The large surplus income at present arising from the fee-funds of the common law courts, and the immense unclaimed suitors' fund in Chancery, rendering it unnecessary to call on the public treasury for the expense of the building.

10. An excellent site, the garden of Lincoln's-inn-fields, being obtainable (as is believed) without compensation or expense.

It appears that in November, 1838, there were 2,660 attorneys in London, and 6,761 in the country; of the former, 1,365 (representing 5,231 country attorneys) were located about the inns of court between Waterloo and Blackfriars bridges, and 803 (representing 1,321 country attorneys) in the city. This number (making, with 77 resident to the north-east, 2,245, and representing, in all, 6,588 country attorneys,) are obliged, each time of attending and returning from court, to travel, needlessly, three miles; and to the same proportion, therefore, of the profession, those other and greater evils apply which result from the courts being placed in a district remote from that of the attorney's occupations.

## TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—By the 7 Geo. 4, c. 64, s. 12, it is enacted, that where any felony or misdemeanor shall be committed on the boundary of two or more counties, or within 500 yards of such boundary, or shall be begun in one county, and completed in another, the offender may be tried in any of the counties as if wholly committed therein.

A robbery was committed in Lancashire, but was tried at the late Chester Assizes, it being sworn by the constable to be within 500 yards of the boundary of Cheshire, where the robbery took place; the place has since been measured, and found to be upwards of 500 yards from the bed of the river which divides the two counties; no rule was laid down by the judge who tried the cause as to the mode of measurement in such matters; and, as some disputes have arisen, and there appear to be no precedents at all on the subject, I shall feel greatly obliged if you will in your next publication inform me the mode of measuring the distances in such cases.

1st. Whether it is along the highway or bye-ways.

2ndly. Whether through people's property, or whether along what is denominated "crow road," or if you can inform me of any cases on the point, I shall be very glad.

I am, Sir,

Your's respectfully,

A SUBSCRIBER.

We think that the decisions of the judges in cases of Agreements between parties, not to carry on a trade within certain limits, will equally apply to the above.—See the cases collected in *Western's Conveyancing—tit. AGREEMENTS*, vol. iii. p. 100.—Ed.

## NOTICE TO SUBSCRIBERS.

We have commenced this Volume with some new features, to meet, if it be possible, the views of our Subscribers. We neither wish to have the additional labour, nor to incur the expense of a double number every month. It will be seen that by a different arrangement of type, we are enabled to give considerable more matter. The face of every number also readily shews its contents, which we submit to be an improvement. We shall continue to give the

Questions put to the Candidates for Examination at the Law Society, and the names of such as do pass,—and Gentlemen called to the Bar.—also the Sittings of the Courts; all other Lists we shall discontinue.

## TO COUNTRY SUBSCRIBERS.

We are desired to state, that in consequence of the great circulation of this Paper out of London, in England, Ireland, and Scotland, the Country Subscribers will in future be relieved from the expence of the government duty. Every future number will therefore be sent out of London post free, price only 6d.

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# The Legal Guide.

VOL. IV.]

SATURDAY, MAY 9, 1840.

[No. 2.

Price Sixpence.

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## ESSAY III.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 3.)

THE case of *Doorman v. Jenkins* which we have before quoted (a) was an action of *assumpsit* against a bailee; it was proved that the defendant, a Coffee-house keeper, having custody of money without reward lost it, and made the following statement:—that he had unfortunately put it with a larger sum of money of his own into his cash-box, which was kept in his tap-room; that the tap-room had a bar in it, and was open on a

*Sunday*, but the rest of his house, which was inhabited, was not open on *Sunday*; and that the cash-box, with his own and the plaintiff's money, had been stolen on that day. TAUNTON, J. said, a great deal has been said on the point, *whether the existence of gross negligence is a question of law or fact*. It is not necessary to enter into that as an abstract question. Such a question will always depend upon circumstances. There may be cases where the question of gross negligence is matter of law more than of fact, and others where it is matter of fact more than of law. An action brought against an attorney for negligence, turns upon matter of law rather than fact. It charges the attorney with having undertaken to perform the business properly, and alleges

C

(a) Ante, Vol. 3. p. 387.



that, from his failure so to do, such and such injuries resulted to the plaintiff. Now, in nineteen cases out of twenty, unless the court told the jury that the injurious results did, in point of law, follow from the misconduct of the defendant, they would be utterly unable to form a judgment on the matter. Yet, even there, the jury have to determine whether, in point of fact, the defendant has been guilty of that particular misconduct. On the other hand, take the case of an action against a *Surgeon* for negligence in the treatment of his patient. What law can there possibly be in the question, whether such and such conduct amounts to negligence? That must be determined entirely by the jury. Without therefore laying down any abstract rule, we may, I think, with perfect safety say that, in the present case, the question was entirely for the jury. It is fact, not law. The circumstances are extremely simple. The defendant receives money to be kept for the plaintiff. What care does he exercise? He puts it together with money of his own (which I think perfectly immaterial), into the till of a public-house. We might certainly have had more explicit evidence as to the exact state of the box; in what place it was; and what class of strangers frequented the room. If there was no negligence, if the box was locked up and put in a safe place, and proper care taken of it, these were circumstances which the defendant had the best means of knowing, and, knowing them, he might have exonerated himself. In the absence, therefore, of evidence to that effect, I think that there was a *prima facie* case of gross negligence, which required an answer on the defendant's part. The phrase "gross negligence" means nothing more than a great and aggravated degree of negligence, as distinguished from negligence of a lower degree. (b) The case

of *Shiells v. Blackburne* (c) created at first some degree of doubt in our minds. It was said that the court, in that case, treated the matter as a question of law, and set aside the verdict, because the thing charged, and the false description of the leather in the entry, did not amount to gross negligence; and therefore the jury had mistaken the law. I do not view the case in that light. The jury there found, that in fact the defendant had been guilty of negligence; but the court thought that they had drawn a wrong conclusion as to that fact. The case, therefore, does not stand against the conclusion to which I have come. It does not appear certainly from the report, how the case was treated at the trial, nor what the judge said in summing up. But I do not find it laid down, as a rule, that in every case the question of negligence is to be matter of law. The ordinary practice is to leave it to the jury, whether such negligence has been proved as the plaintiff has charged in his declaration. If the negligence so charged be insufficient to give a right of action, the defendant may move in arrest of judgment.

PATTERSON, J. said,—It is agreed on both hands that the defendant is not liable, unless he has been guilty of gross negligence. The difficulty lies in determining what is gross negligence, and whether that is to be decided by the jury or the court. If the court is to decide it, and no evidence has been given that satisfies the court, there ought to have been a nonsuit. If the jury was to decide, I cannot feel a doubt that there was some evidence for them. I agree that the *onus probandi* was on the plaintiff. It appeared, by the evidence of what the defendant had said, that the money committed to his charge was laid in a box in the tap-room.

LORD TENTERDEN directed the jury to consider whether there was *great negligence*, which they found and found a verdict for the plaintiff.

(c) 1 H. Bl. 158.

(b) In *Beauchamp v. Powley* (1 Mo. & Rob. 38.) where the defendant, a stage-coachman, received a parcel to carry gratis, and it was lost upon the road,

which room was open on a Sunday, though the rest of the premises were not. Under these circumstances there can be no nonsuit; or there was a sufficient case to go to the jury. Whether, in the abstract, the question of negligence be for the jury or the court, I think it unnecessary, as my brother Taunton says, to determine. The present, at all events, is a question of fact, and therefore for the jury. The general question I approach with much diffidence. I do not know any thing more difficult than to say, in mixed questions of law and fact, what is for the court and what for the jury. In the present case, the principal doubt in my mind arose from the case of *Shiells v. Blackburne*. The facts in that case were not disputed. It appeared that the defendant, being employed (without reward) to send out some *dressed* leather, carried it at the Custom House, together with some *dressed* leather of his own, as *rough* leather, in consequence of which the whole was seized. Whether that amounted to gross negligence must have been a question for the jury. The report does not show how they were directed, nor whether the judge told them that, in his opinion, it was gross negligence. At first I conceived that nothing appeared from the report except that the court thought it was not a case of gross negligence; but on looking into the case, I find the court thought the jury had erred in the fact erroneously, and sent the issue to another jury.

VILLIAMS, J. said,—The only question before us is, whether the judge should have ruled that the case was not made out on the facts of the plaintiff, or should have left it to the jury? If the judge be obliged to lay down a rule, it is extremely difficult to discover what that rule ought to be. Who can say where “gross negligence” begins? Can it be other than a question of fact? The case was properly left to the jury. The report of *Shiells v. Blackburne* does not show how the case was submitted to the jury.

In *Ryce v. Rigby*, (d) which was an action against an attorney for negligence, ABBOTT, C. J., left it to the jury to say, whether, under the circumstances, the defendant had used reasonable care and diligence: he did not take it from their cognizance, and pronounce his own opinion, and the verdict was not disturbed. In *Moore v. Mourgee*, (e) where the defendant was charged with negligence in insuring at a wrong office, (f) LORD MANSFIELD states his own direction thus:—“My direction to the jury was general; that if they thought there was gross negligence, or the defendant had acted *malà fide*, they should find for the plaintiff.” In that case, again, we see that the judge did not take into his own hands, as a question of law, what was gross negligence and what not; and there the court above would not grant a new trial.

LORD DENMAN, C. J., said,—It appeared to me that some degree of negligence was clearly proved in the first instance. I thought, and I still think, it impossible for a judge to take upon himself to say whether negligence is gross or not. I agree to all the legal doctrine in *Shiells v. Blackburne*, which is, merely, that a *bailee without reward is not*

(d) B. & Ald. 202.

(e) 2 Cowp. 479.

(f) In *Wilkinson v. Coverdale*, 1 Esp. 74, it was alleged that the defendant had undertaken *gratuitously* to get a fire policy renewed for the plaintiff, but had in doing so neglected certain formalities, the omission of which rendered the policy inoperative. Upon its being doubted at *Nisi Prius* whether an action would lie under these circumstances, ERKINE cited a MS. note of BULLER, J., in *Wallace v. Telfair*, wherein that judge had ruled under similar circumstances, that though there was no consideration for one party's undertaking to procure an insurance for another, yet, when a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect, by getting a policy underwritten, but did it so negligently or *unskilfully* that the party could derive no benefit from it, in that case he should be liable to an action; in which distinction LORD KENTON acquiesced.

liable to an action without proof of gross negligence. I do not find a word there to the effect that the judge is to say whether, in fact, negligence is gross or not. I certainly did not take the view which the jury did of this case, and I pressed, as strongly as possible, my opinion upon them.

The jury had found a verdict for the plaintiff, which the court refused to disturb. (g)

## PROBLEM II.—VOL. IV.

### LANDLORD AND TENANT.—RE-ENTRY.

What are the necessary formalities required by the Common Law to enable a lessor to re-enter for breach of the proviso for re-entry on non-payment of rent?—Suppose the condition to be that if the rent shall be in arrear for twenty-one days after any of the specified days of payment.

### TO THE EDITOR OF THE LEGAL GUIDE. ANSWER TO PROBLEM XXIII. VOL. 3.

“What will, under ordinary circumstances, be received at law as a sufficient proof of handwriting?”

As a general rule it seems to be holden, that when a witness is called to prove the handwriting of a particular person, that the witness should have gained his knowledge by seeing that person write; but as in many cases a strict adherence to this rule would be unjust, if not absurd, we find that in some cases it is relaxed, and that under some peculiar circumstances it is unnecessary that a witness deposing to the identity of handwriting should have seen the party write; as where the handwriting to be proved was of a person residing abroad, evidence by a party who had frequently received letters from him in a course of correspondence was admitted to prove that handwriting, although the witness had never seen him write. (Bull. N. P. 236).

In proving the identity of handwriting, it does not appear to be at all necessary that a witness should positively swear that the handwriting to be given in evidence is actually the handwriting of any particular individual, but his belief that it is such, is sufficient; such belief being founded on rational grounds, (i. e.) the witness must either have seen the individual in question write his name, or have received letters from him in a course of correspondence, not having actually seen him write; or the like.

(g) See Sir W. Jones on Bailments, p. 22. (II. 2.), p. 119. (III. 2.)

The witness is merely to form an opinion, and that only from looking at the handwriting in question.

In a case where a witness had never seen the defendant, but had corresponded with a person of the defendant's name living at *Plymouth Dock* where defendant resided, and where according to other evidence there was no other person of the name, stated that the handwriting of certain letters was that of the person with whom he had corresponded; it was held that this evidence was sufficient to admit the letters to be read against the defendant, (*Harrington v. Fry*, 2 Bing. 17; 9 Moore, 344; 3 Stark, C. N. P. 90;) and a clerk of the post-office, accustomed to inspect franks for the detection of forgeries, may be examined as a witness to prove that the handwriting of an instrument is an imitated and not a natural hand, though he never saw the supposed person write; and also to prove that two writings suspected to be imitated hands were written by the same person, *Goodtitle d. Revett v. Brake* (trial at bar) 4 T. R. 497. But such evidence has been since rejected, and great doubts are entertained of its admissibility; at all events seems entitled to but little credit, (*Gurney v. Langlands*, 5 B. & A. 330); and to prove the handwriting of a member of parliament the opinion of a clerk employed to inspect franks, who had occasion to apply to the member to read his handwriting, has been held insufficient (*Batchelor v. Honeywood*, 2 Esp. R. 71) and so where it was evident that the witness could not speak to the identity of the handwriting except by comparison, as where the witness deposed to having merely seen the party submit his name to another instrument to which he was attesting witness, and was unable to form an opinion respecting the handwriting in question without examining such other instrument. In the two last cases it will be observed were of the opinion, which the law has rejected as insufficient evidence to prove the identity of any particular handwriting; and it is submitted that however clear such opinion may be in the mind of a witness, yet it is not in reality clearer evidence than where the witness deposes only to similitude of hands, which, since the reversal of the attainder of Algernon Sidney, it seems is generally held not to be evidence in any criminal case, whether capital or not, (2 Hawk. c. 46, s. 15); and perhaps where the writing is so ancient that a witness can be found to prove it, (1 Phil. 5492): as where a person's book was produced to prove a modus, the person having been long dead, a witness who had examined the parish book in which was the same person's name was permitted to swear to the similitude of the handwriting; it was the best evidence for the nature of the thing, as the parish books were not in the

if's power to produce, (B. N. P. 236); or unless perhaps where there is already contradictory evidence of the fact as to the handwriting: evidence by comparison be properly admitted in such cases to prove the genuineness of a signature, the same kind of evidence must also be admitted to prove that the signature is not genuine, (Phil. 492). A witness who has seen a party write may refer to that writing to refresh and strengthen his memory, and not merely for the purpose of comparison, (*Burr v. Harper*, Holt, 1 N. P. 420; 8 B. & C. 16).

The best evidence to prove a signature or writing to be a forgery, is to be derived from the party himself whose writing is alleged to have been forged, provided he be a competent witness.

Where a person had been dead a great number of years whose handwriting was required to be proved, it was done by shewing the similarity of the handwriting in question to the handwriting of his will; and no objection was taken to this either at the bar or by the court, (*Morewood v. Wood*, 14 E. R. 327, n.)

The subscribing witness to a promissory note being dead, proof of his handwriting, and the presence of the defendant when the note was executed, is sufficient without proving the handwriting of the defendant—*sed quare*—if proof of the subscribing witnesses handwriting alone would be sufficient, (*Nelson v. Whittall*, 1 B. A. 19).

A receipt, even of more than fifty years old, offered to be put in to prove a money payment reported by it to have been received in lieu of others, is not admissible evidence of the fact of such customary payment having been acted on so as to establish the defence of a *modus*, unless it is also proved who the parties to the receipt were and in what character they stood, and unless proof be given of the handwriting or death of the party giving it. *Wood*, (B.) dissentiente. *Manby v. Curtis*, 1 Price, 325).

E. A.

## Law Reports.

### COURT OF CHANCERY.—March 4.

#### DUFFIELD v. ELWES.

**STORNIER COSTS—Orders for Payment of, after taxation within a limited time.—Regularity of proceedings upon the Order where served upon the Client after the time for payment has transpired.**

This case was heard at the Rolls on the 24th of last January, which was a motion on the part of Abraham Henry Chambers to set aside an order of the Court for his commitment to the

Fleet, for non-payment of a sum of money to Henry Wilton, pursuant to an order of the Court.

Mr. *Pembroke* and Mr. *Dixon* for Mr. Chambers, in support of the motion, and Mr. *Kindersley* and Mr. *Russell* for Mr. Wilton.

It appeared that Wilton was formerly the attorney of Mr. Chambers; that disputes arose between them, and that upon an application to the King's Bench that Court declared that Wilton was not an attorney of the Court. This declaration was made on the ground that Wilton had omitted taking out his certificate. A similar application was afterwards made by Mr. Chambers to the Master of the Rolls, to declare that Wilton was not a solicitor of the court of Chancery. This application was heard in June, 1838, when the Rolls Court refused to grant it, and ordered that Mr. Chambers should pay Wilton the costs of opposing it. These costs were taxed at 67*l.* 10*s.* 4*d.*, and on the 2d May, 1839, the Court made, on Wilton's application, an order that Mr. Chambers should pay him the money within three weeks of the date of the order. The order, however, was not served, nor demand of payment made, until the 8th of June, 1839, being after the expiration of the three weeks, so that it became impossible for Mr. Chambers to pay the money within the three weeks. Wilton, however, made an affidavit of the service of the order, the demand of the money, and its non-payment, and moved the Court *ex parte* for, and obtained, an order for the payment of the money within four days from its service, or else that Mr. Chambers should be committed to the Fleet. This order was served on the 2d of November last, and the money not being paid, an order for commitment was obtained on the 14th of November, and a detainer for this 67*l.* 10*s.* 4*d.* was lodged against Mr. Chambers, who was then in the Fleet upon other commitments. For Mr. Chambers it was contended, that process of contempt was always considered as matter *strictissimi juris*. The question was, whether there was a disobedience to the first order. That order being served after the expiration of the three weeks, it was impossible for Mr. Chambers to comply with it, for a subsequent payment would not have been a compliance.

Mr. *Dixon* cited a case, *Phillips v. Worth*, heard before Lord Chancellor Brougham, but not reported, to show that service of an order after its expiration was a nullity.

Lord LANGDALE said, the question of regularity or irregularity was the only matter to be determined; and on February 11, his Lordship pronounced his decision on the motion in this cause, made on behalf of Mr. Chambers, to set aside an order for his commitment to the Fleet for non-payment of costs (67*l.* 10*s.* 4*d.*), to

Henry Wilton, pursuant to a former order of the Court. That order was dated May 2, 1839, and was for payment, by Chambers, of the costs within three weeks of its date, but it was not served upon Chambers until the 12th June, when the three weeks had expired. His Lordship discharged, with costs, the order for the commitment of Mr. Chambers.

Mr. Russell now moved to discharge that order, and contended that the order of the 12th of June was perfectly regular, and went into a distinction between the practice in proceedings for payment of costs between party and party, and between solicitor and client. If Mr. Chambers had appeared to the motion of the 12th of June, 1839, he could not have stopped the order then made, except by paying the costs; it was not, therefore, competent for the Court to discharge that order afterwards, and a party who did not appear on notice to oppose a motion against him, ought not to be heard to complain of irregularity. At all events, it was his duty to come to the Court to complain as soon as he knew of the irregularity, whereas he lay by until the 20th of January in the present year. He submitted that the order then made on the application of Chambers, discharging Mr. Wilton's orders, should be discharged with costs for irregularity.

The LORD CHANCELLOR, stopping Mr. Wigram, who was for Mr. Chambers, said he could not agree to the proposition, that if one party takes an irregular order, then, because the other party affected by it does not come to the Court to oppose or discharge it, such order becomes regular. All the orders obtained by Mr. Wilton subsequent to that of the 2d of May were irregular. The first order was on Mr. Chambers to pay the costs: on the 8th of February 1839, the master taxed the costs and gave his certificate, and then a demand was made for payment. Nothing was done from that day until the 2nd of May 1839, when the order on Mr. Chambers to pay within three weeks or stand committed was made. Then, on the 8th of June following, after the three weeks expired, the order of the 2nd May was served, and no payment of the costs being then made, the order of the 12th June 1839 was obtained at the Rolls on the ground that the order of the 2nd of May was not complied with. No notice was given of that order to Mr. Chambers until the time of obeying it expired, and it was not competent for the other party who obtained that order, after acting on it, to abandon it, and rest on the subsequent orders. All the subsequent proceedings did in fact rest on that order of the 2nd of May as appeared to his Lordship, and nothing being done on that order, it could not be made a ground for the order of the 12th of June. Again, the order of the 12th of June

was not served till the 2nd of November, and on the 14th of November an order for commitment was made. If the order of the 12th of June could not stand, the order of the 14th November resting on it could not stand. Nothing was done between the parties from the 12th of June till the 2nd of November after all this negligence and irregularity, when Mr. Chambers appeared on the 20th of January for relief, the Master of the Rolls was quite justified in granting it, and this application must be refused with costs.

The costs to be deducted from the costs due by Mr. Chambers to Mr. Wilton.

April 27.

COLLARD v. ALLISON.

PATENTS — INJUNCTION — PRACTICE — *After Verdict at Law for the Plaintiff, and a rule nisi granted for a new trial.*

This case came originally before the court upon motion for an injunction to restrain the defendant from infringing a patent obtained by the plaintiff about twelve years ago, for certain improvements in pianofortes. Upon that motion coming on, his Lordship refused to grant the injunction, ordering the plaintiff to bring an action at law to try the validity of his patent. The action was brought, and a verdict obtained for the plaintiff. Notice, however, was given on behalf of the defendant of his intention to apply in the present term for a new trial; but in the interim the plaintiff again set down his motion for the injunction, founding that motion upon the verdict he had obtained at law. That motion stood for hearing last Monday, but upon being called on, it was ordered to stand over till to-day, that the result of the application to the Court of Queen's Bench, which would be made in the first four days of the term, might be known. That application had resulted in the court's granting a rule nisi to show cause why a nonsuit should not be entered, or a new trial granted on the ground of want of evidence and misdirection. Under these circumstances the motion came before the court again to-day.

Mr. Richards, on behalf of the plaintiff, stated what had taken place below, observing that it was not his wish, as the court thought was not competent to him, to bring on the application that day, but he understood from the nature of the business in the Court of Queen's Bench that it was not likely the rule which had been obtained could be heard for twelve or eighteen months, and that delay would be extremely prejudicial upon a plaintiff who had the verdict of a court of law in his favour. He trusted, therefore, the motion was to stand over, that his Lordship

would request the Court of Queen's Bench to advance the case for argument.

Mr. Wigram, on the behalf of the defendant, would gladly join in that request, provided his Lordship felt himself justified in doing so.

The LORD CHANCELLOR did not see how he could interfere with the proceedings of another court. What had taken place lately in the Court of Queen's Bench certainly did not improve the situation of the plaintiff. It certainly was quite competent for Mr. Richards to make a motion for an injunction the day after the court had refused to grant one, but there was some risk with it. When the court refused an injunction on the ground that the right at law, which was doubtful, ought to be tried, it was usual that that right should be established before the court determined whether, on a second application, it would grant the injunction or not. That could not be said to have been done in the present case, because, although a verdict had been obtained, it was good for nothing without judgment, and it was at least doubtful whether that would be obtained, when the Court of Queen's Bench had granted a rule *nisi* for a new trial.

Mr. Richards submitted that the jury having found a verdict for the plaintiff, had thereby established the fact of the novelty of the invention, added to which they had the opinion of the Lord Chief Justice in their favour.

The LORD CHANCELLOR said it was competent to the plaintiff to proceed with the motion; but he could not give any credit to a verdict after the Court of Queen's Bench had granted a rule *nisi* for a new trial.

Mr. Anderdon submitted that the court ought to direct a case for the opinion of the courts of law, as by that means the matter might be speedily settled.

The LORD CHANCELLOR said, if it was consistent with the practice of the Court of Queen's Bench to advance a case, he hoped they would do it in the present instance, and during the time the argument had been going on he had communicated with the judges on the subject. As to the proposal of Mr. Anderdon, it was quite impracticable to adopt that.

Motion ordered to stand over, with liberty to either party to apply to the court.

#### ROLLS' COURT.—April 29.

##### VINER v. VAUGHAN AND ANOTHER.

TENANT for LIFE, without Impeachment of waste.—Whether he may remove the surface soil and dig for Clay for making Bricks.—INJUNCTION.

Mr. Pemberton had obtained an order *ex parte* for an injunction to restrain the defendants

from digging up or removing the brick-earth from a certain piece of land situate near Clay Hall, in the parish of Alverstoke, in the county of Southampton. It appeared that James Vaughan died in 1823, having by his will, dated October 26, 1822, devised the premises in question to trustees, to permit his wife, Amy, to receive the rents and profits during the term of her natural life, and after her decease to sell the lands, and divide the money arising from such sale among his daughters, Amy, the wife of George Viner, Jane and Betsy Vaughan, Hannah Adams Vaughan, and Clarissa Vaughan. Upon the decease of her husband, Mrs. Vaughan took possession of the property, and continued to receive the rents till 1840, when she entered into a contract with James Hendy, of Portsmouth, builder, by which she agreed to demise to him the land in question for the purpose of digging clay to make bricks. James Hendy, in pursuance of his agreement, began to remove the surface soil and to dig clay, upon which Mr. and Mrs. Viner caused a notice to be served upon both Mrs. Vaughan and James Hendy, requiring them to desist; this was complied with in order to afford time for inquiring into the rights attached to the estate for life of Mrs. Vaughan, which having been done, and the opinion being in favour of the right to dig for clay, the work was resumed. The defendants were served with notice.

Mr. Pemberton now insisted that the injunction ought to be granted. He denied the right of a tenant for life, who was impeachable for waste, to destroy the surface, or to do any act detrimental to the inheritance. There was a great distinction between digging for minerals and for clay; in the one case the working was beneath the surface, which was not rendered wholly useless for agricultural purposes; in the other, the surface was wholly removed, leaving a barren waste for those who were to succeed to the reversion. The real question, however, was whether a tenant for life was at liberty to work pits which were not worked by the testator; and even assuming this, she was not at liberty to uncover fresh ground, since every foot dug was, in fact, opening a fresh pit. From the death of the testator to the present time no steps had been taken to dig any clay; and, therefore, he trusted that the injunction would be granted.

Mr. Stuart said the pit intended to be worked was an old pit, from which the testator himself had taken some clay. He, previous to his death, also had made preparations for fully working the pits, and had erected a mud-house, and had purchased machinery for making bricks. He contended, therefore, that by the authorities a tenant for life was fully justified in working not only such pits as the donor was working, but also all such pits as had been at any time opened upon

the estate, notwithstanding they might have been abandoned and partially filled up.

Lord LANGDALE observed that the plaintiff, as one of the children of the testator, was entitled to one-fifth of the money arising from the sale of the estate, and claimed a right to restrain the tenant for life, and her lessee, James Hendy, from taking away the substance of the land. There was no doubt the plaintiff had a right to make the application; she was not bound to look to the trustee to protect her, or to say that he was answerable for not doing so. By the words of the will, Mrs. Vaughan was impeachable for waste under it, therefore she had no right to dig for clay. A tenant for life had no right to take away the substance of the land; but it was stated that she had a right to use such pits as had been used by the testator; but did it follow that a tenant for life was to re-open old abandoned pits or mines, or to commence working pits or mines which the testator had merely prepared to work? It had been said that this pit was in a course of working by the testator. It was not so stated in the affidavits. It appeared, however, that there was an old pit, which had not been worked for twenty years; from this the testator had taken some clay for some purpose not explained. There was nothing, therefore, from which it could be gathered that this was an open mine, but only that it was an old mine which the testator was preparing to work. Before the right, therefore, was determined, the plaintiff could not be permitted to take away the clay; that must depend upon the evidence in this cause, and whether the pits were in such a course of working as to enable the tenant for life to continue to work them. The injunction, therefore, must be granted, but it was not to be drawn up until again mentioned to the Court.

#### TENANTS FOR LIFE IMPEACHABLE FOR WASTE.

*On the right of TENANTS for LIFE, IMPEACHABLE for WASTE, to work OPEN MINES, and to LEASE them under the usual POWER of LEASING.*

By T.  
Barrister-at-law.

There are perhaps few questions which more frequently arise between a person having only a limited interest in landed property and the reversioner, than the question of the right of a tenant for life to lead, copper, and other ores—they are parcel of the inheri-

tance, and cannot be appropriated by the tenant for life to his own benefit, for by the act of doing so he would injure the inheritance—the only exception is of such mines as were previously worked, which is a question of fact, but one of great difficulty and complexity. We find the general rule laid down in the Commentaries of Sir William Blackstone in these words: "Waste *vastum* is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail."<sup>(1)</sup> "To open the land to search for mines of metal, coal, &c. is waste, for that is a detriment to the inheritance; (2) but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use."<sup>(3)</sup> "for it is now become the mere annual profit of the land."<sup>(4)</sup> The right then of the tenant for life depends upon this principle, that there were mines upon the property, the produce of which had prior to the commencement of his interest become annual profit of the land; and it is a fair and reasonable presumption, that a testator or settlor having lands in which there were mines of metal or coal which he worked, and having devised or settled such lands to or on any other person for life, intended that the tenant for life should during his interest draw from the gift the annual profit of the mines. It is also to be reasonably presumed, that in case a testator gave to one in his last will an estate in inheritance in tail, with the remainder to another for life, that he must have intended that the latter should work any mines which the tenant in tail might open; for the tenant, by the very act of giving an estate tail, enabled the person to whom he gave it to search for and open mines; and it followed, that those mines being open at the determination

(1) 2 Blacks. Com. 281.; see Co. Litt. 28.—*note*

(2) See 5 Rep. 12.—*Ed.*

(3) Hob. 295.

(4) 2 Blacks. Com. 282.

of the estate tail, and at the commencement of the life estate, the produce of the mines having then become part of the annual profit, the tenant for life might work them and take the annual produce during his interest. This appears to have been decided in the case of *Clavering v. Clavering*, 2 Peere Williams, 388; although in that case the mines were not opened when the settlement was made, they having been opened by the person who by that settlement claimed an estate tail, and had afterwards died without issue. The court holding that the tenant for life might work all the mines which had been lawfully opened by the preceding tenant in tail, though subsequent to the settlement. However, the disposition of a tenant for life to make the greatest annual profit, and the anxiety of the reversioner to protect his inheritance, will necessarily lead to disputes between them. A case occurred in Devonshire, in the early part of the last century, which is thus described by LORD CHANCELLOR KING in deciding upon the case of *Clavering v. Clavering* (*ante*), "This was determined in the great cause of *Hellier v. Twiford*, in which I was of counsel; the matter was tried at the assizes in Devonshire before Mr. Justice POWELL, and held great part of the day; there it was proved by witnesses to be the course of the country, and a practice well known in those parts, among the miners, that any person having a right to dig in mines may pursue the mines and open new shafts or pits to follow the same vein; and that otherwise the working in the same mines would be impracticable, because the miners would be choaked for want of air if new holes should not be continually opened to let the air into them; and the same vein of coal frequently runs a great way, and the same mine of coals was very knowable and easy to be discerned; besides, that to stop the working might be the ruin of the colliery for ever." However, though mines be open, the tenant for life cannot

take timber to use in them. Co. Lit. 53 b. note 1.

There remains now to be considered whether a power of leasing to a tenant for life will enable him to lease open mines; and it has been held, that a tenant for life with power of leasing messuages, lands, tenements, and hereditaments, so as the most improved yearly rent be reserved, can lease mines previously opened and in lease; and that the reservation of a due proportion of the ore is analogous to a yearly rent. (*Campbell v. Leach*, Ambler, 740). (5)

T.

COURT OF QUEEN'S BENCH.—May 5.  
*Sittings in Banco.*

ENGLAND v. DAVISON.

REWARDS to POLICEMEN—*Whether recoverable by action*—DEMURRER.

This was an action of *assumpsit*, in which the plaintiff, a police officer, sought to recover from the defendant a sum of money which the defendant had advertised as the reward to be paid to any person who gave him information that would lead to the discovery of certain offenders who had committed a felony on his property. The plaintiff sought, and gave the information, but the defendant refused to pay him the reward. The defendant demurred to the declaration, on the ground that the promise was one which the policy of the law would not enforce.

Mr. Martin argued in support of the demurrer, and contended that public policy required that no reward should be given to a police-officer for doing his duty. The Court had held that an action of *assumpsit* would not lie in cases where sailors, in times of difficulty and danger, were promised rewards for extra exertions, as it was considered that sailors ought at all times and on all occasions to use their utmost exertions to save the vessel and cargo. A police-officer ought also to be vigilant and use his utmost endeavours to apprehend persons who had committed breaches of the law, and was not

(5) See also *Saunders's Case*, 5 Rep. 12.; *Whitfield v. Bewitt*, 2 P. Wms. 40. in which case LORD MACLESDFIELD said A having only an estate for life, *subject to waste*, he shall no more open a mine than he shall cut down the timber trees; and upon a rehearing, LORD KING, C., was of the same opinion. See *Rolt v. Lord Somerville*, 7 Eq. (a. ab 759. pl. 8.; *Gartie v. Cotton*, 3 Atk. 751. 1 Ves. 524. *Hargreaves*, Note Co. Litt. 2. 218. b.; *Western's Conveyancing*.—Editor.



entitled to any reward beyond what was paid for his ordinary services.

Lord DENMAN : We are of opinion that there may be good services rendered by a policeman, beyond those which he is bound to render in that character, and unless we clearly see that an express engagement is contrary to public policy, we shall not prevent its being carried into effect. We, therefore, give judgment for the plaintiff.

Judgment accordingly.

## COURT OF EXCHEQUER.—April 29.

*Sittings in Banco.*

### NEW TRIAL.

PHILLIPS AND OTHERS v. HUTH the Elder,  
AND OTHERS.

COMMERCIAL CASE—FACTORS ACT, 6 Geo. 4, c. 94—*Bailees of dock warrants pledged by a factor—their right to convert them to their own use under the Factors Act.*

This important case was argued last term upon a rule nisi for a new trial, and the Court took time to consider its judgment, by reason that it involved some very serious questions.—The declaration was for money had and received, to which the general issue was pleaded.

The action was one brought to try the right of the defendants to retain and convert to their own use the produce of a large quantity of tobacco, the cargoes of two ships consigned by bills of lading from the plaintiffs to a merchant and factor named Warwick, and his partner, subsequently taken into business by him, named Claggett, by whom the dock-warrants for these cargoes had been obtained without the sanction of the plaintiffs, and deposited with the defendants as pledges under the Factors Act, 6 George 4, c. 94, s. 2, for the repayment of very extensive advances alleged by the defendants to have been made by them to the factors on the faith of such deposits. It appeared that Mr. Warwick being in want of cash had negotiated an advance of £20,000. from the defendants on the deposit of the dock-warrants of tobacco, being the cargoes of two ships which were his own property. The defendants, however, after having advanced £12,000., objected to the sufficiency of the security, whereupon Warwick, to whom had just been consigned the *Amelia*, by the plaintiffs, having also tobacco, deposited the dock-warrants of that produce, and so prevailed upon the defendants to complete their original agreement for the whole sum. Soon after this Warwick, who had deposited some American securities with the defendants for another advance of £14,000. entered into the partnership with Claggett, when the cargo of the *Mariposa*

having been consigned by the plaintiffs to them, the new firm negotiated the discounting of their acceptances for £14,000., being the amount of that discount and interest due on the other transaction of £14,000., on the deposit of the dock-warrants of the *Mariposa*, the American securities being then surrendered. Just when these several acceptances became due, the firm of Warwick and Claggett became bankrupt, and the plaintiffs, who had in the mean time in vain endeavoured to get some account from them of their tobaccos, found that their property had been thus fraudulently pledged with the defendants by their factors. At the trial, which took place before GURNEY, B. at the London sittings after last Michaelmas term, a verdict was taken generally for the defendants, and a rule nisi was afterwards obtained for a new trial on the ground of misdirection, and also on the further ground that the jury gave a verdict contrary to the evidence.

The ATTORNEY-GENERAL contended, in showing cause against the rule, that there was evidence adduced on the trial which was applicable to these transactions as evidencing an intention on the part of the plaintiffs to entrust their factors with these dock-warrants, and that being so, the learned judge was justified in leaving it to the jury to say whether such was the fact, and that the jury were likewise warranted in coming to the conclusion at which they had arrived, and which had resulted in a general verdict for the defendants. It was enough under the 2nd section of the statute in question to give some evidence from which the jury might infer an intention to intrust the factors with these instruments, the pledging of which by them was legalized by the act. The word "intrusted" ought to be construed to mean "enabled," so that as where ever a principal, by sending to his factor the bill of lading of his property in blank, enables him to deal with that property, and to obtain the dock-warrants, he may be said to have "intrusted" them to him; and as the act says, that wherever persons are intrusted with bills of lading, certificate, or dock-warrants, &c. they should be deemed to be the true owners thereof, and as such entitles to pledge or deposit them as a security for advances to be made upon the faith of such deposits to such persons, then it would follow that these deposits are protected by the act. There was, however, another question, namely, whether these transactions amounted to the terms of the act to advances on the faith of such deposits; but if the Court would look at the dates and surrounding facts, it was apprehended that it must come to the conclusion that these loans were in truth and in fact protected by the act.

Mr. Crompton, for the rule, argued that the word "intrusted" must be construed to mean a trust

and confidence reposed in the factor, in respect of the very instrument pledged by him, and that as the whole case showed clearly that he was not meant to be intrusted with the possession of the dock-warrants, but merely of the bill of lading, the advances made by the defendants were not protected by the act. In the next place, it was strongly urged, that as regarded the cargo of the *Amelia*, the advance could not be protected, as the deposit of her dock-warrant was extorted by the defendants from Warwick in express breach of their contract, as they would have been bound to complete the sum of £20,000, though these latter warrants had not been pledged at all; while, as regarded the second transaction of the *Mariposa*, that manifestly amounted only to a transfer or substitution of those securities for the others which were released, in which view of the case it could never be contended that the £14,400 had been advanced on the faith of those dock-warrants, there being in fact only a shifting of securities accompanied with a payment of only £122, as the balance of the interest and discount.

Mr. Baron PARKE delivered the united judgment of the court upon this case. This was an action to recover the value of large quantities of tobacco, which had been pledged by means of dock-warrants by the factors of the plaintiffs with the defendants, and by the latter claimed to be retained and converted to their own use under the terms of the Factors Act, 6 Geo. IV. c. 94, by the second section of which it is enacted that all documents representing property may be pledged or deposited to secure loans, &c. to factors, who have been intrusted with and in possession thereof in the same way as though they had been actually the owners of the property, the symbols of which they were so entrusted with and in possession of. A verdict having been given for the defendants on the questions whether the plaintiffs entrusted the factors with the amounts in question, and whether the defendants believed the factors to be the real owners of the property, a rule for a new trial was obtained on the grounds that there had been an insufficient direction of the learned Baron Gurney, by whom the case was tried, and that the verdict was one against the evidence in the cause. Time having been taken in order that the case might receive the mature consideration of himself and his learned brethren, he now read the judgment of the court, which was to the effect that the rule ought to be made absolute, on the ground that the meaning of the term "entrusted" in the clause in question, ought to have been more fully explained to the jury, it being their Lordships' opinion that it was not enough to show that the factor was in possession of these documents, but that the plaintiffs when they consigned the tobacco to their factors by bills of

lading, intended and contemplated that they should be enabled to possess themselves of the other documents, dock-warrants, and so to appear to the world as the actual owners. This was clearly not so, for the factors were shown to have possessed themselves of the dock-warrants fraudulently, out of the usual course of business, and contrary to the express directions of the plaintiff. Under this view of the case, the rule *nisi* for a new trial must be made absolute.

The *Attorney-General*, who appeared for the defendants, supposed of course that it must be upon payment of the costs, as the court had said that there was no misdirection of the learned Baron, so that the verdict of the jury was the ground of the judgment.

Mr. Baron PARKE.—No, there certainly was not any misdirection, but as the learned Baron did not give any sufficient direction on the construction of the statute, we think the rule ought to be made absolute, as if there had been an actual misdirection, and without costs.

Rule absolute accordingly.

April 30.

Sittings at *Nisi Prius*.

BARTER v. JONES.

UNDERTAKER'S CHARGES.

This action was brought to recover the balance of an account for 64*l.* 17*s.* 3*d.* The plaintiff was an undertaker, and the defendant a captain of a ship. In November last, the defendant being then at sea, the plaintiff was sent for by the wife of the former to receive instructions for the funeral of her brother, Mr. Watt, who had died. The defendant's wife asked the plaintiff what he would charge for furnishing a plain and respectable funeral, and whether it would exceed 40*l.*, to which the plaintiff answered that a funeral of the description required would cost that sum, or a little more, upon which the defendant's wife gave the order. The plaintiff accordingly furnished, and upon the return home of the defendant from sea also furnished his bill, which they found amounted to 64*l.* On looking into the account, the defendant observed several charges which he could not help thinking were rather exorbitant, and that, taking into consideration the rank in life of his deceased brother-in-law, some of the articles supplied were, if not superfluous, unsuitable. Amongst the former may be mentioned a charge of 4*s.* 6*d.* per pair for gloves for the servants, and, amongst the latter, was a leaden coffin for which 7*l.* 10*s.* was charged, and which it was contended was not required, and two hat-bands for each mourner, besides sundry other little superfluities, by which

an ingenious undertaker will sometimes contrive to increase the *éclat* of a funeral and his own emoluments. On these grounds the defendant refused to pay the undertaker's bill, and hence this action was brought. The defendant had paid 50*l.* into court, pleaded a set-off of 2*l.* advanced on account, and denied his liability for the remainder.

Witnesses for the plaintiff (all undertakers) proved the reasonableness of the charges in their opinion; whilst on the other hand, the defendant's witnesses, some of whom were also undertakers, said that the charges in the plaintiff's bill were most exorbitant, particularly those for the gloves and the leaden coffin; two hat-bands for each mourner were certainly superfluous, because (as one of the witnesses shrewdly remarked) each could wear but one at a time.

GURNEY, B., said, the jury had to decide whether, in their opinion, the plaintiff was justified in exceeding the amount specified by him when he took the order. The evidence as to the reasonableness, or the contrary, of the charges, was certainly conflicting, but it was for them to decide upon the credibility of the witnesses on either side; in a word they would have to say whether, considering the rank and condition of life of the deceased the 52*l.* paid by the defendant was sufficient for a suitable funeral.

Verdict for the defendant.

May 2.

Sittings in Banco.

EVE v. RUMBOLL.

REWARDS for Information—*What party entitled to—definition of "first information."*

This action was brought by two of the London police, to recover the amount of a reward offered by the defendant, under the circumstances mentioned below, and was tried before Mr. Justice Erskine, at the Wilts summer assizes for 1839, when a verdict passed for the defendant. A rule *nisi*, to set aside this verdict, was obtained in a subsequent term by Mr. Sergeant Bompas, on behalf of the plaintiffs, against which Mr. Crowder showed cause on Monday last, and Mr. Sergeant Bompas was then partly heard in support of the rule.

It appeared that the defendant, who is a gentleman of property in the county, was proceeding homewards one evening in the early part of last year, when, on arriving at a certain spot, he was fired at, and though not mortally, yet dangerously wounded. This circumstance occurring in a hitherto peaceable and quiet neighbourhood, occasioned no little consternation among the inhabitants, and two of the London police were

sent down for the purpose of discovering the perpetrator, but they failed in their efforts to do so; and after a short time returned to London. The alarm of the inhabitants, however, not having been quieted, but rather increased by this failure, the plaintiffs were sent down for the purpose of protecting them. An association for the prosecution of felons, of which the defendant was a member, had published handbills offering a reward of £100. to such person or persons as should give such information as would lead to the discovery and conviction of the offender. The plaintiffs employed their utmost vigilance to discover the person who had attempted the assassination of the defendant, but without effect, until at length, on information received by them and others from various persons, they succeeded in tracing the crime to a man of the name of Maskelline, who was subsequently tried, convicted, and executed for the offence. The reward was distributed amongst the persons who had given the information upon which the plaintiffs and the prosecutor had acted, but no part of the reward was given to the plaintiffs. It is unnecessary to enter into a detail of the various circumstances connected with this case, but it is sufficient to say that the question at issue was whether the plaintiffs had given the first information, so as to entitle them to the reward or any portion of it, jointly with others. It appeared that the first information which had led to a suspicion against the perpetrator of the crime was acquired by a gentleman of the name of Henley, who, being a friend of the defendant, was actively engaged in the discovery of the offender, and this information was received by him from one Farmer, who had heard one Smith say that he had heard the person suspected make use of revengeful language towards the defendant. In the course of their inquiries other circumstances were communicated to the plaintiffs as policemen, which, being acted upon by them, ultimately resulted in the conviction of the person charged as before mentioned. Upon the trial the learned judge excluded some portions of the evidence, as related to information given by certain parties to the plaintiffs, and put it to the jury whether the information given to Mr. Henley was the first which led to the apprehension of the criminal, and if so, the plaintiffs were not entitled to recover.

Mr. Crowder upon showing cause, supported this view of the learned judge.

Mr. Baron ALDERSON asked the learned counsel what was his definition of the "first information?"

Mr. Crowder said that if his Lordship put the question in reference to the present case—

Mr. Baron ALDERSON—I merely put the question as an abstract one. Suppose A gives

certain information, B other information, C other information, and E other information, and then D comes in and supplies a fact without which the other facts communicated would be incomplete. Who, in this instance, would have given the first information?

Mr. Crowder should say that D was the person, but their lordships must look at the facts of the present case. It must be recollected that the plaintiffs were employed and paid for their services.

Mr. Baron ALDERSON said that he was the first who gave information who first communicated a fact, which fact ultimately turned out to be material to a conviction; and the question would then arise whether it should be a fact within that person's own knowledge, or received by him from another, who had no intention to communicate it.

Mr. Baron PARKE here read from the report of the learned judge that part of his summing up which more particularly referred to this point. The learned judge (Erskine) said the jury would have to ascertain whether the evidence was jointly given by the plaintiffs, and told them that the plaintiffs were not entitled to the reward in respect of information which they were merely the channels of conveying, and that though they were employed and paid, they were not precluded from any share in the reward in respect of any information which they might have acquired in the course of their own observations, provided such information was the first.

Mr. Crowder referred to some of the facts which constituted part of the chain of evidence against the criminal, and contended, that though they were material, and were even essential to the conviction, yet that they could not be considered to be the first information.

The COURT said they had considered the case, and they did not think there were sufficient grounds for disturbing the verdict. The rule must therefore be discharged.

Rule discharged.

## INSOLVENT DEBTORS' COURT.

April 25.

ANON.

**ASSIGNERS.**—*The remedy against them for money retained in their hands after order made to pay it into Court.*

**ASSIGNEESHIPS.**—An application was made at the rising of the Court for the committal of a person who had been an assignee of an insolvent's estate, and had kept in his possession upwards of 800*l.*, which money he had been ordered to pay into Court. Efforts had been

made to serve him with a rule to show cause why he should not be committed, but he had evaded the order, and the present application was for a peremptory order for his committal. The provisional assignee made an affidavit of the facts of the case, which had been some time before Mr. Commissioner LAW.

Mr. Commissioner BOWEN thought the present motion could not be granted. The party must be served with a rule to show cause.

The CHIEF COMMISSIONER concurred, remarking that a very strong case indeed must be made out before the Court could dispense with the usual proceedings.

The COURT refused the application.

The Commissioners have laid down a rule, in all cases where there are funds in Court, or a sum to be set aside out of pensions or otherwise, not to appoint an assignee. The provisional assignee acts, obtains the money, and divides the same without any expense. By the last act the Court had the power. There were before a number of instances of delinquent assignees—persons who had received large sums, and applied them to their own uses, regardless of the other creditors.—ED.

May 2.

## CASE OF HORATIO HASTINGS.

*Insolvent out upon Bail, and not appearing at the day for hearing—further defect in the Statute for abolishing Arrest—Whether the Bail have the power to render the Insolvent—Jurisdiction of the Court to issue a distress warrant against the Bail on their recognisance, and a warrant for the apprehension of the Insolvent.*

The insolvent, who was out upon bail, was called to be heard pursuant to notice, but failed to appear. The recognisance was for £165.

Mr. Cooke applied that a warrant might issue for the apprehension of the insolvent, and also a warrant of distress on the recognisance entered into by the bail.

Mr. Commissioner BOWEN thought that a rule should be granted. The insolvent might shew illness or some other cause.

Mr. Cooke said he was bound to inform the Court if such was the case. The warrant could issue in the first instance, and the Court could grant a rule nisi on the bail.

The CHIEF COMMISSIONER asked what portion of the 38th section the learned counsel would refer to in his application.

Mr. Cooke referred to the latter part of the 38th section of the 1st and 2nd Vic. c. 110, by which it is enacted, "That in case any insolvent so discharged out of custody shall not appear at the time and place fixed for his hearing or adjourned hearing, (not being prevented by illness or other lawful impediment to be allowed of by the said Court) the recognisance so entered into shall be forfeited, and the amount secured thereby shall be recoverable in a summary way by a distress and sale of the goods and chattels of such sureties as the said Court shall direct; and the amount so recovered shall be applied for the benefit of the creditors of such insolvent in like manner as if the same were part of his estate and effects; and the said Court may also issue a warrant, authorising a specified person or persons to arrest such insolvent, and deliver him into the custody of the gaoler or keeper in whose custody such prisoner was at the time when he was so discharged as aforesaid; and all detainers which were in force against him at the time of such discharge, or which shall have since been duly lodged against him, shall thereupon be deemed to be in force; and that any insolvent so discharged out of custody as aforesaid shall, on his appearing before the said Court or Commissioner, or justices, be considered for all the purposes of this act in the custody in which he was at the time he was so discharged." The learned counsel moved for a warrant for the apprehension of the insolvent in the first instance, and for a rule on the sureties to shew cause why the recognisance so entered into should not be put in force.

Mr. Commissioner Bowen said he had misunderstood the learned counsel in respect of the latter part of his application.

Mr. Cooke read the affidavit of Mr. John Huish Webber, attorney for the opposing creditor, stating the fact of the insolvent being discharged on bail, and his non-appearance. The present was the first case of the kind, and of no inconsiderable importance. It was a creditable circumstance, that out of the number discharged on bail, only one had been base enough to fix his sureties. He applied that the warrant against the insolvent should issue *instanter*, and a rule on the bail.

Mr. Woodroffe said he appeared for the bail, not to oppose the application for the warrant, but to state the circumstances of the case. The bail were respectable persons, and feared the worst. It was clear they must produce the insolvent, or have to pay the amount of the recognisance. The bail asked the Court not to issue a distress warrant, they might apprehend

the insolvent, and if the Court declared the bail forfeited, they would preclude the question whether they were liable or not to the full extent of the recognisance. There was no doubt that the act was very defective, but it was peculiarly hard on bail; they had not the power to render a party; but the bail in this case would endeavour to find the insolvent, and they had some clue to where to find him, and they would bring him into Court at all risks. All they required was, that the Court would, before they proceeded to issue a distress warrant, grant a reasonable time for the apprehension of the insolvent.

Mr. Cooke thought it would be dangerous to be made known that the recognisance was not forfeited. It was forfeited when the man did not appear.

The CHIEF COMMISSIONER referred to the clause, and said the recognisance was forfeited as a natural consequence, but it was another question whether it should be put in force without a rule on the sureties.

Mr. Commissioner Bowen expressed his concurrence in the view taken.

Mr. Cooke said the recognisance being forfeited he did not know how it was to be got over without the payment of the money.

Mr. Commissioner Bowen remarked that they need not now discuss that question.

Mr. Woodroffe said the bail could not render the party, such was the defect in the act.

Mr. Cooke observed that there was no power to render after bail was admitted, not even if the party was on board a ship to leave England.

The COURT suggested that the warrant should be given in the name of the bail, for the apprehension of the insolvent.

Mr. Cooke asked for a rule on the bail. It might be for some period beyond a reasonable time for the apprehension of the insolvent.

The COURT granted a rule and a warrant *instanter*.

The COURT named Mr. Prew assignee.

A warrant was granted and given to the assignee to execute, and a rule was granted, calling on them to show cause why the recognisance should not be put in force against them.

## NEW POSTAGE STAMPS ORDER.

"General Post Office, April 28, 1840.

### "NOTICE TO THE PUBLIC.

"The Lords of the Treasury having fixed the 6th of May next for the issue of postage stamps, on and after that day all letters written on stamped paper, or enclosed in stamped covers, or having

stamps affixed to them, the stamps in every such case being equal in value or amount to the rates of postage now chargeable on such letters if prepaid, will pass free of postage in whatever part of the United Kingdom they may be posted.

"In those cases where the value of stamps on the letter is less than the amount of the postage to which it would be now liable, if prepaid, the letter will be charged double the amount of such difference on delivery. An inland letter, for example, weighing more than half an ounce, and not exceeding an ounce, if bearing only a penny stamp, will be charged twopence on delivery.

"The same regulation applies to letters prepaid by money, where the full and proper rate of postage has not been paid in advance.

"Stamps may be used for printed votes and proceedings in Parliament; if the stamps, however, should be less in value than the proper rate of postage to which these documents are subject, only the difference, and not double the difference, is to be charged.

"Stamps may also be used on foreign, colonial, and ship letters, &c. outwards. If any letter, however, addressed to places beyond sea shall bear an insufficient number of stamps, it will be sent to the Dead Letter Office, to be returned, in all practicable cases, to the writer. Stamps are not permitted to be used on letters arriving in the United Kingdom from the colonies or foreign countries. In such cases, therefore, letters will be chargeable with the same rates as they would be if not bearing stamps.

"All these regulations will be applicable to newspapers in those cases where they are liable to postage.

"It must be distinctly understood, that it is optional with the public either to use stamps or to forward their letters, &c. prepaid or unpaid, as at present.

"The instructions issued in December and on the 4th of February last remain in full force, the only alteration being that the stamps are permitted to be used in certain cases, instead of the postage being paid in money.

"By command,

"W. L. MABERLY, Secretary."

TO THE EDITOR OF THE LEGAL GUIDE.

PROPOSED REMOVAL OF THE COURTS FROM WESTMINSTER HALL.

SIR,—The proposed removal of the Westminster Hall Courts, as given in your Paper of Saturday last, (a) must be a subject of great interest to the profession; and the reasons given

(a) Ante, p. 15.

in support of the plan are sufficiently good, except the tenth, viz. :—

"10. An excellent site, the garden of Lincoln's-inn-fields, being obtainable (as is believed) without compensation or expense."

Cap. xxvi. of George II., however, is an act which gives power to the present and future proprietors and inhabitants of the houses in Lincoln's-inn-fields "to adorn and keep in repair for the future the said fields," and which, if allowed to be built upon, according to an indenture recited in the said Act, would occasion the field to revert to the heirs of the original grantor.

This point being so far clearly settled, the question arises, can no other eligible site be obtained?

In the neighbourhood of Lincoln's-Inn there are situations in which such desirable buildings would give beauty, where there is at present none; and by throwing open places that are now close would prevent the spread of contagious diseases, and, as well as conferring local advantages to a particular class, would be a public benefit to society at large. For instance :—

1st. Adjoining Clement's Inn is Clement's Lane (a seat of typhus and other fevers, and squalid misery), and the south-east corner of Clare Market—filthy places of small value.\*

2d. The site of the projected new street, near Temple Bar, where there is an assemblage of as vicious and miserable a set of inhabitants as can be pointed to in any district.

3d. The Liberty of the Rolls, Rolls Buildings, &c. east of Chancery Lane, in a line with Lincoln's-Inn, where the neighbourhood is equally confined, and of as small value, though less objectionably inhabited than either of the two already mentioned.

With respect to the outlay, it may be remarked that an eminent architect† has already published plans, demonstrating that the purchase of the most expensive of the above sites for building upon, would afford an excellent investment of capital.

Yours, &c. D.

May 7, 1840.

We understand that a General Meeting upon this subject is called for this day, to be held at the Hall of the Law Society.—ED.

In the debate in the House of Commons on the 9th of February, 1836, on Mr. Hume's

\* The entrance by the archway north of St. Clement's Church might lead to a coach thoroughfare, easily to be made to Carey Street, a good way of approach (much needed) to Lincoln's-Inn and King's College Hospital.

† Mr. Burton, of Lincoln's Inn.

motion, "That the Building Committee of the new Houses of Parliament might be instructed to reconsider the fitness of the intended site." On that occasion, the separation of the Houses of Parliament from the Courts of Law was incidentally touched on, and Sir Frederick Pollock observed that, "with regard to those members of the profession to which I have the honour to belong, and who are also members of this house, I apprehend it is a matter of indifference to them, whether the House of Commons be situated in the vicinity of Westminster Hall, St. James's Palace, or Charing Cross. Even supposing the removal of the Houses of Parliament might occasion inconvenience to the members of my profession, I am quite sure that not one of them would be found to let any personal consideration of that sort prevail against what might be considered the general convenience of the members of the Houses of Parliament. *I repeat, however, that the site of the Houses of Parliament is a matter of perfect indifference to the gentlemen of the bar.* It is undoubtedly true that the Courts of Law sit a certain portion of the year in Westminster Hall; but it is also true that the Courts of Equity sit a much longer time in Lincoln's Inn, as also does the Court which I chiefly attend, at the Guildhall, in the City of London, or in its immediate neighbourhood. For my own part, I should care little whether, after my hours of business, I went from Guildhall to Westminster, or to Pall Mall. But there is a class of persons belonging to the legal profession,—I mean the solicitors and attorneys,—and a portion of the public connected with the administration of justice, to whom I believe the proximity of the Houses of Parliament to the place where justice is administered, is of the greatest importance at the time when the House of Lords is sitting as a Court of Appeal, and when committees of the House of Commons are engaged on business which requires the assistance of gentlemen of the bar. Because if the Houses of Parliament were to be removed from the place where justice is administered, and where the members of the bar congregate together, it would be impossible for solicitors, engaged in parliamentary business, to obtain that assistance and advocacy which they might desire, or the House require, without putting their clients to a very great expense. Either the business would remain for a length of time unsettled, or be done indifferently. I do, therefore, think it would be a matter of great inconvenience for those who might have business to transact with the House of Lords, or the Committees of either House of Parliament, if there were such an entire removal of those Houses, as I should look upon their removal to St. James's Palace, or the back of the Mews to be. It is not for any personal interest

of my own, or that of any member in this House belonging to the same profession, that I have thought it necessary to make these few observations, but for the benefit of those connected with it who are absent, and such portion of the public as would be affected by the proposed change."

SIR ROBERT PEEL.—"I entirely agree, that if all other things were nearly balanced, historical recollections ought to be considered of some importance. \* \* \*. It is also of some importance that the Houses of Parliament should be in the neighbourhood of the Law Courts, where the judges are accustomed to sit, and where those counsel and other gentlemen of the legal profession, by whom the parliamentary and other business is usually transacted, are in the habit of attending; for the near vicinity of the House the command of the services and assistance of the first men of the profession. This is important, especially after a general election, and I much doubt whether we should not derive this advantage if the courts were removed to a distance from us."—EDITOR.

#### NOTICE TO CORRESPONDENTS

A Subscriber—See our first notice, Vol. I. p. 96.

#### NOTICE TO SUBSCRIBERS.

The Index to Vol. III. has been unavoidably delayed, it will be published on Saturday next.

#### NOTICE TO COUNTRY SUBSCRIBERS

We are very sensible of the compliment bestowed upon us for reducing the price of the Country Edition.

#### CHELTENHAM.

A FREEHOLD GENTLEMAN'S RESIDENCE is to be sold in Carlton Place. Half the purchase money may remain on mortgage at 5 per cent. Apply, by letter, to W. G. 194, Fleet Street. Immediate possession may be had.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, May 2, 1846.

# The Legal Guide.

1. IV.]

SATURDAY, MAY 16, 1840.

[No. 3.

Price Sixpence.

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## ESSAY III.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 19.)

THE case we last cited of *Doorman v. Jenkins* (a) is of considerable importance, and ranges under the first class of *Lord Holt's* bailments—viz. *Depositum*. In that case the question of *gross negligence* was left to the jury, and from the decision, it is now very clear that *gross negligence* may be committed by a depositary, although he may have kept the property entrusted to him with as much care as his own, and that *gross negligence* of his own goods is no de-

(a) *Ante*, p. 17.

fence (b). This may to superficial readers appear at variance with the opinion of *Lord Holt*, who in saying “The keeping them as he kept his own, is an argument of his honesty,” meant that it was an argument against the supposition of *gross negligence*, which his Lordship considered almost the same thing with *dishonesty*; this is illustrated by his own expression: “If there be such *gross neglect*, it is looked upon as evidence of *fraud*,” but it is equally clear that a depositary is not liable for any thing short of *gross negligence*. The doctrine of *Lord Holt* over-ruled the opinion of *Lord Coke* in *Southcote's* case (c), which was, that a

(b) See *Rooth v. Wilson*, 1 Barn. & A. 61.

(c) 4 Rep. 83 b.; 1 Inst. 89—see Cro. Eliz. 815; Kelv. 77.; Sav. 74.; Sid. 36.; Roll. Ab. 3 pl.; 2 Bro. tit. Bailment, 7—tit. Detinue, 35.

D



depository is responsible if the goods are stolen from him, unless *he accepts them specially to keep as his own*. Before this case there was no solemn determination of this question. *Sir William Jones*, in his treatise on bailments<sup>(d)</sup>, expresses an opinion that *Lord Holt's* division of bailments is a little inaccurate, that in truth the *fifth* sort is no more than a branch of the *third*, and a *seventh* might with equal reason have been added, since the *fifth* is capable of another subdivision. *Sir William Jones* acknowledged, therefore, but *five* species.—1. *Depositum*, which is a naked bailment, without reward, of goods to be kept for the bailor. 2. *Mandatum*, or *commission*; when the mandatory undertakes, without recompense, to do some act about the things bailed, or simply to carry them; and hence *Sir Henry Finch* divides bailment into two sorts, to keep and to employ, Law bk. 2, c. 18. 3. *Commodatum*, or *loan for use*, when goods are bailed without pay, to be used for a certain time by the bailee. 4. *Pignori Acceptum*; when a thing is bailed by a debtor to his creditor in pledge, or as a security for the debt. 5. *Locatum*, or hiring, which is always for a reward, and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary use of the thing; or 2. *locatio operis faciendi*, when work and labour, or care and pains, are to be performed and bestowed on the thing delivered; or 3. *locatio operis mercium vehendarum*, when goods are bailed for the purpose of being carried from place to place, either to a public carrier, or to a private person. In this learned and elegant essay, *Sir W. Jones* has, by a close analysis of the cases, shewn the confusion occasioned by *Lord Coke's* inaccurate doctrine, as to the responsibility of a mere depository for stealing without his default (see Co. Lit. 89, a. b. *Southcote's case ante*), and as to the non-responsibility of a pledge in such cases by reason as *Lord Coke* says of his property;

(*id.*) he has confirmed, with slight exception, the luminous view of the responsibility of the several bailees, by *Lord Holt* in *Cogg v. Burnard*, by reference to the text of the civil law and its commentators, from which, through the medium of *Bracton*, *Lord Holt* derived his doctrine. He has pointed out the incongruity in *Lord Holt's* system, in requiring the same extreme care from a hirer as from a borrower, and has traced it to its source in a peculiar expression in the Digest, copied by *Bracton*; and has thus, besides illustrating the subject with such apposite learning, done all that reasoning, without judicial authority, can do, to reduce the English law on the subject to a system harmonising with the settled doctrine of *Rome*, with the laws of other countries, and with the rules of natural equity and good sense. His conclusions may be summed up thus: that when the bailment is beneficial merely to the bailor (as in cases of gratuitous deposits to keep), the bailee is only responsible for fraud, or that extreme negligence which in legal presumption is equivalent to it: that when the bailment is mutually beneficial, (as in cases of pledge, of letting, and hiring, of performing works for pay,) the bailee is responsible for ordinary neglect, or the want of that ordinary care, which a prudent man takes of his own goods: and that where the bailment is beneficial solely to the bailee, (as in loans for use without reward,) the bailee is responsible even for a slight neglect. (e) The opinion of *Sir William Jones* was adopted by *LORD LOUGHBOROUGH* in *Shields v. Blackburne*, (*ante*) in which case his Lordship said, "I agree with *Sir William Jones* that when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, then the bailee is only liable for gross negligence."

(e) Bac. Ab. tit. Bailment D. see also Potliam Contr. trat. de Dépôt. n. 29. *Stiern de Jure Sacro* l. 2. c. 5.—1 Gow. N. P. Ca. 39.—*Jones v. Charles*, 5 Baist. 306-312.—1 Roll. 126-99.—*Kettle v. Brown*, 2 Will. 118.

(d) 35-36.

But if a man *gratuitously* undertakes to do a thing to the best of his *skill*, when his situation or profession is such as to imply *skill*, an omission of *that skill* is imputable to him as *gross negligence*. If, in this case, a ship broker, or a clerk in the Custom-house, had undertaken to enter the goods, a *wrong entry*, would in *them* be *gross negligence*, because *their* situation and employment necessarily imply a competent degree of knowledge in making such entries." This distinction does not make any unpaid agent liable for *less than gross negligence*. It only makes *some persons* who by reason of *their skill*, are more competent of care, liable in a greater degree to the charge of *gross negligence*, than less skilful persons, and even this distinction is confined to a *class of cases*, where competency and skill are required. With this exception, all the cases go to establish a doctrine as clearly settled, that an unpaid agent is liable for *gross negligence* and for *nothing less*.

(To be continued.)

### PROBLEM III.—VOL. IV.

#### BANKRUPTCY.

##### JOINT AND SEPARATE FIATS.

In what cases may a *joint fiat* be sued out against all or *some* of the members of a firm, or *separate fiat* against one or each of them?—In what debts may be admitted to proof under each of such fiats?

### ANSWER TO PROBLEM 25. VOL. 3.

By E. A.

ON WHAT SUBJECTS MAY RELIEF BE OBTAINED BY BILL IN CHANCERY?"

The first step in a court of equity on the part of the plaintiff, is what is technically called *filing a bill*." This bill usually contains an averment that the matter in question is within the jurisdiction of the court; and hence we are led to the observance of the necessity which exists of a correct knowledge of the nature and boundaries of this jurisdiction, in order that it may be in our compass to ascertain when and wherefore the matter in question lies within such jurisdiction.

The subjects of relief by bill in Chancery are usually divided into seven distinct classes, viz.:—

1. Accident; 2. Account; 3. Fraud; 4. Infancy; 5. Mistake; 6. The specific performance of Agreements; and, 7. Trusts. Under each of which heads it is proposed, in answering this problem, to give a certain number of examples, sufficient (with due deference to your opinion) to show the nature and extent of the relief sought for, and, we may presume, in all probability, obtained in a court of equity; first of all premising, that to some one or other of these stocks, almost every exercise of the equitable jurisdiction of the court may be referred; not only in cases which are primarily and exclusively submitted to its decision, but also whenever it lends its aid as ancillary to, or by its power of granting injunctions, restrains proceedings in other courts. Having said thus much, we will begin with the first of those heads, or stocks, which the subject is divided into, viz.:—

**Accidents.**—The redress for many accidents is supplied in the courts of law; as loss of deeds; mistakes in receipts or accounts; wrong payments; deaths; which make it impossible to perform a condition literally, and a multitude of other contingencies; and many cannot be relieved even in a court of equity: as if by accident a recovery was ill-suffered, a devise ill-executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. (3 Bla. Com. 431.) But in general, a party who is, or is likely to be injured by an accident, seeks relief in a court of equity; as if by unavoidable accident, parties who have entered into an agreement, are prevented from executing it literally, a court of equity will interfere, and if compensation can be made will give relief. (Per Lord Alvanley, M. R. in the case of *Eaton v. Lyon*, 3 Ves. 692.) So where in consequence of the death of a trustee or other accident, the execution of a trust would otherwise fail, the Court of Chancery will execute it. (*Brown v. Higga*, 8 Ves. 570.) And when advantage is attempted to be taken of any accident rendering a literal performance of a contract impossible, if the failure be not substantial, courts of equity will interfere, though courts of law could give no relief. (See *Eaton v. Lyon*, above cited.) A palpable case is, where a bond has been burnt, lost, or cancelled, by accident. This is another ground for relief in equity, but the averment in the bill must be supported by an affidavit, annexed, to the same effect; if the court be satisfied of the truth of the averment, it will give such relief as the circumstances of the case, and its consistency with justice, may seem to require, and that not only against a principal, but against his surety. (*Skip v. Huey*, 3 Ask. 93.) The grounds on which this equitable jurisdiction was originally built, were that the party suing on a bond in a court of law could

not recover without *profert* and *oyer* of the bond; and when those courts, in relaxing from their strictness, dispensed in such cases with *profert* and *oyer*, the courts of equity still retained a concurrent jurisdiction with them, which, as observed by Lord Thurlow, could not be excluded by a mere change of proceeding in other courts. This jurisdiction extends to, and a like relief is given in, all cases in which the deed or instrument has been lost by the plaintiff or concealed or destroyed by the defendant. (Fonblanque, Eq. Tr. 1. 17. note.) The estate of a mortgagee usually becomes what is termed in law absolute, on non-payment of the money by a day named; but the Court of Chancery will decree a re-conveyance to the mortgagor at any time within twenty years from the last payment of interest, or payment of part of the principal, or from the last acknowledgment in writing, (a) on payment by the mortgagor of all sums due for principal and interest. It is evident that in this case the court regards the mortgagee's estate merely as a security for a debt, which the mortgagor has from accident or misfortune been prevented from paying (Id. 257. 2. n. d.); it being on the ground that accident alone has prevented their performance, that courts of equity relieve against penalties in bonds and covenants; but the party against whom relief is had must, generally speaking, be put into the same condition he would have been in if the penalty had not been incurred. (1 Mad. 32.) Upon the ground of preventing the injustice which might otherwise be occasioned by the loss or destruction of deeds by accident, equity will sometimes imply a grant, of which there is no other evidence than the acts of the parties, which, it is presumed, would not have been performed had no such grant originally existed. (1 Mad. 29.) And where a party covenants to produce title deeds (without the usual exception against accidents), and they happen to be destroyed, here equity will relieve the covenantor against the consequences of his covenant. If trustees under a power of sale, make a legal contract for sale of the estate, the contract binds the estate; and though by unavoidable accident, as by deaths of the parties, the power should be extinguished, yet the contract must be executed by those who obtained an interest by the extinguishment of the power. (Mortlock v. Buller, 10 Ves. jun. 292.) And so the death of the vendor or vendee before conveyance is in equity immaterial. (1 Sugden, Vendors, 275. last ed.) So equity will (on the presumed ground of accident) relieve a purchaser for valuable consideration against a defective execution of a power. (See Sugden's Tr. Powers, c. 6.)

(To be continued.)

(a) For what shall be deemed a sufficient acknowledgment in writing, see *ante*, vol. 1. p. 130.

## CITY OF LONDON.

### COURT OF COMMON COUNCIL—CORPORATION REFORM BILL.

May 8.

We have, as an important STATISTICAL matter, before noticed the motion made by CORNELIUS WHEELER, Esq., (*Aldgate Ward*) upon the Report of the Committee, in relation to the representation of the Wards in Common Council, and on the expediency of reducing the number of Members of the Court of Common Council; also, the opinions of the City Law Officers upon the power possessed by the Lord Mayor, Aldermen, and Commons in Common Council assembled, to increase or reduce the number of members of the Court of Common Council (a).

That Committee was of opinion that the total number of members should be 200, and that such Wards as would by virtue of the respective number of inhabitants and amount of rateable property, be entitled to more than twelve representatives, should be subdivided in such manner as that no one division should have more than twelve nor less than six representatives, and that in all cases where Wards might be subdivided, there should be representatives for such Wards should be returned by and from such subdivisions respectively independently of any other parts of Wards.

This important measure of Corporation Reform was introduced into the Court of Common Council by Mr. Wheeler, to whom unsparing exertions the citizens of London are indebted for the completion of the measure. This day an act of the Common Council was passed, carrying into effect the recommendations of the Committee, by which the representation of the citizens will depend now upon themselves, and if they are bound to themselves they must be well represented.

We are enabled, from authority on which we can place reliance, to place before

(a) *Ante*, vol. 2. p. 306.

ers the following Table, showing the  
ber of houses, and amount of rateable  
erty in the several Wards, the number of  
mon Councilmen at present elected by  
Ward; and the number to be elected by  
on St. Thomas's Day, 1840:—

Wards.	Number of Houses.	Amount of Property.	Number of Common Councilmen.	
			Present.	To be elected on St. Thomas' Day, 1840.
Bassishaw	130	£6,819	4	4
Time Street	192	12,750	4	4
Dowgate	203	14,897	8	6
Handlewick	210	15,067	8	6
Ordwainer	315	11,503	8	6
Pintry	260	14,480	9	6
Falbrook	266	17,421	8	6
Quecnhithe	350	13,709	6	6
Worndhill	167	23,899	6	6
Bridge	198	19,036	15	8
Bread Street	290	19,154	12	8
Billingsgate	343	20,776	10	8
Heap	360	27,733	12	8
Road Street	560	31,903	10	8
Tower	530	34,437	12	8
Langbourn	500	40,356	10	8
Castlebaynard	542	38,311	10	8
Ldersgate, n. and Wt. }	726	33,297	8	8
Coleman Street	761	34,785	6	8
Oldgate	770	42,529	6	8
Portoken	1,216	33,060	5	8
Arringdon within }	1,008	55,794	17	14
Bishopsgate, n. and Wt. }	1,460	66,437	14	14
Ripplegate, n. and Wt. }	2,079	68,999	16	16
Arringdon without }	3,030	158,572	16	16
Totals	16,466	£855,724	240	206

s reform introduces no change in the  
itueny, but merely restores the Court  
at it was originally intended to be, a  
entation of the Freemen House-  
rs, by each Ward returning a number  
portion to its size.

## TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—Your correspondent, "Aliquis," in answering Problem 22, vol. 3.(1) has omitted to state what is now considered a most important "act of bankruptcy," and which I will state as in continuation of his answer:—14th, By the 8th section of 1 and 2 Vic. c. 110. it is enacted, that if any single creditor, or any two or more creditors, being partners, whose debt shall amount to £100. and upwards, or any two creditors whose debts shall amount to £150. or upwards, or any three or more creditors whose debts shall amount to £200. or upwards, of any trader within the meaning of the Bankrupt Laws, shall file an affidavit or affidavits in the Court of Bankruptcy that such debts are due, and that such debtor is such a trader as aforesaid, and shall cause him to be served with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not within twenty-one days after personal service of such affidavit or affidavits and notice pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with such two sufficient sureties as a Commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been or shall thereafter be brought for recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been or may be brought, according to the practice of such court, in such time and manner as the said court or any Judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of Bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat shall issue against him within two calendar months from the filing of such affidavits.

E. A.

(1) We have another communication on the Answer to this Problem, which shall appear, if possible, next week.—EDITOR.

## CORONERS' JURIES.—EXEMPTION OF ATTORNIES.

Case submitted to the ATTORNEY and SOLICITOR-GENERAL upon the liability of Attornies to serve on Coroners' Juries.—OPINION.

## CASE.

1. Whether attornies and solicitors of the

Superior Courts, are liable to serve as jurymen on coroners' inquests?—and if so, to what penalty or punishment do they subject themselves by refusing to serve?

2. In case you should be of opinion that they are not liable so to serve, what course should be taken to establish the privilege, and to put a stop to the practice of causing attornies and solicitors to be summoned?—and will it be necessary that an attorney or solicitor who may be summoned should personally attend the inquest and claim the exemption, or will it be sufficient to send to the coroner notice of such exemption?—or must a writ of privilege be sued out on each occasion?—or what other mode of proceeding do you recommend to be adopted?

1. We are of opinion that attornies and solicitors of the Superior Courts are not liable to serve on coroners' inquests.

2. We think the best mode of trying the question, would be for an attorney summoned on a coroner's inquest, to attend and claim his privilege; and if he should be fined by the coroner to contest the validity of the fine in the Court of Exchequer.

Temple, } J. CAMPBELL,  
April 19th, 1840. } THO. WILDE.

#### QUEEN'S BENCH.—NEW RULE.

##### ADMISSION OF ATTORNIES.

*Easter Term, 1840.*

IT IS ORDERED, that every person who shall intend to apply for admission as an attorney of this Court, and who shall not have been admitted an attorney or solicitor of any other Court, shall (instead of the notices required by rule of Trinity Term, 31st Geo. 3, s. 2, but in addition to the notices to be given to the Examiners, Masters, &c. as required by the rule of Hilary Term, 6 William 4, 1836, read in all the Courts) for the space of one full term previous to the term in which he shall apply to be admitted, enter or cause to be entered in two books kept for that purpose, one at the chambers of the Lord Chief Justice of this Court, and the other at the chambers of the other Judges, his name and place or places of abode, and also the name or names, and place or places of abode of the attorney or attorneys to whom he shall have been articulated. And it is further ordered that a printed copy of the list of admissions be stuck up in the Queen's Bench Office, and at the Judge's Hall or Chambers in Rolls Garden.

And it is further ordered, that every person applying to be re-admitted an attorney of this Court, shall, instead of the notices now required, three days at the least previous to the first day of the term, and the last day of which he intends to

apply to be re-admitted, leave at the office of the Masters of this Court a notice in writing, containing his name and place or places of abode for the last preceding twelve months. And that before the first day of term, he shall enter or cause to be entered in the two before-mentioned books, a like notice, and shall at the same time cause to be filed the affidavit upon which he seeks to be re-admitted, at the office of the Masters aforesaid, and a copy thereof, left at the chambers of the Lord Chief Justice of the Court of Queen's Bench. And it is further ordered, that the Masters reduce such notices of re-admission into alphabetical order, and add the same to the list of admissions.

(Signed)

DENMAN,  
J. LITTLEDALE,  
J. PATTESON,  
J. WILLIAMS,  
J. T. COLERIDGE.

#### QUESTIONS

*Put by the Examiners to applicants for admission as Attornies at the last Examination,—Easter Term, 1840.*

##### I. PRELIMINARIES.

Where did you serve your clerkship?

State the particular branch or branches of the law to which you have principally applied yourself during your clerkship?

Mention some of the principal law books you have read and studied?

##### II. COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.

Name some (seven at least) of the ordinary kinds of action at common law.

When there are several defendants to an action, ought you to insert all their names in one writ, or is there any limitation as to the number?

What are the names of the different pleadings in an action of assumpsit?

When personal service of a writ of summons cannot be effected, how is the plaintiff to proceed?

Can an action be brought by an infant, and how is it to be prosecuted? Can an action be brought against an infant, and if so, how must he defend it?

Within what period can an action of ejectment be brought?

What is the first proceeding in an action of ejectment, and how, and on whom, and where is the process to be served?

If a plaintiff delay his proceedings in an action for a considerable, and what space of time, any, and what notice necessary before taking proceedings?

What are the different writs of execution for an

- forcing a judgment in an action of debt? and in an action of ejectment?
- When is a defendant entitled to call on a plaintiff to give security for costs? and at what time should the application be made?
- What is meaning of suing in *forma pauperis*? and what is requisite to be allowed to do so?
- What is the advantage of filing a cognovit "under the statute," and within what time must it be so filed?
- In what cases must an attorney deliver his bill of costs signed, before he can bring an action? and how soon after delivery can he bring an action?
- Is it necessary for an executor or administrator of an attorney to deliver a bill of costs signed, before bringing an action?
- Within what time must application be made for a new trial? or to set aside an award?

### III. CONVEYANCING.

- Are there any cases in which the interest of a devisee or legatee does not lapse by their death in the lifetime of the testator? and state instances?
- What is the order in which next of kin are entitled to letters of administration?
- In what case is a purchaser bound to see to the application of the purchase money? and in such case, who are necessary parties to the conveyance?
- Is a mortgagor barred of his equity of redemption by any and what length of time, and how may this right be preserved?
- What are terms attendant, and what in gross?
- In what cases will a term protect a purchaser from incumbrances?
- What are the requisites necessary to be observed to bar dower to the wife before marriage?
- Can a valid conveyance be made of real property to charitable uses, and how?
- What are voluntary settlements, and in what cases are they deemed fraudulent?
- What is the difference between an executory devise and a shifting use?
- What is a power of attorney, and how is it put an end to?
- What is meant by tacking a mortgage?
- Can a right of way be conveyed, and in what manner?
- Would the direction to sell an estate be discretionary or absolute, in order to constitute an equitable conversion of the freehold into personality?
- Is a freehold estate liable to the payment of simple contract debts in any and what cases, in what order of distribution?

### IV. EQUITY AND PRACTICE OF THE COURTS.

- What is the nature and effect of a writ of *Ne exeat Regno*, and from what Court, under

- what circumstances, and in what manner is it obtained?
- What is the nature and object of a bill of discovery?
- When a bill of discovery has been filed, praying discovery only and no relief, can any, and if any, what further step be taken by the plaintiff or defendant in the suit after the answer has been filed, and the time for excepting to it has expired?
- If a trustee having stock or other property vested in him become a lunatic, and a new trustee be appointed, how is a transfer of the stock, or a conveyance or assignment of other trust property from the lunatic to the new trustee to be made?
- What is the distinction between a legal and equitable debt?
- To what courts or tribunals do appeals lie against the decrees of the Master of the Rolls, the Vice-Chancellor, and the Lord Chancellor respectively?
- Does or not an appeal to a superior court necessarily stay the proceedings under the decree or order appealed from?
- Explain the nature and effect of a demurrer to a bill in equity.
- Explain the nature and effect of a plea to a bill.
- What is an equitable mortgage, and how is it made available by the mortgagee?
- When a second mortgagee files a bill of foreclosure, how is the first mortgagee to be dealt with?
- State a few of the ordinary cases in which courts of equity grant injunctions.
- If a party to a suit who is ordered by the Court to execute a deed obstinately refuse to do so, is there any, and if any, what mode of giving effect to the order without obtaining the signature of the party?
- What is the nature and effect of a bill of interpleader?
- What is the meaning of an examination of witnesses *de bene esse*?

### V. BANKRUPTCY AND PRACTICE OF THE COURTS.

- What persons, whose trades are not named in the statute, have been deemed by the Courts liable to the bankrupt laws?
- Are temporary or occasional dealings, and of what kind deemed sufficient to constitute a trading?
- State what acts of a trader are deemed acts of bankruptcy, and with what intention such acts must be done?
- How can a debtor be compelled to commit an act of bankruptcy, since the abolition of arrest on mesne process?
- State generally the proceedings necessary to be taken, and by whom, in order to obtain a fiat?

Is there any, and what, alteration recently made regarding the validity of transactions before the fiat, though after an act of bankruptcy?

If the assignees of a bankrupt do not elect to take a lease, to which the bankrupt is entitled, what proceeding can the lessor adopt?

Are there any and what provisions relating to ships transferred by a bankrupt, by way of security, before his bankruptcy?

Must any, and what notice, and when, be given of disputing the validity of the fiat, in an action or suit brought by the assignees?

What evidence must be adduced of the petitioning creditor's debt, trading, and act of bankruptcy, on the trial of an action by the assignees?

Will property held by the bankrupt in trust pass to the assignees?

In case a bankrupt should refuse to execute a conveyance what is the remedy?

What effect will the proof by a creditor have with respect to a bankrupt who is in prison at the suit of such creditor?

If the fiat be superseded, can any and what proceedings be taken in an action commenced against a bankrupt before the fiat?

What debts of the bankrupt are discharged on his obtaining his certificate?

#### VI. CRIMINAL LAW, AND PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

Can a person be apprehended for felony without a magistrate's warrant, and if so, under what circumstances, and by whom?

For what, if any, felonies can an accused person be admitted to bail, and by whom?

Is there any and what act for the apprehension of persons trespassing, and under what circumstances?

Under what circumstances may a constable break open an outer door in execution of a warrant?

What is essential to be proved to constitute the offence of burglary?

Can a person who has sworn to his belief of a fact, be under any and what circumstances indicted for perjury?

Where stolen property belonged to a company of many persons, is it necessary to name them all in the indictment, or what other mode, if any, may be adopted?

What acts constitute the offence of larceny?

What are the offences still punishable with death?

When and how do you proceed to obtain security for the good behaviour of a person?

In what manner is the real estate of a person affected who is convicted of felony?

Are accessories before and accessories after the fact punished differently, and if so, in what respects?

Are there any and what instances of compulsion or necessity which afford an excuse for committing an offence?

What is the jurisdiction of the Central Criminal Court, both as to the nature of the offences, and the counties to which it extends?

Is there any and what appeal in criminal cases?

#### CIRCUMSTANTIAL EVIDENCE.

##### CASE of CELIA TIPPINS, *tried and found GUILTY of MURDER of her child at the last Gloucester Assizes.*

At the last assizes for the county of Gloucester, Celia Tippins, the wife of John Tippins, a painter at Bristol, was indicted for the murder of her infant child. From the evidence it appeared that shortly after her marriage with Tippins, in September, 1838, they quarrelled, and she left her husband and went to reside at Hereford. During her residence in that city, it was alleged that she formed a connexion with one Thomas Lee, that she left him in May, 1839, and having returned to Bristol in October last, she was delivered of a son (the child she was charged with having murdered), who was registered by herself in the name of "Richard Lee, the child of Thomas Lee and Celia Tippins." Shortly after her confinement, her husband sent her back to Hereford to her mother, requesting that she would assist her in obtaining some support for the child from Lee, and expressing his willingness to receive and protect his wife, if she was not burdened with the support of the child. She reached Hereford with the child in a state of great distress and fatigue, and upon application to Lee he refused to give her any thing, and pushed her out of doors. She left Hereford, on her return to Bristol, with the child on the 1st of November, and on the 2nd reached Slimbridge, in the county of Gloucester, apparently much fatigued, the weather being very wet. She left Slimbridge the same afternoon with the child, and arrived at Newport without it at six in the evening. The body of the child was subsequently found in a watercourse, about twenty yards from the road, and on being apprehended at her husband's house at Bristol on the following Tuesday, the clothes which had been worn by the infant were found in her possession. It was shown that the road from Slimbridge to Newport would have brought her for some distance along the side of the Gloucester and Berkeley Canal, into which she could have thrown her infant if it had been her object to destroy it, and in a great degree escape detection. The jury having returned a verdict of guilty, Mr. Baron Gurney pronounced sentence of death on the prisoner.

Mr. Godson, the member for Kidderminster, who was of counsel for the prisoner, being dissatisfied with the evidence on which the conviction was chiefly founded, on the 13th of April addressed a letter to Lord Normanby, forwarding a petition in favour of the prisoner, requesting his Lordship's attention to the case, and urging the propriety of referring the medical evidence to the examination of some eminent surgeon, as it was at complete variance with all medical authority. On the same day Mr. Godson received an answer from Lord Normanby, stating that the prisoner would receive a pardon on condition of transportation for life. Mr. Godson, on the 16th of April, again addressed a letter to Lord Normanby, stating that he was not satisfied with the condition imposing transportation for life, and stating that the medical evidence upon which the conviction was chiefly founded was so erroneous that the prisoner was entitled to a pardon, or at least to the punishment of imprisonment. To his second application on behalf of the prisoner Mr. Godson received no answer till the 4th of May, when he was informed that the prisoner had been removed to the Lunatic Asylum for the county of Gloucester, it having been certified to Lord Normanby that she had become insane.

The trial and conviction took place on the 6th of April. From that day the unfortunate prisoner was kept in suspense until reason gave way, a period of eighteen days having elapsed from the date of Mr. Godson's letter.—*Times*.

### Imperial Parliament.

#### HOUSE OF LORDS.—May 11.

#### NEW BILL FOR THE BETTER ADMINISTRATION OF JUSTICE.

The LORD CHANCELLOR moved the second reading of this bill. His Lordship made a long statement for the purpose of showing that the Chancery Courts, as at present constituted, were insufficient to perform the immense increase of business which came under their cognizance, and proposed some alterations, of which the following were the leading points:—

That there should be two new judges in Chancery, to be called Vice-Chancellors, making altogether three Vice-Chancellors.

That there should be a new Master in Chancery.

That the Master of the Rolls should be permanently Vice-President of the Judicial Committee of the Privy Council.

That this committee should have power to call on the 15 judges for their opinions.

That the equity jurisdiction of the Court of Exchequer should be abolished.

### Late Reports.

#### VICE-CHANCELLOR'S COURT,

DEC. 20.

LENNOX v. LENNOX.

**LEGACY.**—*Construction of a bequest to a Woman surviving any Husband, and she dying unmarried.*

In this case Samuel Lennox, by his will, dated 4th April, 1835, gave to trustees £4,000. upon trust after his decease to invest the same in Government Securities, and to pay the dividends to his daughter, Ann Lennox, for her life, or to any person whom she should by writing appoint to receive the same, to the intent that the dividends might be enjoyed by his said daughter during her life for her sole and separate use, independently of any husband with whom she might intermarry, and so that she should have no power to anticipate the same; and after her decease, upon trust, or to the said trust-moneys as the testator's daughter should by deed or will appoint, and in default of appointment in trust for all her children; but in case there should be no child, who should attain the age of twenty-one years, or be married, then as to the said trust-moneys, if his said daughter *should survive any husband* with whom she might intermarry, in trust for his said daughter, her heirs, executors, administrators, and assigns, for her or their own absolute use and benefit; but if the husband of his said daughter should survive her, then in trust for such person or persons as his said daughter should, by her will, as if she were sole and unmarried, appoint; and in default of appointment, in trust for such person or persons who at the decease of his said daughter, would have become entitled thereto under the statute for the distribution of the effects of intestates, if the said Ann Lennox died possessed thereof intestate and without having married. The testator died on the 13th June, 1836. The trustees laid out the £4,000. according to the trusts of the will, and paid the dividends to Ann Lennox, until her death, in the month of March, 1839, intestate, and *without ever having been married*. The testator's widow claimed the £4,000. as administratrix of Ann Lennox; but the trustees refused to act, except under the direction of the Court; and the question was, whether by the death of Ann Lennox, intestate and unmarried, the £4,000. became undisposed of and fell into the residue of the testator's estate, or whether it went to her personal representatives.

Mr. K. Bruce, for the plaintiff, cited *Davis v. Norton*, (2 P. Wms. 309); *Doe v. Shippard*, (Douglas, 75); *Swayne v. Smith*, (1 Sim. & Stu. 56); and *Murray v. Jones*, (2 Ves. & Bea. 313), to show that a party cannot speculate upon what was intended to be done by a testator in case a general bequest should fail, without



having words which directly specify the intention, and contended that she has as much not survived as survived her husband.

Mr. Wigram, for the administratrix of Ann Lennox, said the cases which have been mentioned, but not particularly quoted on the other side, are those upon which I mean to rely; the first *Murray v. Jones*, in which the testatrix, stating her power to appoint by will under a settlement, left the interest of two-thirds of a certain sum of stock vested in trustees to E. M. for life, and, after her death, the capital to her children; and also of the other third in case of the death of persons to whom it was given. And after several other bequests, the testatrix provided, that "in case she herself should have but one child living at her death, or, in case she should have children, whether sons or daughters, who should all but one die in her lifetime, then that her trustee should stand possessed of her whole residuary personal estate, in trust for E. M. and her children, upon the same trusts as were declared of the previous gifts to the said E. M." The testatrix then died, having never had a child; and the question was, whether E. M. and her children could claim under the residuary clause. And it was held, that the testatrix, never having contemplated such an event as her own death without children, being a condition on which E. M. and her children were to take, the limitation of the residue took effect. Then *Jones v. Westcomb*, (Pr. in Ch. 316), where a testator devised a term of years to his wife for life, and after her death to the child she was then enceinte with; but if such child died before twenty-one, then he devised one-third part of the said term to his wife, whom he appointed executrix; the wife happened not to be enceinte at the time, and so the contingency upon which the devise to her was to take place never happened. It was held, first, that the devise to her was good, though the contingency never happened; secondly, that she should have the undisposed surplus of the personal estate, which should not go in a course of administration. In that case the residue was given upon supposition that a child would be born; here it is the same, on the supposition that the daughter would marry. In that case it was nothing to the testator whether the child was born or not; but the interests were to be protected of any child that might be born; so, here it was nothing to the testator whether his daughter married or not, but merely protection was to be given in case of marriage. The case of *Makinnon v. Sewell*, (5 Sim. 78, 2 M. & K. 202), there was a bequest of a residue to D. for life, with remainder to her daughter L. if she should survive her mother and attain twenty-one; but, if not, then to such other children of D. as should be living

at their mother's decease, and should attain twenty-one; then over to M. D. survived her daughter L., and her only other child attained twenty-one, but died in her life time; and it was held, that on the death of D., leaving no children, the bequest over to M. took effect. And in the case of *Prestwidge v. Groombridge* (6 Sim. 171), a testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews G. and C.; and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business. And the testatrix went on to say, "In the event of G. and C. both or either of them, being settled before this will comes in force, I provide that the next by (J. or H.) have the benefit, and so on." G. and C. survived the testatrix, but died under twenty-one; held, that J. and H. were entitled to the residue. *Aiton v. Brooks* (7 Sim. 294) is another authority in support of this bill. In *Meadows v. Parry* (1 V. & Bea. 124), there was a gift of a residue to R. P., in case all the children which the testator should happen to have should die before coming of age, at which period the shares previously given to them were made distributable, and in the testator's lifetime. The testator died without having ever had any children; and it was held, that his having children was not a condition precedent, and the gift of the residue took effect.

Mr. Knight Bruce replied. The case of *Davies v. Norton* he never heard questioned there A. seised in fee had a son B. and a son C., and devised his lands to his son B. in fee, and if his son B. should die without issue, and his wife should survive him, then to his wife to have the premises for life, remainder to C. in fee. B., the son, died without issue, but the testator's wife died before him. It was held that C. was not entitled to the remainder in fee, because the contingency was annexed to all the devises over; there the mention of the wife was merely for the purpose of introducing her estate. Thus in the case of *Doe v. Shippen* (Douglas, 74), under a devise of land to trustees to pay £20 of the rents and profits to the testator's daughter, and the rest to her husband, and the whole rents and profits to the husband after the daughter's death; and in case the daughter should survive her husband, then (the land) to the use of the daughter for life, and after her death to the use of her son in tail, then to the heirs of the body of the husband by the daughter, then to the heirs of her body, then to the heirs of the husband; the daughter dying before her husband, the limitations over could not take effect, the contingency not being satisfied in her life estate; but affecting all the other limitations.

tions, and operating as a condition precedent. And, in the case of *Swayne v. Smith*, (1 Sim. & St. 55), the same doctrine was recognised by Sir John Leach, who says, "It is not very easy to find a satisfactory reason why the testatrix should have intended that the three legatees of the three sums of stock should take if the sister died without child or husband, having been married, which would be the effect of this will; and that the same legatees should not take if the sister died without child or husband, not having been married."

The VICE-CHANCELLOR—The question is, whether it can be collected on the face of the will, that it was the intention of the testator that the legacies should pass, other than by reason of the fact of marriage. I think that the simplest of all the cases is *Jones v. Westcomb*; and all the others in effect are founded on it: there, the limitation was to the child the testator's wife was *eniente* with; but, if such child died before twenty-one, then he devised one-third over. The fact was, she was not *eniente*. The question was, whether she was entitled to the one-third. There was nothing to prevent the wife's taking, except the fact of a child being alive to take it from her. It is immaterial in effect whether he said, if no child should live to attain twenty-one, or whether he said, if a child die before attaining twenty-one, that the ultimate limitation is to take effect. When an ultimate limitation is to take effect on the failure of the preceding gift, and the language which describes the preceding gift happens to be not in terms applicable, then the meaning is clear that the gift over should take effect; but it cannot be overlooked that marriage was the event which he contemplated. Plainly, the circumstance of its passing away from the bulk of his property is made to depend on the fact of his daughter there-after marrying: it might have been different if the daughter had been married. If the testator had meant that his daughter should take in the event simply of her being unmarried, he might have said, in trust for my daughter Ann Lennox only; and then he might have gone on to say, "but if the husband of my daughter shall survive her," then over. But, instead of doing that, I am of opinion that, for the purpose of marking the general intention not to let the corpus go away, except on marriage, he says, if the said daughter should survive any husband with whom she might intermarry, then in trust for his daughter. I think here that the testator did not intend, on the face of the will, that the legacy should pass away from his estate, unless in the event of the daughter's marrying. So the testator has described the very event, on the happening of which it was to go over: and it must go, under these circumstances, to the residuary legatees.

# ROLLS' COURT.—May 6.

WILLIAMS v. NIXON AND OTHERS.

EXECUTORS—their liabilities for the acts of each other.

Rees Williams, by his will dated July, 1824, devised to the defendants, John Trinder Nixon and Alexander William Mills, after certain legacies all the residue of his personal and all his real property upon trust to pay testator's wife £200. a year, his three sisters £10. each per annum, an annuity to his son George Rees Williams, and to pay certain other annuities, and then he directed Nixon and Mills to invest the residue of his rents and dividends upon Government or real securities, so as to accumulate until his son George Rees should attain 45, and then to pay the whole of the annual produce to his son for life, and after his death to his son's widow. The testator died in 1826, leaving Nixon and Mills, his executors, surviving, who proved his will. George Rees Williams, the son, died, and appointed his wife sole guardian to his children, the plaintiffs. By the decree, which was made on the 30th of January, 1836, there was a reference to the Master to take an account of the personal estate of Rees Williams, come to the hands of Nixon and Mills. The Master, by his report, dated August 1, 1838, certified that £13,364. had come to the hands of Alexander William Mills, and that he had disbursed £7,029. leaving a sum of £6,113. due from him. A part of this sum Alexander W. Mills had, by his answer, admitted to be in his hands on account of his personal estate, but had failed to pay the same into court, pursuant to an order which had been made by the court on the 14th of November, 1833. A small dividend, however, had been received from his estate; but there still remained due from him a sum of £5,489. 7s. 6d. But although Mr. Mills was in June, 1826, in debt to the testator's estate, yet still his co-trustee, J. T. Nixon, had joined with him in the sale of the sum of £567. 16s. 5d. Three per Cent. Reduced Bank Annuities, which had produced a sum of £480.

Mr. *Pemberton* contended that under these circumstances, Mr. Nixon must be considered as having been guilty of a breach of trust, and consequently liable to make good the sums for which his co-executor was a defaulter. Mr. Nixon, by proving the will, had accepted the trust, notwithstanding which he had allowed Mr. Mills to take and retain the dividends to as large an amount, though he ought to have seen that they were invested as directed by the testator's will.

Lord LANGDALE said, the question was, whether the defendant Nixon was to be charged with monies of the testator which were to be received

by his co-executor, Mr. Mills. If an executor knew that the funds received by his co-executors were not applied according to the will, he would in respect of that negligence be charged with the amount. The testator here having invested these persons with the character of executors, had intrusted them, and each had a separate right of receiving the testator's property. There was money in the funds and other property. He directed several annuities to be paid, and was possessed of a leasehold estate. Both executors proved the will, and each became entitled to receive the profits. Mills received the dividends. If Nixon knew his co-executor was misapplying the property, he became liable himself, because he was a witness of, and an acquiescing party in, the application. He must have known that there was stock, and that the dividends were received by Mills, but he might have reason to believe they were applied in satisfaction of the annuities. The action had proceeded on the ground that Nixon, in point of fact, knew all he might have known. He must have known the contents of the will, and the value of the property, of which he had to make a statement, but it did not appear that he knew what Mills had done, and he did not think that the Court had ever gone to the extent now sought.

#### COURT OF QUEEN'S BENCH.—May 6.

*Sittings in Banco.*

COOK v. FRENCH.

##### BILL OF EXCHANGE—NOTICE TO THE DRAWER.

In this case an action had been brought by the holder of a bill of exchange against the drawer, and which had been dishonoured by the acceptor, Mr. Duterran. When the bill was dishonoured, the following note was sent by the holder to the defendant:—"I beg to inform you that Mr. Duterran's acceptance for £200., drawn and endorsed by you, and due July 1, has been presented for payment and returned, and now remains unpaid. Yours, &c." On the trial the jury gave a verdict for the plaintiff, and a new trial had been moved for on the ground that this notice was insufficient, inasmuch as it did not give the defendant notice of the nature and extent of his liability.

The Court was of opinion that the notice was sufficient.—Rule refused. (a)

#### COURT OF COMMON PLEAS—MAY 13.

MISSINGER v. SOUTHEY.

##### PROMISSORY NOTE.—What is sufficient notice of dishonour?

In this case the plaintiff, the holder of the defendant's promissory note which had been dis-

honoured, wrote him as follows:—"This is to inform you that the bill I took of you for £15. 2s. 6d. is not took up, and 4s. 6d. expences and the money I must pay immediately." Proceedings took place, and at the trial the plaintiff had a verdict for the amount of the note.

A rule nisi was afterwards had to show cause why the verdict should not be set aside and entered for the defendant, on the ground of the want of sufficiency of the notice of dishonour.

Cause was shewn this day, and TINDAL, C.J., in giving the judgment of the Court, said that the rule laid down by the *House of Lords* in *Solarte v. Palmer* (1), the Court was bound by, and that the notice in this case was *not sufficient* within that rule. According to the natural construction of the letter it seemed rather to point to presentment of the note to some third person not liable in this action. The words "and 4s. 6d. expence," could not be held to convey any positive intimation of that having been incurred for noting the bill.

*Rule made absolute.*

(1) 1 Bing. N. C. 194; 1 Scott 2. Clarke and Fin. (*Dom. Proc.*) 98. In that case, which was an action by the holders against the indorsers of a bill of exchange for £683. drawn the 25th of April, 1825, by Joseph Keats, on, and accepted by, Daniel, Jones, and Co., payable at Williams, Burgess, and Co.'s, eight months after date.

Payment having been refused by the acceptors when the bill became due, the attorneys of the holders wrote to the indorsers as follows:—"A bill for £683., drawn by Mr. Joseph Keats, upon Messrs. Daniel, Jones, and Co., and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to gentlemen, your obedient servants."

At the trial of the cause, before Lord TENTERDEN, the only question was, whether this letter amounted to notice of the dishonour of the bill, without which notice the indorser would not be responsible. Upon that point Lord TENTERDEN felt himself bound, at *nisi prius*, by the decision in *Hartley v. Case*, (4 Barn. and Cres. 339). Where it was held that a notice of the dis-

(a) See *Missinger v. Southey*, post.

honour of a bill of exchange must contain an intimation that payment of the bill had been refused by the acceptor, and therefore, that a letter merely containing a demand of payment was not a sufficient notice. However, observing that the sum was large, and the question of importance, he suggested that the defendant might tender a bill of exceptions, as the readiest mode of obtaining the opinion of the highest tribunal.

A bill of exceptions was tendered and sealed accordingly, and argued in the Court of Exchequer Chamber, when that Court unanimously confirmed the authority of *Hartley v. Case*, and held, that a letter demanding payment and threatening proceedings at law, did not amount to notice of the dishonour of a bill. (See 7 Bing. 530.)

From this decision an appeal was made to the House of Lords, and the Judges being summoned to hear the argument,

PARK, J. declared the unanimous opinion of the Judges present, (*Williams, B., Boland, B., Alderson, B., Patteson, J., Taunton, J., Littledale, J., Vaughan, J., Gaselee, J., Park, J.*) that the letter of the plaintiff's attornies did not amount to notice of the dishonour of the bill, as such a notice ought, in express terms, or by necessary implication, to convey full information that the bill had been dishonoured.

LORD BROUGHAM, C., said the Judgment of the Court below must be affirmed, with costs not exceeding £350., on the ground, that after the decision of *Hartley v. Case*, and the sanction given to the authority of that decision by the unanimous judgment of the Court of Exchequer Chamber, and the 5th edition of *Bayley on Bills*, the present case was too clear for an appeal, and affirmed the Judgment. S. C. 1 Bing. N. C., 195.—From these cases a notice of dishonour must express the fact of the bill having been presented and dishonoured, a mere demand of payment is not sufficient. See also 6 Dow. and R. 505; and 6 & 7 W. 4.

c. 58. It will not be sufficient to say "it has been returned unpaid."—See also *Cook v. French*, ante. EDITOR.

#### COURT OF EXCHEQUER.—April 30.

##### Sittings in Banco.

MORTIMER V. WRIGHT.

PARENT AND CHILD.—*Liability of a Father for Debt incurred by his Child, a Minor, for Board and Lodging.*

Mr. F. V. Lee showed cause against a rule for a non-suit, or for a new trial, which had been granted in this case. The action was one in which the plaintiff sought to recover a sum of money from the defendant, as the father of a young man, aged twenty, who had incurred a small debt for board and lodging during his illness in the house of the plaintiff. These facts being proved at the trial, the plaintiff put in and relied on the defendant's letter in answer to the application for the debt, which was in the following terms:—"I am sorry to hear Joseph is so ill. You have written home for money, but I cannot advance any at this time, being harvest. But Joseph will be of age soon, when he will be able to pay you what he owes you, being entitled to some money." This, it was contended by the plaintiff's counsel at the trial, was not any evidence to bind the defendant to pay this claim, but the learned BARON ROLFE, by whom the cause was tried, refused to nonsuit, and leaving the case to the jury, a verdict was given for the plaintiff. The present rule having been obtained, it was now urged in support of the verdict on the first point, that the letter in question contained evidence of an admission of liability on the part of the defendant sufficient to go to the jury to warrant them in inferring that there was an implied contract between the parties. A father was not indeed bound by law to pay the debt of a son, but very little evidence was necessary to fix him with such a liability, and the jury were quite justified in construing this letter into an admission of the father's liability. The authorities, moreover, were in favour of this position, and would be seen by reference to the cases of *Blackburne v. Mackie*, 1 C. and P.; *Nicholls v. Allen*, 3 C. and P., 36; and *Low v. Wilkin*, 6 Ad. and El., 718 (1) in which latter case a father had been held liable for clothes supplied to his son while at school, while there was no proof whatever that he ever saw them in use.

The COURT, without calling upon Mr. Knowles to support his rule, made it absolute for entering a nonsuit. There was no evidence whatever to go to the jury of any contract on the part of the defendant to pay the plaintiff's claim. The

was no doubt a moral obligation on the part of the father to support his child, but no legal one more binding on him than on any other relation, the only difference being, that the proximity of his connexion would lead juries more readily to infer, from circumstances, a promise to do so, or admission of liability. Beyond this letter there was, however, no circumstances whatever, and the case must, therefore, be decided, as all others, upon the construction which that letter ought to bear. Looking at its terms, then, they did not appear to the Court to contain any passage which admitted any contract or liability to pay anything for the son. The whole case went to show that the son had been in the habit of supporting himself, and the father, on being applied to in his son's illness, rather to assist him as an act of kindness than as an obligation, declined to advance anything, adding that his son would soon be in a situation to pay what he owed to the plaintiff. Throughout this there was no passage to fix any liability on a contract express or implied upon the defendant, and the case was wholly without foundation. The case of *Low v. Wilkin*, moreover, on which such stress had been laid by the plaintiff's counsel, as reported, was not one to which the Court could bring themselves to assent, as it went quite to remove the foundations of the law.

Rule absolute for a nonsuit.

(1) That case was an action of assumpsit for clothes sold and delivered. The plaintiff, a tailor, proved that the clothes were furnished to defendant's son, a boy at school, without the father's permission, and worn; the boy, when sent to the school, seemed in want of clothes; that when he went home for the holidays, he took the clothes in question with him, but was not wearing them; and he returned to school with them. The defendant lived at a short distance from the school. It did not appear that he had given any direction, or made any provision for supplying his son with clothes, nor was there any direct proof that the father had ever seen them. The judge (PARKE, B.) being of opinion that there was no evidence to go to the jury, directed a nonsuit, and *Blackburn v. Mackey* (1 Car. and Payne, 1) was cited. A rule *Nisi* for a new trial was granted, upon the ground that there was

the contract between the father and the tradesman, in such a case, might be *express* or *implied*, and that it ought to have gone to the jury whether there was not an *implied* authority from the defendant for the supply of the clothes, for which *Baker v. Keen* (2 Stark, N. P.C.5 01.) was cited.

After showing cause, Lord DENMAN, C.J., said, a father is properly liable for any necessary provision made for his infant son. In this instance the father was living at a short distance from the place where the goods were supplied; there was no evidence that he had authorized the master of the school, or any other person, to provide the boy with clothes, or that he had in any way furnished a supply for that purpose. If he wished to relieve himself from liability, I do not see why he should not have proved that he took such steps to provide for his son as rendered this supply unnecessary. If, indeed, the order had been given under circumstances which, of themselves, showed an impropriety in giving it, the case would have been different. I think it was for the jury to say, upon the facts, whether or not there was an implied authority from the father that these clothes should be furnished.

PARTISON, J., said, there was some evidence, though not a strong case. The son went home with the clothes, and we are not to suppose that while at home he shut them up in a box. The rest of the court concurred, and the rule was made absolute and set aside the nonsuit.—EDITOR.

#### KENNEY v. HUTCHINSON.

JUDGE'S ORDER upon a SUMMONS—PRACTICE as to the time of Service so as to prevent Judgment.

In this case the plaintiff having demurred to the defendant's plea, a summons was taken out for time to join in demurrer; and Gurney, Esq. made an order for two days' time, with the consent of the attorneys for plaintiff and defendant. This order was made at half-past four in the afternoon of the 22nd of January, and taken up

by five. It was not served, however, until between two and three o'clock on the following day, on the morning of which at half-past eleven, the plaintiff signed judgment.

A rule *Nisi* having been obtained for setting aside this judgment, after showing cause,

PARKE, B., said, the attorney, it is true, may have been present at the making of the order, but how can he know from that whether the opposite party will elect to draw up the order and serve it or not? The real question is, what is a reasonable time to allow him to make that election? When the parties live within any reasonable distance of each other, there is ample time from five in the afternoon until nine at night to serve an order of this description. But at all events it ought to be served before the opening of the office next morning, or rather in strictness, before the time when the clerk of the opposite attorney would have to leave his office for the purpose of being present at the opening of it at eleven. Then as to the affidavit of merits, it is insufficient, for a man might with a safe conscience, interpret the word "defence" to signify merely a denial. The defendant had better amend, on the terms of pleading instantly and issuably, and taking short notice of trial.

The rest of the court concurred.

Leave to amend on terms.

#### Sittings in Banco.

May 6.

WYSE v. WAKEFIELD.

**COVENANT.—LIFE POLICY.—CONSTRUCTION of Covenant to appear at Insurance Office and to perform all the Conditions of the Insurance, and not to do any act that should avoid the Policy.—DEMURRER.**

The defendant had entered into a covenant with the plaintiff to appear at any insurance-office then established, within London or the bills of mortality, for the purpose of having an insurance effected on his life, and to answer the usual questions touching the state of his health and as to his age; and, further, that he would afterwards do any act whereby such insurance might be avoided or prejudiced, and that he would well and faithfully perform all the conditions of the insurance. In pursuance of this covenant, it appeared the defendant attended at the Rock Insurance Company's office, and answered the necessary questions as to health, age, &c. The plaintiff subsequently effected an insurance on the life of the defendant at the office above-mentioned. One of the conditions of the insurance was, that the defendant should not go out of Europe. The defendant, however, did so beyond the limits prescribed, and, conse-

quently the several premiums, of £81 per annum, paid by the plaintiff in respect of the policy, were forfeited, and the insurance became void. The plaintiff, therefore, brought his action for a breach of covenant. The defendant demurred to the declaration, on the ground that he had received no notice of the particular condition of insurance which he had violated. The question was, whether the plaintiff was bound to have given notice, or whether the defendant, in fulfilment of his covenant, was not bound to ascertain the conditions of the insurance.

Mr. *Cowling* contended, that the plaintiff need not have given notice to the defendant, when the latter had covenanted to perform all the conditions of any insurance which the plaintiff should effect on his life within the bills of mortality; that no such insurance could be effected without the defendant's knowledge; and that, as his residence was limited within certain bounds, the defendant ought to have ascertained, by inquiry, what the conditions upon which his life had been insured were.

PARKE, B. said, that if the covenant applied to any insurance to be effected in the Rock Insurance Office, it was clear that the plaintiff was not bound to give notice. On the other hand, if the covenant applied to "any insurance office," without specifying any one in particular, then it was equally clear that the defendant ought to have received notice of the conditions.

LORD ABINGER said he thought that the defendant was entitled to judgment on two grounds. In the first place, he was of opinion that if it were unnecessary on the part of the plaintiff to furnish notice with regard to the conditions of any insurance effected within the bills of mortality, it should be held to be equally unnecessary if the specified limit were all England. The plaintiff had reserved to himself the option of choosing the time to make the insurance, and when there was so extensive an option possessed by the plaintiff, he thought the defendant entitled to the notice. Besides the covenant was not merely to observe the usual conditions of an insurance, but to perform any conditions which might be made. There might have been a condition that the defendant should abstain from a particular kind of food, or from a particular practice, and of such conditions the defendant would certainly be entitled to notice.

PARKE, B. concurred with his Lordship, and said he thought that the correct interpretation of the covenant was, that the defendant had undertaken to perform any condition of a policy of insurance of which he should receive notice.

The rest of the Court concurred.

Judgment for the defendant.

## Sittings of the Courts.

## QUEEN'S BENCH.

SITTINGS AFTER EASTER TERM, 1840.

Middlesex.

Over.

London.

Monday, May 18th. (Adjournment day.)

Tuesday, May 19th.

Wednesday, May 20th.

## COURT OF COMMON PLEAS.

Sittings appointed after Easter Term.

Middlesex.

Saturday, 16.

London.

Monday, May 18; Tuesday, 19; and Wednesday, 20.

Common Juries only will be taken these sittings.

## EXCHEQUER OF PLEAS.

Sittings at *Nisi Prius* in Middlesex and London, before the Right Hon. James Lord Abinger, Chief Baron of her Majesty's Court of Exchequer, after Easter Term, 1840.

Middlesex.

Saturday, May 16. } Common Juries.

Monday, May 18. }

London.

Tuesday, May 19.—Adjournment Day, Common Juries.

Wednesday, May 20.—Common Juries.

The court will sit at half-past nine.

## QUEEN'S BENCH.

Easter Term, 1840.

1st May, 1840.

This Court will, on the 14th instant, hold sittings, and will proceed in disposing of the business in the Special Paper on that day. A list of the cases to be heard will be immediately exhibited on the outside of the Court of Queen's Bench, and of the Chief Justice's Chambers.

BY THE COURT.

## NOTICE TO CORRESPONDENTS.

GUILIELMUS.—We do not reject your meritorious answer to Prob. 25, Vol. III. We have taken some pains with the examination of your answer, and that by E. A. (which is of some length,) and we think *both* deserving of attention. We therefore intend next week to notice your answer to the first of the seven classes into which E. A. has divided this extensive subject. Be-

tween you the Problem will be solved so as to be advantageous to yourselves and really useful to all.

E. A.—We have admitted into our library the last edition of Archbold by Chitty (Ed. 7). Your letter upon Problem XXV. Vol. III. shall have attention next week.

C. B.—See our note to the Letter by E. A. *ante*.—We can give you no satisfactory answer as to the publishing a Digest of our Reports. We have not as yet had sufficient encouragement to encounter the labour and expense.

A SUBSCRIBER—*Watford*.—Your request does not come within our rules; we cannot however refuse a request so modestly made *for once*. We are not aware that the decision in *Luffkin v. Nunn* has been disturbed. You may refer to *Denn v. Cartwright*, 4 East. 29. *Doe v. Luffkin*, id. 221. The decision in *Luffkin v. Nunn* demands great attention; the purchaser had voluntarily placed himself in a situation in which it was his interest to refuse his consent, *without which the Lease could not be sustained*.

## NOTICE TO SUBSCRIBERS.

We are so pressed as to be compelled to delay the publication of the Index to Vol. III. till next Saturday, when it shall appear.

## ERRATUM.

Ante p. 23, Rolls' Court—*Viner v. Vaughan* as Another—title—for "Tenant for Life without impeachment of waste," read—*impeachable* for waste.

LAW.—LAIDMAN'S ORIGINAL AGENCY CHARGES OFFICE, 123, Chancery Lane (opposite the Common Pleas' Offices).

L. LAIDMAN, during many years practical experience as a Managing Clerk, having felt the inconvenience to the Profession for want of a Collector of Country Solicitors' and Under-Sheriffs' Charges, communicated his idea thereon to many of the largest firms (agency or otherwise), and begs to state that the above Office is established with the approval of the Profession generally, as evidenced by the fact of Solicitors, Under-Sheriffs, and their Agents, daily placing accounts in L. L.'s office for collection. References will be given to firms of the first respectability, as also to several Members of the Bar. The terms will be 5 per cent. for sums collected exceeding £5.; 7½ per cent. if 40s. and under £5.; 10 per cent. if under 40s.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookbinder, 104, Fleet Street, in the Parish of St. Dunstons-in-the-West, in the City of London.—Saturday, May 16, 1840.

# The Legal Guide.

VOL. IV.]

SATURDAY, MAY 23, 1840.

[No. 4.

Price Sixpence.

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## ESSAY III.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 35.)

WE will now proceed to the second class  
of Lord Holt's bailments, viz.—*Com-  
odatum* or lending *gratis*. The responsi-  
bility of the bailee in this class is more strictly  
forced, the loan being to the advantage of  
the bailee and not as in the first class for that  
of the bailor, and he will be made responsi-  
ble for *slight negligence*.

There are four obligations imposed upon  
the borrower, and these are the result of the  
civil and the common law. (a)

1. To take proper care of the thing bor-  
rowed;

(a) Domat. B. 1, tit. 5. s. 2. n. 1.

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2. To use it according to the intention of  
the lender;

3. To restore it at the proper time;

4. To restore it in proper condition.

The right of using the thing bailed is strictly  
confined to the use of the thing, and the con-  
ditions upon which that use was granted.

(b) If therefore A lends his horse to B to  
ride to York, B must not ride to New-  
castle, if he does, and any accident should  
occur to the horse, however inevitable, he  
will be held responsible (c). So if A lends  
B her jewels to wear, this will not authorize  
B to lend them to C. to wear. But if a man  
lends his horses and carriage for a month to  
a friend for his use, there a use by any of his  
family, or for family purposes, may be fairly  
presumed; though not a use for the mere

(b) *Bringloe v. Morris*, 1 Mod. 210, 3 Salk. 271.

(c) See Jones on Bailments 63, 68, 69, Cro. Jac. 244,  
2 Ld. Raym. 909, 916, 2 Bulstr. 306.

E



benefit of strangers. In *Bringloe v. Morrice*, an action of trespass was brought for immoderately riding the plaintiff's horse. The defendant pleaded that the horse was lent to him by the plaintiff, and license given to him to ride him, and that by virtue of the license the defendant and his servants, alternately had ridden the animal. The plaintiff demurred; and the Court on the demurrer, held, that the license was annexed to the person of the defendant, and could not be communicated to another; for this riding was matter of pleasure. And NORTH, C. J. took a difference, where a certain time is limited for the loan of a horse, and where not. In the first case, the borrower has an interest in the horse during that time; and in that case his servant may ride, but in the other case not. A difference was also taken between hiring a horse to go to York, and borrowing a horse. In the first place, the party may allow his servant to ride, in the second, not.

It is somewhat remarkable that *Blackstone* and *Lord Holt*, should have considered that the same degree of responsibility attached to a bailee for hire, and to a borrower—the contracts are wholly unlike. *Blackstone* says, “Hiring and borrowing are also contracts by which a qualified property may be transferred to the hirer or borrower; in which there is only this difference, that hiring is always for a price, or stipend, or additional recompence; borrowing is merely gratuitous. But, the law in both cases is the same.” (d) Mr. *Christian*, in his note to this passage, observes, “the learned Commentator has here followed *Lord Holt*, who has treated a *commodatum* and a *locatio*, without distinction,” (e) but this seems to be properly corrected by Sir *William Jones*, (f) who concludes, that the hirer of a thing is answerable only for ordinary neglect; but that a gratuitous borrower is responsible even for slight negligence, (g) and that the borrower's incapacity to exert more than or-

dinary diligence, will not even on the ground of impossibility, furnish a sufficient excuse for slight neglect; as the borrower ought to have considered his own capacity, before he deluded his friend by engaging in the undertaking. (h) *Pothier* says the borrower ought to exert all possible care, such as the most careful persons apply to their own affairs; and that he is liable not only for a slight fault but for the slightest fault, de levissima culpa. (i) The *Pandects* say, “Exactissimam diligentiam custodiendæ rei prestare compellitur, nec sufficit ei, eandem diligentiam adhibere, quam suis rebus adhibet, si alias diligentior custodire poterit.” (k) The care “such as the most careful persons apply to their own,” admits into the doctrine a qualification. Where the lender, for instance, is aware that the borrower is incapacitated from taking such care. As if a spirited horse is lent to a raw or rash youth, or to a weak and inefficient person, who is known to be such, the lender must content himself with such diligence as may be fairly expected to use; and he has no right to insist upon the diligence or prudence of a very thoughtful and experienced rider. (l)

So that the term *slight neglect* must be construed to depend upon the particular circumstances of every case. The rule of civil law that ordinary theft constitutes an excuse, because it can scarcely arise without some default or negligence of the borrower, may be relaxed where the borrower is not at fault; as if A borrows a silver ewer of B, and afterwards delivers it to a person of extraordinary fidelity and vigilance, to be returned to B; if it should be stolen from that person by thieves, without any neglect on his part, A would be excused, so if a robbery should be committed by open force or burglary. (m)

(h) Id. 65. (i) Prêt à Usage, c. 2 s. 2. art. 2. n. 4.  
(k) Dig. lib. 44. tit. 7. l. 1. n. 4.

(l) Jones Bailm. 65. Pothier Prêt à Usage, c. 2. art. 2. n. 49.

(m) Pothier, Prêt à Usage, c. 2, s. 2, art. 2, n. 49. Jones, Bailm. 69.

(d) 2 Com. 453.

(f) Bailm. 85.

(e) ante. Vol. iii. p. 401.

(g) Id. 120.

So again in cases of extraordinary casualties, against which human prudence cannot by extraordinary diligence guard against, as by fire, the fall of ruins, shipwreck, pirates, enemies, mobs, sudden inundation, sudden sickness, and even the frauds of strangers, against which the borrower could not guard himself, but there must be no default on the part of the borrower. Sir Wm. Jones says, if the house of Caius be in flames, and he, being able to secure one thing only, saves an urn of his own in preference to the silver ewer, which he had borrowed of Titius, he shall make the lender a compensation for the loss; especially if the ewer is the more valuable, and would consequently have been preferred, had he been owner of them both. Even if his urn is the more precious, he must either leave it and bring away the borrowed vessel, or pay Titius the value of that which he has lost; unless the alarm was so sudden and the fire was so violent that no deliberation or selection could be justly expected, and Caius had time only to snatch the first utensil that presented itself.

This is the doctrine of *Pothier*, who argues that the borrower is obliged to use the most exact diligence in respect to the thing borrowed, and he bestows less than his engagement imports, when he uses less, than he applies to his own property even when he applies it to a case, where there is an impossibility of saving the borrowed property as well as his own.—So the *Pandects*—*Si in medio vel ruina aliquid contigit, vel aliquod munus fatale, non tenebitur, nisi forte, cum posset res commodatus salvam facere, non protulit* (o).

Bacon, in writing upon this subject says, lending gratis to use for his advantage, here the borrower is strictly bound to keep it, for if he be guilty of the least neglect he shall be answerable, as if I lend a horse to go to the north of England, and he goes to

the west, and the horse is stolen, he shall in that case be chargeable, for if he had gone as I directed, the horse, perhaps, would not have been stolen. This sort of bailment is mentioned in *Bracton*, 99; but in this case, if this horse had been in the stable of the bailee, and stolen thence without his default, as perhaps the thieves might first have bound the bailee, and then have taken the horse, he shall not be answerable. *Bracton* says he ought to take the utmost care, but in no place says he shall be charged where no default was in him. Such is also the *French Law* (p).

(To be continued.)

#### PROBLEM IV. VOL. IV.

##### CONTRACTS.

##### VENDOR AND PURCHASER.

In what cases will equity permit the contracting parties to make time the essence of a contract.

TO THE EDITOR OF THE LEGAL GUIDE.

#### ANSWER TO PROBLEM 25. VOL. 3. By GUILLIELMUS. (1.)

BILL IN CHANCERY.—On what subjects may relief be obtained by a bill in Chancery?

In endeavouring to answer this problem, I shall avail myself of Mr. Maddock's classification of the subjects falling under the equitable jurisdiction of the Court of Chancery. It is as follows:—1. Accident and Mistake; 2. Account; 3. Fraud; 4. Infants; 5. Specific performance of Agreements; 6. Trusts. In each of these cases relief may be obtained by filing a bill, but in some of them it is not the only, though most commonly adopted, means of gaining the assistance of the court.

1. *Accident and Mistake*.—The most usual case of accident, as here applied, is where a deed or instrument on which a title depends is accidentally lost or burnt or has been cancelled by mistake. Cases of mistake, in which relief may be obtained by bill in Chancery, are very numerous. It is not only in instances of palpable mistake on the face of contracts in writing, or where there has been obvious misunderstanding, that Courts of Equity will interfere, but, by abating the ri-

(n) Bailm. 60, 70.

(o) Dig. Lib. 13, tit. 6, l. 5, s. 4.

(p) Code Art. 1928. See also Grotius, B. 2, c. 12, s. 13.

(1) See Ante, pp. 35, 48.

gour of the old maxim, "*ignorantia juris non excusat*," they have even relieved parties from the effects of a contract founded on a misapprehension of law. Lord Thurlow once said, that money paid on a mistaken notion of law might be set right at any length of line. (See *Lansdowne v. Lansdowne*, Mos. 364; *Jones v. Morgan*, 1 Bro. C.C. 219.) The following will serve to illustrate the general nature of cases relievable in equity on the ground of mistake:—Where a deed of feoffment is not accompanied by livery of seisin, it is invalid by the common law but equity will supply the defect. Where an agreement has been entered into for a *valuable consideration* equity will relieve against a mistake in the execution of it. (*Goring v. Nash*, 3 Atk. 188.) Defects in the execution of powers, and in the surrender of copyholds, have also long been relieved against. But the court has been most frequently called upon to afford its aid in cases of settlements executed subsequent to marriage purporting to be made in execution of articles entered into before marriage. Thus where the words of the articles would create an estate tail, and so give the parents a power to defeat the intention of the settler by barring the issue, equity will decree a strict settlement, on the ground of mistake, and so frame the instrument that the main objects, namely, the issue of the marriage, shall not be defeated of the provision intended by the articles of settlement. (*Fearne Cont. Rem.* 112.) "Where a term for raising portions was placed *after* an estate tail, but should have been *before*, the court has rectified the mistake. So a settlement has been reformed according to the intention as declared in the *recital*. A settlement has been reformed in favour of the younger children against the heir of the mother claiming a reversion, upon a letter from her written long after the settlement, stating what her intention was. (1 Madd. Cha. P. 66, and cases there referred to.) One of the most recent cases, in which the court has interfered to alter a settlement, when not prepared according to the intention of the parties, is that of *Keymer v. Perring*, to which, as it is reported in the *Legal Guide*, (vol. 3, p. 377,) I refer your readers without more particularly mentioning it. "In regard to mistake by arbitrators, it has been holden, that if an arbitrator in his award make a plain mistake, either in the law, or in fact; as where an arbitrator miscalculates, or when the judgment is right but the premises are wrong, a bill in Equity may be filed against the party in whose favour the award is made, to set aside the award; provided the submission to the award has not been made a rule of court," in which case other proceedings must be taken. (See 1 Madd, 79.) Equity will also lend its aid to rectify a mistake in a will, (*Williams v. Williams*, 2

Bro. C.C. 87), but, it is said, *it must be apparent on the face of the will*. (*Whitfield v. Clement*, 1 Meriv. 402.) And, it is well known, parol evidence will not be admitted to point out the true meaning of the testator, where the expressions made use of in the will, however contrary to the testator's intention, are clear and explicit.

## ANSWER TO THE SAME PROBLEM,

BY E. A.

(Continued from Page 36.)

Actuated by the encouraging hint thrown out in your last I proceed with my answer to the problem, and having previously disposed of "accidents," will now consider,

2. *Accounts*.—If we trace the origin of the jurisdiction exercised by courts of equity in cases falling under this head, we shall find (3 Bla. Com. 163) that the remedy usually resorted to, to compel a man to bring in and settle his accounts, was an action of account at common law. But it being found by experience that the most ready and effectual way to settle these matters of account, was by bill in a court of equity, where a discovery might be had on the defendant's oath, without relying merely on the evidence which the plaintiff might be able to produce; these actions fell into disuse, and though when an account is once stated, nothing is more common, than an action upon the implied *assumpsit* to pay the balance, yet, I think I may venture to assert that courts of equity exercise an almost universal jurisdiction in matters of account, and I think the change before described, may be considered as resulting principally from the different modes of proof adopted in the respective courts. And to give an idea of what these different modes of proof are, it may not be altogether useless to introduce a passage cited by Mr. Western, in his excellent work on the Constitution and Laws of this country, in which we find that "a defendant in a court of equity has the protection arising from his own *conscience*, in a degree in which the law does not affect to give him protection. If he positively, plainly, and precisely, denies the assertion, and *one witness*, only, proves it *positively, plainly, and precisely*, as it is denied, and there is no circumstance attaching credit to the assertion over-balancing the credit due to the denial as a positive denial, a court of equity will not act upon the testimony of that witness. Not so at law, there the defendant is not heard, *one witness proves the case*, and however strong the defendant may be inclined to deny it, upon oath, there must be a recovery against him." (See Western's Commentaries, 2 Ed. 169.) Thus we see that when facts, or their leading circumstances rest only in the knowledge of the party, a court

of equity applies itself to his *conscience*, and purges him upon oath with regard to the truth of the transaction, and that being once discovered the judgment is in most cases the same in equity as it would have been at law. And it is owing to a want of a similar method of discovery at law that the courts of equity have acquired a concurrent jurisdiction with every other court in matters of account; as incident to accounts they take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. (See 3 Bla. Com. 437.)

As no action can be maintained at law for a legacy (*Deekes v. Strutt*, 5 T. R. 690.) or for a distributive share under an intestacy, (*Jones v. Tanner*, 7 B. and C. 545.) courts of law have no concurrent jurisdiction with courts of equity over these subjects.

A Bill in Chancery is the usual mode by which relief is obtained by partners against each other, by principals against their factors and agents, by mortgagors against mortgagees, who have been in possession, and *vice versa*. An account once taken cannot be re-opened, except for frauds shown, or where good reasons for suspecting it can be adduced. (1 Madd. 102.) Where liberty has been given to surcharge and falsify, the *onus probandi* lies on the party applying for such liberty. (Gray's Ch. Pract. 117.)

To use the words of Blackstone, it would be needless to point out all the several avenues in human affairs, and in this commercial age which lead to or end in accounts. (3 Com. 437.)

3. *Frauds*.—The class of cases which may be ranged under this head, will, I fear, be found more numerous than under any of the others which I have adopted, indeed, it may be said, but this is perhaps the most fertile source of equity jurisdiction. Equity will not only give relief where fraud has actually been committed, it will even interfere to prevent fraud. For its purpose it will not allow of the sale of a trust estate to the trustee, (*Lister v. Lister*, 6 Ves. 32.) nor of a lunatic's to a committee, (*Wright v. Proud*, 13 Ves. 136.) nor of a testator to an executor, (*Burden v. Burden*, 1 Ves. and B. 10.) conceiving that persons so situated must necessarily acquire a knowledge and influence over the confidence reposed in them which they may unduly turn to their own advantage, and to the injury of those for whom they were trusted. Upon this principle it is, that gifts and sales from clients to their attorneys and solicitors, and generally speaking, of all transactions of a pecuniary nature between persons so situated, are regarded by courts of equity with a jealous eye, and will here be set aside on grounds which would not affect similar transactions between other persons.

In many cases of actual imposition, if the fraud can be clearly established, courts of law will give relief. But it has been well observed, Lord Coke, by the same passage of 4 Inst. 84. in which he desires to confine the jurisdiction of courts of equity to such "frauds, covins, and deceits, for which there is no remedy by the ordinary course of law," admits that all frauds are not relievable at law. (See Fonb. Eq. 1. 66.)

The Court of Chancery has an undoubted jurisdiction to relieve against every species of fraud, (*Colt v. Wollaston*, 1 P. W. 156; *Stent v. Baylis*, ib. 219). The variety of forms which fraud may assume sets classification entirely at defiance, and as new devices of fraud are invented they must be met by new correctives, taking care of course not to clash with former resolutions, (*Webb v. Rorke*, 2 Sch. and Lef. 646; *Suwyer v. Vernon*, 1 Ver. 387,) and to this end courts of equity have with prospective sagacity always avoided imprudently hampering themselves by defining what shall be held to constitute fraud.

Voluntary conveyances are set aside by courts of equity in every instance as against subsequent purchasers. They are also void against creditors whose claims existed prior to the conveyance. They are not, however, void against creditors having claims at the time, if made before and in consideration of marriage, or even in pursuance of a parol agreement before marriage, (*Dundas v. Dutens*, 1 Ves. 195). For marriage is regarded by the Court as a valuable consideration even when no portion is given to the wife, and therefore places her on as good a footing as the creditors.

For what shall be deemed voluntary conveyances, vide Sugden. Vend. and Pur.

Wills are in some measure an exception to the general rule that equity has jurisdiction in all cases of fraud; for if relating to personals it can only be set aside in the Ecclesiastical Court, and if it relate to real estate all a court of equity can do in the first instance is to direct an issue *devisavit vel non* to a court of common law. (*Pemberton v. Pemberton*, 13 Ves. 297; *Bennett v. Wade*, 2 Atk. 324; *Jones v. Jones*, 2 Mer. 171; *Jones v. Frost*, Jac. 467).

Underhand agreements which comprise the partial compromise of a debtor with some or one of his creditors unknown to the rest, marriage brokerage bonds, and the sale of a man's interest to procure another an office or employment under the crown are all relieved against in equity as being fraudulent in their nature or opposed to public policy.

If any one person obtains an undue advantage at the expence of another, and owes his success to any artifice, trick, or deceit, such artifice, trick, or deceit, will be relieved against in equity,

it being there deemed a fraud; and what is of the greatest importance is that no length of time can be pleaded as a bar to relief under such circumstances. "The next question is, whether delay will *purge* a fraud? Never while I sit here," said Lord Northington, in *Alden v. Gregory*, (2 Eden, 285,) "every delay arising from fraud only aggravates its injustice and multiplies the oppression." But it must be borne in mind that fraud alone must be the occasion of the delay; for if it be partly owing to distressed circumstances, or any other cause than sheer fraud, length of time will bar. A decree obtained by fraud will be set aside, and equity will relieve against a verdict so obtained.

But the most useful jurisdiction of courts of equity is perhaps the powers they possess of restraining by injunction a party from doing that which in justice and good faith he ought not to do; this is a very usual mode of obtaining relief in Chancery and comes under the present head, as being grounded on the jurisdiction of the court to interfere in the prevention of fraud.

An injunction is a prohibitory writ directed to the defendant, and must be prayed for in the bill which sets forth the plaintiff's right to the relief prayed. (See 1 Ves. and B. 314.) I shall not enter into the subject of injunctions more

fully here, but refer such of your readers as are desirous of obtaining further information on a subject of so great importance, to the *Legal Guide*, vol. 3, p. 115, where it will be found that the subject is amply treated of.

On the same ground of fraud courts of equity will allow a purchaser of an estate to hold it against a person who has the right thereto, if such person permitted or encouraged the purchaser to buy it of another, although such person having the right might be covert or under age. (See *Hobbs v. Norton*, 2 C. C. 128; *Savage v. Foster*, 9 Mod. 39; and *Watts v. Cresswell*, 9 Vin. 415; 4 Bro. C. C. 507, n.) Fraud is in equity an exception to every rule. In the case of *Lord Irnham v. Child*, Lord Thurlow stated that if an agreement had been varied by fraud, parol evidence would be admissible to supply the defect, (1 Bro. C. C. 92.) Under this head I shall also include the case of *Foxes v. Joyce*, (Prec. in Ch. 7, S. C. 2 Vern. 129,) in which it was settled that if a landlord has induced the owners of cattle to leave them for a night on lands occupied by his tenant, and the cattle are distrained by the landlord after having been *levant and couchant*, even if the distress could be supported at law relief might be had in equity.

#### ARTICLED CLERKS WHO PASSED THEIR EXAMINATION AT THE HALL OF THE LAW SOCIETY, EASTER TERM, 1840.

<i>Names.</i>	<i>Name and Residence of Attorney, to whom articled and assigned.</i>
Adamson, William	John Adamson, Newcastle-upon-Tyne; John Trotter Brockett, Newcastle-upon Tyne.
Angell, Thomas John	John Phillips Beavan, 30, Sackville-street, Piccadilly.
Astley, Henry Edward	Thomas Macauley Crutwell, Bath.
Bailey, Elijah Crosier	James Winter, Norwich.
Baines, John George Fuller	Frederick Hayward, Needham Market.
Baker, Richard Dod	John Cooper Beckett, of Brooklands.
Ball, Edwin	Robert Gillam, Worcester.
Barwick, John Marshall	Matthew Bloome, Leeds.
Bateson, William Gandy	Thomas Carson, Liverpool.
Berry, Edward	Samuel Stone, Leicester.
Bloxham, John Richard	John Stubbs, Birmingham, Warwickshire.
Boodle, James	William Huberte Gyde, Cheltenham.
Bristow, Alfred Rhodes	Robert Christopher Parker, 2, Thornton-row, Greenwich.
Brodrick, George	William Brodrick, Bow Church Yard.
Browne, Charles	Henry Philipps, 4, Size-lane.
Browne, Robert	Abraham, Flint, Uttoxeter, county Stafford; assigned to John Michael Blagg, Cheadle.
Bush, John Alderton	John Bush, Bradford, county Wilts.
Chandler, Arthur	William Henry Calhoun, Arundel; assigned to George Balchin, Arundel.
Chater, William	Thomas Chater, Newcastle-upon-Tyne.
Childe, Harry Joseph	Joseph Shipton, Warwick; assigned to William Edmund Buck, Warwick.
'lins, George Browne	Thurston Collins, St. Columb.

<i>Name</i>	<i>Name and Residence of Attorney, to whom articled or assigned.</i>
Coles, Robert	Alfred Phillips and James Wason, Bristol; assigned to John Whittington, Bristol.
Cooper, Henry Roberts	George Cooper, East Durham, Norfolk.
Cross, Seth	Edward Newman, Barnsley.
Cullen, William Henry	Stephen Plummer, Canterbury.
Davies, Henry Touchet	Thomas Macauley, Cruttwell, Bath.
Devey, Frederick William	Frederick Nicholls Devey, 34, Ely-place.
Dickenson, Daniel	Robert Francis Yarker, Ulverston, county Lancaster.
Douglas, Charles	John Cutts, Witham.
Dowman, William, the younger	William Dowman, the elder, Sudbury.
Empson, Henry	William Charles Empson, Leamington Priors.
Fall, John	Bernard Maynard Lucas, Chesterfield; Henry Ingledew, Newcastle-upon-Tyne.
Fewkes, Paul	Joseph Parkes, 21, Great George-street, Westminster.
Field, William	Henry Downe Barton, Exeter.
Ford, Henry	Archibald Law, Portsea.
Gant, John Castle	Anthony Brown, Mincing-lane.
Gay, William	Phillip Wilson, King's Lynn.
Gurney, John	William Paul, the younger, Truro.
Haigh, John L.	Edward Parker, Selby.
Hamley, Edmund Gilbert	Edward Pearce, Bodmin; Henry Coode, 8, Guilford-street, Russel-square.
Harding, Henry	Thomas Harding, Newcastle-under-Lyme, Stafford; assigned to John Plant Harding, Burslem, co. Stafford.
Harrison, George	George Harrison the elder, Bishop Wearmouth; assigned to Joseph John Wright, Sunderland near the sea.
Haxby, Joseph Barber	Twisleton Haxby, Wakefield, county York.
Heald, Richard Henry	George Rawson the younger, Leeds.
Hill, Granville Diggle	Thomas Macauley Cruttwell, Bath.
Hitchcock, William	Charles Hyde, Ely-place.
Holland, Thos. Moore Woollams	Thomas Bird, Upton-upon-Severn; assigned to Thomas Loftus, New-inn.
Holmes, Edward Carleton	William Holmes, Brookfield, near Arundel; assigned to Edward Bach Hillier, 38, Cumming-street, Pentonville.
Homes, William, the younger	William Homes, Poole-end, near Ledbury; assigned to Thomas Jones, Ledbury.
Honnywill, William Henry	John Nicholetts, of South Petherton, county Somerset; assigned to Henry Seymour Westmacott, 1, Gray's-inn-sq.
Hostage, John	John Finchett Maddock, Chester.
Ingram, James	George Abraham Crawley, 20, Whitehall-place, Westminster.
Jackson, William	William Dobinson, Carlisle.
Jessop, Francis Johnson	Thomas Fowke Andrew Burnaby, Newark-upon-Trent; assigned to William Edward Tallents, Newark-upon-Trent; and assigned to Godfrey Tallents, Newark-upon-Trent.
Johns, Henry Tremenhure	Henry William Johns, Blandford, county Dorset.
Justice, Thomas Francis	James Beaumont, 28, Golden-square; assigned to John Pike, 28, Golden-square; and again assigned to James Beaumont, 19, Lincoln's-inn-fields.
Jutsum, Edward Milener	David Jennings, 71, Whitechapel-road.
Kersteman, William	Michael Broadmead, Langport, Eastover.
Kingdon, Thomas	Edward Harley, the younger, Bristol; assigned to Alfred Lester, Sidmouth; re-assigned to Edw. Harley, of Bristol.
Kingdon, William	Nathaniel Overbury, 44, Friday-street; assigned to Edward Thomas Whitaker, 5, Gray's-inn-square.
Kingson, George Edwin	Charles Carter, the younger, Bideford.
Lamb, Charles	John Barber and Thomas Pasfield Davidson, Furnival's-inn.
Maples, Frederick	Thomas Frederick Maples, 6, Frederick's-place, Old Jewry.
Martall, Charles	George Pritchard, 28, New Bridge-street, Blackfriars.
Melland, William	John Cutts, Chesterfield.

<i>Name.</i>	<i>Name and Residence of Attorney, to whom articled or assigned.</i>
Merriman, Frederick Ward	Thomas Baverstock Merriman, Marlborough, Wilts; assigned to Thomas Ward Blagg, St. Albans, Herts; and assigned to Samuel Benjamin Merriman, 25, Austin-friars.
Messiter, Malim	George Messiter, Frome; assigned to Edward Francis Fennell, 32, Bedford-row.
Meymott, William Joseph	John Gilbert Meymott, 86, Blackfriars Road,
Moultrie, Charles	John Allan Powell, 9, New Square, Lincoln's Inn.
Neville, Charles James	John Bridges, Red Lion Square.
Norris, Anthony	Horatio Nelson Fisher, 12, London-street, Fenchurch-street.
Ord, Charles Ovington	Henry Clarke, Guisborough
Perry, Henry	Wilson Perry, Whitehaven.
Pilleau, William	Beriah Drew, 185, Bermondsey-street; assigned to George Drew, 185, Bermondsey-street.
Pope, Charles Lee	John Monckton, Maidstone.
Pott, Joseph Compton	William Woodgate, 3, New Square, Lincoln's Inn.
Powell, John	John Bird, Birmingham; assigned to William Dunn Wheeler, Birmingham.
Rendall, Alfred	Benjamin Bodenham, Kington, county Hereford.
Roberts, Richard	William Palmer the elder, Birmingham.
Rogers, Francis	Edward Hearle Rodd, Penzance.
Robinson, Francis	George Stone, 36, Jermyn-street, St. James's.
Saunders, William	William Lawrence Bicknell, 57, Lincoln's Inn Fields.
Sedgley, Charles	William Hodgson, Carlisle; T. Briggs, Esq., 55, Lincoln's Inn Fields; and assigned to Thomas Houghton Hodgson, Carlisle.
Scudamore, Frederick	Robert Furley, Ashford; assigned to Charles Scudamore, Maidstone.
Sears, Henry	Thomas Walker, Dartford; Carey Bonham Hopkins, Dartford; and assigned to John Hayward, of Dartford.
Shackleton, John	William Hargreaves, Leeds.
Shephard, Mark	Edward Shearm, Stratton.
Simcox, Alexander	Clement Ingleby, Birmingham.
Simpson, George Septimus	Thomas Atkinson, Peterborough; assigned to Evan Morris, Temple.
Smith, Thomas	Richard Edgar Smith, 3, New Boswell Court, Lincoln's Inn.
Steavenson, John	George Waugh Stable, Newcastle-upon-Tyne.
Sumpter, William Richard	Charles Pestell Harris, Cambridge; assigned to Frederick Barlow, Cambridge.
Thompson, Thomas	Henry Ling, 34, Bloomsbury Square.
Thorp, Frederick William	George Game Day, St. Ives.
Tryon, Henry Curling	John Mercer, the younger, Ramsgate.
Turner, John Gillgrass	William Stewart, Horbury, near Wakefield.
Vrignon, Gabriel	Joseph Mountford, Exeter; assigned to George William Finch, 57, Lincoln's Inn Fields.
Walker, James	Thomas Baker Bass, Dover; assigned to Edward Knocker, Dover; and assigned to Joseph Noakes Mourilyan, 2, Verulam Buildings, Gray's Inn.
Watson, Richard Thomas Rundle	George Ogle, 4, Great Winchester-street.
Wilkinson, Robert Thomas	Robert Aiskell Davison, Bishop Wearmouth.
Williams, William John	Frederick Cooper, Brighton.
Winckworth, Lawrence Henry	Henry Atkinson Wildes, Maidstone.
Woods, Arthur William	Henry Woods, Godalming, Surrey; assigned to William Drummond, Croydon.
Wybergh, John	Richard Rushton Preston, Liverpool.
Wright, Newenham Charles	Alexander Milburn, Lincoln's Inn Fields; assigned to James Boxer, 61, Moorgate-street.

108 Gentlemen were candidates for the examination; three were sent back.

#### EXAMINERS.

Sir A. D. Croft, Bart., Mr. Amory, Mr. Clayton, Mr. Harrison, Mr. Metcalfe,—Attornies!

## POSTAGE LABELS,

*Under the Protection of the Statute, 3 and 4 W. 4, c. 97.*

It may prove an awkward thing to give or lend a penny label to a neighbour, as it subjects the party to be seized forthwith and lodged in gaol. By the 2nd and 3d Vic., c. 52, sec. 8, the rates denoted by the labels or covers are to be deemed stamp duties, and the paper impressed with postage stamps is subjected to all the regulations, pains, penalties, and clauses contained in the acts relating to stamp duties. The labels are, therefore, under the protection of the statute 3 and 4 William IV., c. 97, by the 12th clause of which, if any person shall hawk or carry about for sale any stamped paper, "or shall utter or offer for sale or exchange, at any house, shop, or place, other than the house or shop in which he shall reside, or *bona fide* carry on his trade or business, any stamped paper," he shall forfeit 20*l.*, and any man may apprehend him. He may be further fined 20*l.* for selling stamps without a license, and the informer may have all the penalty, at the option of the commissioners of stamps. By the same act, if any person shall fraudulently get out of, or discharge from any stamped paper any matter or thing thereon written, printed, or expressed, he shall be adjudged guilty of felony, and be liable to be transported for life. The same punishment may be awarded to any person who shall "knowingly use, or have possession of," any stamped paper, from which any matter or thing shall have been fraudulently erased, cut, scraped, discharged, or gotten.

## Law Reports.

COURT OF CHANCERY.—Nov. 6.

GARNER'S Bankruptcy.—*Ex parte* HOLMES.  
*Special Case.*

APPEAL FROM THE COURT OF REVIEW.

**SURETY.**—*Accepting Bills for the accommodation of the Bankrupt, who deposited them with his Banker for his floating balance.—The Banker proved the debt, and recovered a dividend.—The Surety afterwards paid the Bills.—Whether the Surety is entitled to recover the dividend from the Bankers, and to stand in their place for future dividends.*

In this case, Joseph Garner was declared a bankrupt. Previous to the bankruptcy, the petitioner, George Holmes, for the accommodation of the bankrupt, accepted bills of exchange, amounting to £523 15*s.* 6*d.*, drawn by, or made payable to the bankrupt, or order, two months after date. These bills were endorsed by the

bankrupt, and deposited by him before his bankruptcy with his bankers, Messrs. Goodall, & Co., as securities for any floating balance due, or which might become due, in respect of advances made by them from time to time to and for the bankrupt. They had no notice that the bills were accommodation bills, and they proved under the fiat the £7,526. 14*s.* 11*d.* as owing to them upon the balance of accounts, and at the time of making such proof they exhibited the bills accepted by the petitioner. A dividend of 2*s.* in the pound was declared, and was paid to the bankers, with the knowledge of Mr. Holmes. He afterwards paid the full amount of the bills to the bankers, and previous to the last payment made by him he apprised them that he claimed to be entitled to stand in their situation to the amount of the bills under the fiat, and to receive all future dividends on their amount, and he also required them to pay him the dividend of 2*s.* in the pound, received by them on the bills. This they refused to do, and claimed to retain, there being still a large balance due to them. They did not prove these bills specifically as a debt under the said fiat, but exhibited them under the fiat amongst other securities they held their balance. In March 1839, a meeting for a further dividend was held, and Mr. Holmes attended, and claimed to prove for the £523. 15*s.* 6*d.*, the amount of the bills, but the commissioners refused to allow the proof. In April, 1839, he presented a petition to the Court of Review, praying that Court to declare him entitled, as between him and the bankers, to the benefit of, and to stand in their place in respect of, the proof made by them under the fiat, to the extent of the sum of £523. 15*s.* 6*d.*, and to the benefit of the past and future dividends on such proof to such amount as last mentioned, and that they might be ordered to refund to the petitioner the amount of the dividend of 2*s.* to the extent of £523. 15*s.* 6*d.*; or that, if necessary, the assignees under the fiat might be ordered to pay the amount of such past dividends on such last-mentioned amount to the petitioner out of any subsequent dividends which might be payable to the said bankers on the balance of their proof after deducting the amount of the petitioner's acceptances, and that the assignees might be ordered also to pay to the petitioner all future dividends on the debt proved by the bankers to the extent of the amount of petitioner's said acceptances; or that, if necessary, the petitioner might be declared entitled to go in and prove under the fiat for the amount of the acceptances, and receive dividends thereon equally with the other creditors, not disturbing the prior dividend; and that in the last mentioned case, the proof of the debt by the bankers might be reduced accordingly, or be ordered to stand only as a proof for the amount



proved, less the amount of the petitioner's acceptances. The Court of Review ordered it to be dismissed with costs as against the bankers, but ordered that the petitioner was entitled in their place to receive out of the estate of the bankrupt, all future dividends in respect of the sum of £523. 15s. 6d.: and that the costs of the petitioner and of the assignees should be paid out of the bankrupt's estate. This order was now appealed from. The petitioner feeling aggrieved by that order, so far as it deprived him of the past dividend, appealed to the Lord Chancellor.

Mr. Rogers, for the appellant, cited the 52d section of the Bankrupt Act, (a) a surety "if he shall have paid the debt, or any part thereof, in discharge of the whole debt," is declared, "if the creditor shall have proved his debt under the commission, entitled to stand in the place of the creditor who has proved as to the dividends and all other rights under the commission, which the creditor possessed, or would be entitled to in respect of the proof, &c." and contended that the appellant's case was completely within that enactment, and it was supported by *Ex parte Brimskill*, (b) *Bardwell v. Lydall*, (c)

Mr. Swann, for the bankers, the respondents, said, these bills were held for their full value, and were available securities to the bankers as long as any thing was due to them from the bankrupt. They were deposited not to secure £523. 15s. 6d., but what balance was due from the bankrupt. There was a balance of £7,526. 19s. 11d. due, and the bankers were entitled to the dividends on that sum, besides the full amount of these bills. *Ex parte Samman*, (d) The case of *Bardwell v. Lydall*, had no application here, as the surety in that case was for a particular debt, but the appellant was surety for any balance against the bankrupt.

Mr. Steere, for the assignees, submitted to any order the Court might make.

Mr. Swanston, for the appellant, in reply, insisted that the dividend received by the bankers was spread over every pound of the £7,526, including the amount of these bills. The case of *Ex parte Brimskill* was decisive that they must refund the dividend to the extent of the amount of these bills.

The LORD CHANCELLOR.—The order of the Court of Review in this case assumes, that if the surety had paid the amount of the bills before any dividend was declared, he would be entitled to all the dividends by the 6th section of the bankrupt act, the surety is declared to be entitled to be in the place of the creditor, who has proved his debt to the extent of the sum for which he was surety, and which he

has paid. Why should not the petitioner be entitled to the dividend of 2s.? The order appealed from admitted him to be entitled to the future dividends. On what principle is he entitled to the future dividends, that does not also entitle him to the past dividends, he having discharged the whole debt for which he was surety? It was argued that the creditor has a right to appropriate payments to such of his demands as he thinks proper. That principle has no application in this case. The dividend of 2s. was applicable to every pound of the proved debt, including the amount of these bills, and if the bankers were to be allowed to retain the dividend of 2s. in addition to the payment made in full for these bills by the petitioner, they would have received 22s. in the pound for this part of their debt; which would be contrary to reason, and to the cases *Bardwell v. Lydall*, *Ex parte Rushworth*, (e) *Paley v. Field*, (f) *Martin v. Bricknell*, (g) *Ex parte Brimskill*. If the first division of 2s. is to be applied to the £523, the amount of these bills, as it clearly is, then the right of the petitioner to that dividend is not to be questioned. That part, therefore, of the order of the Court of Review, dismissing the petition with costs as against the bankers must be reversed. If there should be any difficulty in making the order on the bankers to refund, let the matter be mentioned again. In that case I would stop this sum out of the future dividends payable to the bankers, in residue of their debt.

#### COURT OF QUEEN'S BENCH.

Sittings in Banco.

Jan. 21.

REGINA v. PRICE.

BIRTHS, MARRIAGES, AND DEATHS REGISTRATION ACT, 6 & 7 W. IV. c. 86.—*Whether an indictment is sustainable in point of law for a violation of this act, and whether the REGISTRAR can demand the information.*

This was an indictment against the defendant for refusing to give the particulars of the birth of a child, pursuant to the statute 6 & 7 W. IV. c. 86, sec. 20, by which it is enacted: "That the father or mother of every child born in England after the first day of March, 1837, or in case of the death, illness, absence, or inability, of the father or mother, the occupier of the house or tenement in which such child shall have been born, shall within forty-two days after the day of every such birth, give information upon being requested so to do, to the

(a) 8 G. IV. c. 16.

(b) 4 Dea. & Chitty, 443.

(c) 7 Bingh. 489.

(d) 1 Dea. & C. 564.

(e) 10 Ves. 409.

(f) 12 Ves. 435.

(g) 2 M. & Selw. 39.

istrar, according to the best of his or her knowledge and belief, of the several particulars hereby required to be known and registered, concerning the birth of such child." The indictment stated that the defendant was the father of a child which had been born in St. Peter's district, Birmingham. That Geo. Pinner was the registrar of that district. That in pursuance of an act he applied to the defendant and requested he furnished with information respecting the date of the birth, the sex of the child, the names of the parents, and the business or profession of the father. That the defendant had no lawful excuse for not giving the required information, intending to prevent the due execution of the law and the carrying into effect of the statute, he contemptuously and unlawfully wholly refused to give to the said Geo. Pinner the information so demanded of him. The indictment was found at the sessions, and the defendant pleaded not guilty. The indictment was afterwards removed to this Court by *certiorari*, on a verdict of guilty was submitted to, submitted to the opinion of this Court on a case. Two questions were originally intended to be raised, namely, one relating to the evidence necessary to show that Pinner was the registrar of the district, and as such entitled to demand the information; and secondly, whether an indictment for this offence was sustainable in point of law. The latter was the only question argued and decided. The argument occurred in Michaelmas term, 1839.

The *Attorney General*, in support of the indictment, said, the question whether this is an indictable offence seems to depend on two considerations. First, whether the statute requires information to be given, or leaves it optional to the parents to give or refuse the information; and secondly, whether if the information required to be given, the withholding of it amounts to an indictable offence under the statute. The act was passed for a public purpose: the information may be withheld at the will or pleasure it may be withheld by the negligence of the parents. Then the object of the act may be defeated, either by the wilful folly or the carelessness of anybody. The legislature never could have intended such to be the case. If the act required the information to be given, is the refusal to give it a matter which may be made the subject of an indictment? It is. It is a principle of law, that where a public act directs something to be done for a public purpose, but does not provide any special penalty for the not doing of it, the party guilty of the disobedience to the act is punishable at common law by indictment. The law has thrown a duty upon him which he must discharge.

Sir F. Pollock contended that it was not an

indictable offence. The act did not intend to compel all parties to register the births of their children, but only to give those who might be desirous of having the benefit of a complete register the opportunity to avail themselves of the means thus afforded by the legislature. The matter was left optional with the parties. It is a matter of notoriety that in passing through the legislature the compulsory clauses were struck out on an objection raised to them by the most venerable church authority in the land, and it is therefore a matter of history that the legislature intended only to pass an act offering a perfect means of registry, but not compelling persons to adopt it.

Lord DENMAN said, this was an indictment preferred against the defendant for not having given, in the manner provided by section 20 of the 6 & 7 W. IV. cap. 86, the information required by that statute, the Registration Act, to the registrar of the district concerning the birth of a child. Though in the course of the argument there did not appear to be in the minds of any of those who argued the case, any doubt that it was the general intention of the legislature to obtain this information, yet it was contended that the provisions of the statute were such as to leave it to the parties to give such information or not at their pleasure. But upon considering the provisions of the statute we cannot adopt that argument, and we think that the words of the 20th section are too strong to be got over. They declare that "the father or mother of every child born in England, or in case of the inability of the father or mother, the occupier of the house, &c., shall within forty-two days next after the day of the birth give information on being requested so to do, of the particulars required to be registered." It is the duty of the registrar to require such information, and if he neglect the duties imposed upon him by the act, he will be liable to an indictment for neglect of such duties, the performance of which is not otherwise provided for in the statute. Now it is impossible for him to perform all the duties of his office if this information is withheld. The section gives direct and positive injunctions that the information shall be afforded. Here it is withheld, and looking at the general object of the law we cannot avoid holding that these injunctions must be obeyed in this, which is a matter of great public concern. The question here is, whether the defendant has been brought within the provisions of the statute so as to be liable for the wilful though innocent refusal of obedience to its provisions. We think that he has been, and that the verdict must be entered for the crown.

The *Attorney General* said, the only object was to assert the law, and that he did not press for more than merely a nominal punishment.

## COURT OF EXCHEQUER.

Sittings at Nisi Prius.

May 14.

CARN v. BRYCE AND ANOTHER.

SEPARATE USE.—*Personal Property settled upon a Woman, before her Marriage, to her separate use.*

This was a feigned action, in the nature of an issue directed by the Court above, under the Interpleader Act, to try whether any, and what portion of certain wearing apparel, seized by the plaintiff under an execution, was the property of a person named Morgan, who was the plaintiff's debtor.

It appeared that a widow lady named Hall, possessing considerable property, which chiefly consisted of an annuity of £500 per annum, under the will of her former husband, Mr. Hall, married, in April, 1826, a Mr. Richard Morgan. Previous to the marriage, a deed of settlement was executed, by which, with the consent of her intended husband, all the household furniture and effects then belonging to Mrs. Hall, together with the annuity of £500, were assigned to the defendants as trustees, upon trust for the *sole and separate use* of Mrs. Hall during coverture, without being subject in any manner to the control, debts, or engagements of her intended husband. Mr. Morgan became indebted to the plaintiff, Carn (a butcher), for meat, who brought an action to recover the amount. In that action, judgment was suffered to go by default; and an execution was issued against the goods belonging to Mrs. Morgan, which was in the house at Haverstock-hill, where she resided. The defendants in this case, as trustees in Mrs. Morgan's marriage settlement, served a notice on the Sheriff, claiming the goods seized as the sole and separate property of Mrs. Morgan; upon which the Sheriff applied to this Court for an interpleader rule, when the the present issue was directed. A judge's order was obtained, directing the plaintiff to make a seizure *de novo*, in order that the defendant might know what goods he intended to rely on as having seized. In pursuance of that order, the plaintiff's broker accompanied the attorney of the former, who attended at Mrs. Morgan's residence, at Haverstock-hill, and, under the direction of the attorney, seized several articles of wearing apparel belonging to Mrs. Morgan and her children by her former husband. These goods were not, however, taken away, as the seizure was made merely in order to try the question at issue, the defendants having paid into court the amount claimed by the plaintiff for debt and costs.

Mr. Erle, having briefly stated the plaintiff's case, contented himself with proving the seizure,

and did not adduce any evidence to prove that the articles were the property of Mr. Morgan.

Mr. Platt for the defendants, stated the grounds of defence on which he intended to rely. First, the deed of settlement, which settled the furniture and other household effects, and also the annuity, on Mrs. Morgan; secondly, that the greater part of the articles seized by the plaintiff's broker had been purchased long before the marriage with Mr. Morgan, and for such as had been purchased since then, Mrs. Morgan had herself paid for out of her own monies; and, thirdly, that, if the goods were not the property of Mrs. Morgan, they became vested in the assignees of her husband's estate and effects, under his commission of bankruptcy. He contended that, in order to entitle the plaintiff to the verdict of the jury, he ought to have proved to the satisfaction of the jury, the affirmative of the issue—viz., that the articles in question were the property of Mr. Morgan at the time of the seizure.

The evidence proved that the greater part of the wearing apparel seized, had belonged to Mr. Morgan many years before her marriage to her present husband, and that those purchased since then, had been paid for by herself.

Mr. Platt, then proposed to prove a fiat and proceedings in bankruptcy against Mr. Morgan, and also a previous composition, in order to show that as 15s in the pound had not been paid under the latter, and all subsequently-acquired property would vest, by the operation of the law in such cases, in the assignees appointed under any subsequent commission of bankruptcy.

Mr. Moody, for the defendant, objected to the reception of this evidence, on the ground that, in cases like the present, when the question of property was between two parties only, a third party was not allowed to come in and set up a claim.

Lord ABINGER said he was clearly of opinion that he ought not to receive the evidence. If the assignees had made a claim in the first instance, they would, no doubt, have been made parties to this suit; and if they had been served with the interpleader rule; but had not taken any notice of it, it was a fair inference that they considered they had no claim to the property.

Mr. Moody was about to reply, when

Lord ABINGER said, that, as the matter had now resolved itself into a question of law upon which he would have to direct the jury, it was, he thought, unnecessary that the learned gentleman should trouble himself. His lordship then told the jury that the question for their decision upon this issue was, whether any and what portion of the articles of wearing apparel seized, was the property of Mr. Morgan. Now, as to the goods purchased before the marriage with Mr. Morgan, the jury must, with respect to those goods, find their verdict for the defendant. But, as to such

les as had been proved to have been purchased the use of Mrs. Morgan, since her second marriage, the verdict must be for the plaintiff. It was a married woman may have the use of a chattel settled upon her, but she cannot convert chattel into another. The trustees in this case a property in the annuity settled on Mrs. Morgan, but they had no property in the chattels shared with that annuity, because they belonged to the husband. As to the clothes belonging to the children, it was clear that the husband had no property in them, even if he had shared them himself since the marriage, for, as were not his children, but the children of his by a former marriage (there being no issue by his second marriage), such articles, if they had been so purchased by him, which, however, was not proved to have been the case, must be considered in the nature of gifts. His lordship enumerated the articles which it had been proved in evidence were purchased since the marriage of Mr. and Mrs. Morgan.

The jury found in accordance with his lordship's direction—viz., for the plaintiff as to the clothes purchased for the use of Mrs. Morgan since the marriage, and for the defendants as to the others.

Mr. Platt obtained leave to move the court on the point respecting the evidence in *truptey*.

#### Sittings in Banco.

LEWIS v. GOMPERTZ.

COURT OF EXCHANGE.—*What is sufficient notice of dishonour to an indorser.*

Mr. Kelly, on behalf of the defendant, moved for a rule to show cause why the verdict for the plaintiff should not be set aside and a nonsuit entered. This was an action against the indorser of a bill of exchange for £250, and was tried before Mr. Baron Gurney, when the plaintiff obtained a verdict. The motion was made on the ground that the notice of dishonour was insufficient at law. The following was the notice given to the defendant:—

"6, Barnard-street, Russell-square.

The bill for £250, drawn by J. Trendall, bearing your indorsement, has been presented for payment to the acceptor thereof and has been dishonoured, and now lies over due and unpaid with me as above, of which I hereby give you notice."

Mr. Kelly relied upon *Solarte v. Palmer*, and *Strange v. Price*, (2 Per. and D. 278.)

MR. JUSTICE ARKLE, B.—We may collect from this notice that it is necessary to make a good notice of dishonour, viz. first, that the bill was presented

when due; secondly, that it was dishonoured; and, thirdly, an intimation to the party to whom the notice is addressed, that he is the person to be held liable for the payment of it. No mercantile man, and it is among such principally that notices of this kind are in use, who read this document, could fail to come to the conclusion that those three requisites were complied with. First, the bill itself is correctly described; on that subject there can be no question, for we cannot suppose the existence of another bill drawn and accepted by the same parties respectively, and for the same amount; and if there be but one bill, the defendant must know at what time it would fall due. Now it turns out, that in the present case the bill would fall due on the 22nd December, the day before this notice was given, so that this notice that it was duly presented when due, was given in sufficiently good time. Then come the words, "bearing your indorsement, has been presented for payment, and returned dishonoured." The word "returned" has obtained among merchants a sort of peculiar meaning, as implying that the bill to which it relates has been duly presented and dishonoured. So that we must understand, not only that there has been a presentment in the present case, but a presentment when due. Then follow the words, "and now lies overdue," which import that the bill was not paid when it arrived at maturity. The only part of this case on which I entertained any doubt was, whether it appeared by necessary inference from this letter, that the plaintiff meant to hold the defendant responsible for the amount of the bill. But when he says, "it now lies overdue and unpaid with me as above," i. e. 6, Barnard-street, Russell-square, what man could fail to draw from those words the inference—you are to come to 6, Barnard-street, Russell-square, to take it up. I think, therefore, that there is here a foundation for each of the three inferences necessary to constitute a good notice. There is therefore no reason to disturb the verdict in the present case, and the rule which is applied for cannot be granted.

The rest of the Court concurred.

Rule refused.

#### PREROGATIVE COURT.

May 1.

WILL OF THOMAS THOMPSON, Esq.

NEW WILL ACT.—*As to sufficient execution and lunacy, the deceased having committed suicide; the verdict of the Coroner's Jury being temporary insanity, and the will executed the day before the death.*

This was a cause of proving in solemn form the last will and testament of Mr. Thomas Thompson, formerly of University College, Ox-

ford, and the Inner Temple, who died on the 16th of November last, aged 60, the will in question being dated the day previously. This gentleman though of very considerable property, left no known relations, and having died by his own hand, at a time when the coroner's inquest found him to have been of unsound mind, a communication of the circumstances was made to the proper officers of the Crown, which would be entitled to the property in the event of an intestacy. The executors had been sworn, when probate was stopped by the Queen's proctor; the executors then propounded the will in a *condidit*, and examined the three subscribed witnesses. On the publication of the evidence, the Queen's proctor, on behalf of the Crown, brought in an allegation, pleading—first, that the deceased was of unsound mind; secondly, that the will had not been executed in conformity with the late act. Upon this allegation only one witness was examined—namely, Dr. Shepherd, who had been intimately acquainted with the deceased for many years, and the case for the Crown with the facts upon the evidence of this gentleman and the evidence of the executors, who had supplied the Crown with the facts upon which its plea was framed. It appeared that the deceased towards the latter end of 1838, and in the beginning of 1839, had laboured under some erroneous impressions as to his being slighted by his acquaintance and the world, in consequence of his not having resented an insult; that shortly before his death and the execution of the will he had called upon Mr. Yatman, who, with Mr. Chambers, was appointed an executor of the will (which bequeathed the bulk of the property to them), and stated that he was in great trouble, since the Benchers of the Temple were about to disbar him, in consequence of a fraud on his part, in having represented himself on his admission as the son of a gentleman instead of a chymist. These were ascertained to be delusions, no such intention being entertained. On the 15th of November he had made an appointment with Mr. John Woolfitt, an upholsterer of Fleet-street, (who, with his shopman, had witnessed a former will,) to meet him, his shopman named Ellis, and his shopwoman, Louisa Lucas, at 3 o'clock, that they might attest his will. At the time appointed the deceased came, produced the will from his pocketbook, and these three persons subscribed the attestation clause, which purported that the deceased had "signed, sealed, declared and delivered" the same in their presence. In their depositions upon the *condidit*, however, one of them, Ellis, stated that the deceased did not sign the paper in their presence; another, Lucas, spoke to the same effect, and added (contrary to the statement of a former witness), that there was no signature opposite to the seal when she attested the will; the other witness, Mr. Woolfitt, de-

posed that the deceased signed the will in the presence of all three witnesses, and moreover declared, placing his finger on the seal, "This is my act and deed."

This part of the case was first argued.

Dr. ADDAMS, on behalf of the executors, contended that on his evidence it was clear that the testator had either made or acknowledged his signature in the presence of the witnesses, either of which would satisfy the act.

The QUEEN'S ADVOCATE for the Crown contended that the proof of signing was deficient, and that there was no acknowledgment of signature, *qua* signature, which was required by the act.

Sir H. Jenner said, upon this branch of the case, upon the general principle of the law, that affirmative evidence was preferable to negative evidence, and looking to the discrepancies in the evidence of Ellis and Lucas, and the consistency of that of Mr. Woolfitt (though all three intended to depose truly, as far as their recollection went,) the evidence of execution was sufficient to satisfy the requisition of the law.

The other branch of the case, *viz.* the capacity of the testator, was reserved for consideration.

May 9.

Sir H. Jenner gave sentence on the point reserved for consideration, *viz.* the capacity of the testator. The deceased was brought up at Westminster School, where he became acquainted with Mr. Yatman, and this acquaintanceship which ripened into friendship, continued to death. The deceased went afterwards to University College, Oxford, where he formed an acquaintance with Mr. Chambers, with whom he likewise kept up an intimacy and friendship to the end of his life; both of them were called to the bar together nearly at the same time. The deceased did not practise at the bar, having considerable property, his personal amounting to about £25,000, besides some real and copyhold estates. He was unmarried, and seemed to have led a very retired life, particularly of late, as evidence of which the Crown had been able to find only one witness (Dr. Shepherd) who could depose to his habits and character. The allegation, on the part of the Crown, set up a case of habitual insanity, as well as particular delusions evinced during a few months preceding his death. The only witness, as before observed, examined on the Crown's allegations was Dr. Shepherd; the rest of the evidence in the case was supplied by the answers of the executors themselves. It was admitted that where habitual insanity does not exist, the proof of insanity, at the time of the execution of the will, must come from the party who seeks to impeach; and he could not find in the evidence anything of the nature

nity in this gentleman till the latter end of 8, or beginning of 1839. Dr. Shepherd did nothing of the nature of delusion in him about that time. In the spring of 1839 the deceased did intimate to Dr. Shepherd that he was an object of scorn to his friends, on account of not having resented an insult; but upon Dr. Shepherd inquiring who entertained such a sentiment, and convincing the deceased that his opinion was groundless, he gave up the delusion. Dr. Shepherd declared that it became wholly abandoned; thereby showing that whatever might be the cause of the delusion it yielded to reason. After a later delusion, which was admitted in the answers of Mr. Yatman and Mr. Chambers was, the benchers of the Inner-Temple intend to put him on account of a supposed fraud which was imagined he had committed upon them. This was a groundless imagination, and the two executors to whom he communicated it, convinced him that it was so, one of them advising him that it was infected with some derangement of the body, that he should take physic, which he promised to do. He observed that the executors were very fairly in their answers, furnished evidence for themselves, and therefore they were entitled to have their testimony taken, not in parts, altogether, and when explanations were demanded by them, the Court was bound to receive them with confidence; and, upon the whole, he was clearly of opinion that, neither from the evidence adduced by the Crown, which negatived delusional insanity, from the answers of the executors, from the testimony of the attesting witnesses, from the contents of the will itself, which indicated a natural disposition of the property, or from any evidence that, at the time he wrote it, he did not contemplate self-destruction, could the Court deduce any proof that the testator was of sound mind, still less that, at the time of his death, he did not enjoy a lucid interval. In the course of his judgment, which was of considerable length, Sir Herbert referred to two cases, as remarked in the arguments, were put forward on these occasions, namely, *Cartwright v. Cartwright*, (a) and *Dew v. Clark*. (b) In the former Sir William Wynn had relied upon the circumstances of the will being a rational act naturally done, and it was sometimes thence inferred that every testamentary act rational in itself, which appeared to have been done in a rational manner, was entitled to the probate of the court; but Sir William Wynn's observation was a specific reference to the circumstances of the peculiar case. Again, in *Dew v. Clark*, John Nicholl said that it was a rule that a delusion is there is insanity, and this was not to be taken beyond the purpose for which that learned

judge intended the observation, or, if he meant that in all cases where any delusion existed in the mind of an individual, that individual was insane and intestate. But in his elaborate judgment in *Dew v. Clark*, which must not be quoted in isolated passages, Sir J. Nicholl pointed out the manner in which the delusion of Stett, the deceased, infected the whole of his conduct towards his daughter, an amiable, accomplished and pious woman, and which appeared in a passage of his will, inserted at the express desire of the deceased himself. Nothing of the kind appeared in the present case, habitual insanity was negatived by the only witness brought to support it; the delusion in the mind of the deceased, if they were delusions, properly so called, were of a transient kind, one had entirely ceased, and the other was not unconquerable, and it was worthy of remark that Mr. Copeland, the medical attendant of the deceased, who was frequently in the habit of seeing him, owing to a disorder under which he laboured, whose attention had been particularly directed to the deceased's mind, and who could therefore, have spoken to its condition, had not been examined by the Crown. Upon the whole, he was perfectly satisfied that the will had emanated from the deceased at a time when he was of sound mind, memory, and understanding; he had, therefore, no hesitation in pronouncing for its validity, and in decreeing probate of it.

The *Queen's Advocate*, on the part of the Crown, asked for the Crown's costs out of the estate, observing that under the circumstances, the Coroner having transmitted the verdict of the jury to the Treasury, the Crown could have done no less for the protection of the property.

Sir H. Jenner declined to make such an order, observing, however, that the Crown could have done no less, under the circumstances in which the deceased died, leaving no legal representatives who could have contested the will.

#### ORDER APPOINTING COMMON LAW EXAMINERS.

Easter Term, 1840.

It is ordered that the several Masters for the time being of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively, together with John Teesdale, Thomas Metcalfe, Thomas Adlington, Robert Riddell Bayley, William Loxham Farrer, George Frere, James Wm. Freshfield, Bryan Holme, William Lowe, Edward Rowland Pickering, William Tooke, and Richard White, gentlemen, attorneys, be, and the same are hereby appointed Examiners for the one year next ensuing, to examine all such persons as shall be desirous to be admitted attorneys of all or either of the said Courts, and that any five of the said Examiners (one of them being

<sup>1</sup> Hag. 311. Dick. 345.

<sup>1</sup> Phil. 90. 1 Sim. and Stu. 108.

*Sittings of the Court, &c.*

one of the said Masters) shall be competent to conduct the said examination, in pursuance of, and subject to, the provisions of all the Courts made in this behalf in Hilary Term, 1836.

Approved by the Judges of the Queen's Bench,  
15th April, 1840.

A. D. CROFT.

Approved by the Judges of the Common  
Pleas, 16th April, 1840.

H. B. RAY.

Approved by the Judges of the Exchequer of  
Pleas, 16th April, 1840.

STEPHEN RICHARDS.

EXAMINATION AT THE ROLLS.

Name.	Name and Residence of Attorney to whom articled.
Charles Henry Cooper.	William Jeary Cannon, Cambridge.

**Sittings of the Courts.**

**QUEEN'S BENCH.**

SITTINGS IN AND AFTER TRINITY TERM, 1840.

In Term.—*Middlesex*.

Thursday, May 28; Monday, June 1; Monday, June 15.

*London*. Tuesday—June 16.

After Term.

Thursday, June 18; Friday, June 19.  
(To adjourn only.)

The Court will sit at eleven o'clock in Term in *Middlesex*; at twelve in *London*; and in both at half-past nine after Term. Long causes will probably be postponed from the 28th May and the 1st June, to 18th June; and all other causes on the lists for the 28th May and 1st June, will be taken, from day to day, until they are tried. Undefended causes only will be taken on the 15th June. Short defended as well as undefended causes entered for the sitting on June 16 will be tried on that day, if the plaintiffs wish it, unless there be a satisfactory affidavit of merits.

**COMMON PLEAS.**

In Term.—*Middlesex*.

Wednesday, June 3; Wednesday, June 10.  
*London*.—Friday, June 5; Friday, June 12.

After Term.

Thursday, June 18; Friday, June 19.

The Court will sit at ten o'clock in the forenoon on each of the days in term, and at half-past nine precisely on each of the days after Term. The causes in the list for each of the above sitting days in Term, if not disposed of

on those days, will be tried by adjournment on the days following each of such sitting days. On Friday, the 19th June, in *London*, no cases will be tried, but the Court will adjourn to a future day.

**EXCHEQUER OF PLEAS.**

In Term.—*Middlesex*.

Friday, May 29.—1st sitting.

Saturday, May 30. } By adjournment.

Monday, June 1. }

Wednesday, June 10.—2nd sitting.

Thursday, June 11. } By adjournment.

Friday, June 12. }

*London*.

Wednesday, June 3.—1st sitting.

Monday, June 15.—2nd sitting.

Tuesday, June 16.—By adjournment.

After Term.—Thurs. June 18. Friday, June 19.  
The Court will sit during Term at ten o'clock.

**QUEEN'S COUNSEL.**

The following barristers have been called to the bar:—

Armstrong, Robert Baynes, Esq.

Bethill, Richard, Esq.

Dundas, David, Esq.

Turner, George James, Esq.

**EQUITY SIDE OF THE EXCHEQUER.**

MASTER—The Hon. Robert C. Scarsden.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Cornhill, in the County of *Middlesex*; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet-street, in the Parish of St. Dunston-in-the-Fields, in the City of *London*.—Saturday, May 23, 1840.

# The Legal Guide.

L. IV.]

SATURDAY, MAY 30, 1840.

[No. 5.

Price Sixpence.

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## ESSAY.

### ON BILLS OF EXCHANGE. NOTICE OF DISHONOUR.

WE have received several letters upon the important subject (in this country) of the recent discussions in the Courts, as to what is sufficient notice of dishonour of a Bill of Exchange or a Promissory Note (a), which appears to have excited considerable excitement among commercial men, and a difficulty seems to exist as to what is a legal notice of dishonour.

WE have already shewn the opinion of the law given to the House of Lords in *Solarte v. Palmer*, but this must not be taken as a leading case for all notices of dishonour,—they must stand upon their own respective merits. In *Solarte v. Palmer*, the notice was to the indorsee as follows:—

“London, 17th Dec. 1825.

“Gentlemen,—A bill for £683. drawn by Mr. Joseph Keats upon Messrs. Daniel, Jones, & Co., and bearing your indorsement, has been put into our hands by the assignees of Messrs. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to

“Gentlemen, your’s, &c.

“J. & S. PEARSE.”

This was held to be bad. The LORD CHIEF JUSTICE TENTERDEN expressed his opinion to the jury, that the letter did not in terms import that the bill had been refused payment by the acceptor,—it was not a sufficient notice of the dishonour and non-payment.

In *Cook v. French* the notice was to the

*Cook v. French*, Q. B. ante p. 44. *Messenger v. Atkey*, C. P. ante p. 44. *Lewis v. Gompertz*, Ex. 61.



drawer, that the bill due July 1, had been presented for payment and returned, and remained unpaid. The Court of Queen's Bench held *this* to be *good*. It should be observed that here was *no demand of payment*.

In *Messenger v. Southey* the notice was of an illiterate kind,—and was to the *maker* of a promissory note by the holder and *payee* of the note that it was “not took up,” and the Court of Common Pleas held this to be *bad*.

In *Lewis v. Gompertz* the notice to the indorser was of a more regular kind, and was thus construed by the judge (PARKER, B.)—

1st. That the bill was presented when due.  
2ndly. That it was dishonoured, and

3rdly. An intimation to the party to whom the notice was addressed, that he is the person to be held liable for the payment of it.

The Court of Exchequer held this to be *good*, and the reasons for that judgment we have already shewn (b).

In the latter case it should be also noticed there was *no demand of payment*.

The decision of Lord TENTERDEN in *Sollarte v. Palmer* was carried by writ of error into the Court of *Exchequer Chamber*, where after full argument, LORD CHIEF JUSTICE TINDAL delivered the following judgment:—The question in this case is whether the direction to the jury “that the letter given in evidence at the trial, and set out upon the bill of exceptions, was not sufficient notice of the dishonour and non-payment of the bill, and that upon such evidence the jury ought to find a verdict for the defendants,” was a proper direction or not. And we are of opinion that the direction was proper, and that the judgment which has been given for the defendants must be affirmed. The notice of dishonour which is commonly substituted in this country in the place of a formal protest, such formal protest being essential in other countries to enable the plain-

tiff to recover(c), most certainly does not require all the precision and formality which accompanied the regular protest for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount. Here the allegation in the declaration is that the bill has been presented to the acceptor who has refused payment, whereof the defendant has had notice; and, consequently, to satisfy this allegation, though *no express form of words is necessary*, the notice should convey an intimation to the party to whom it is addressed, that the bill is in fact dishonoured. Now looking at this notice, we think no such intimation is conveyed in terms, or is to be necessarily inferred from its contents. Besides, it is perfectly consistent with this notice, that the bill has never been presented at all, and that the plaintiffs mean to rely upon some legal excuse for its non presentment. The present case is stronger against the sufficiency of the notice than that of *Hartley v. Case*(d), where there was at least an allegation that the bill had become due, which is not found here. This letter may not improbably have been written with a different intent than that of giving notice of the dishonour to the indorser, and may have been information that an action was about to be brought by the attorney taking for granted that the notice of the bill's dishonour had been given in the ordinary way, before the bill was put into the hands for the purpose of suing thereon. In all events, however intended, it appears to us not to amount to such notice, and the judgment was affirmed (e).

From this judgment the plaintiffs brought a writ of error in the House of Lords, where

(c) See Pothier. *Traité du Contrat de change* Pl. c. 5, s. 2, art. 1, s. 5.

(d) 4 Barn. & Cross. 339.

(e) See 5 Moo. & Payne, 475; 7 Bing. 589; Carr. & Payne, 475; 1 Cramp. & J. 417; 1 Tyt. 371.

JUSTICE PARK declared the unanimous opinion of the judges present (f), that the failure of the plaintiff's attorneys did not amount to notice of the dishonour of the bill, which notice ought in express terms, or by necessary implication, to convey full intimation that the bill had been dishonoured. The LORD CHANCELLOR (BROUGHAM) in pronouncing the judgment of the House, said, "I never saw a case which, whether regarding the facts, the principle of law, or cases bearing upon it, was more absolutely free from all doubt. The question, my Lords, is whether the letter of Messrs. Pearse amounts to notice of the dishonour of the bill change referred to in that letter. As this is a point of law, a question was put by the Lordships to the Judges, whether this was a valid notice of dishonour, so as to render the party to whom it was directed, the acceptor, liable. The Judges were unanimously of opinion that it was no notice of dishonour. I never thought there could be any doubt that that must be their opinion, and I only doubted whether we ought to trouble ourselves to come here upon such a point. My Lords, I hold that this is no notice of dishonour; it is a threat of legal proceedings,—a demand of payment. It is clear on authority and by decided cases, that a demand of payment does not amount to a notice of dishonour. Lawyers and merchants alike understand this rule and they act upon it. When the learned Judges are clear and unanimous in their opinion upon this subject, it seems superfluous in me to waste the time of your Lordships by arguments in support of their opinion, but I will say, that when I see counsel sign their names to reasons in appeal, and bottom those reasons upon precedents and authorities, I naturally look to these precedents and these authorities, to see whether they bear out the opinions for which they are offered. The case of *Tindal v. Brown* has been

cited; (g) that case is referred to in the 4th edition of *Bayley on Bills*, p. 206, which authority is also quoted in the plaintiff's "reasons." *Tindal v. Brown* does not warrant the purpose for which it is cited; but it is remarkable that another case should not have been looked at,—the case of *Hartley v. Case* (h). If that case had been looked at, it would have been found that it was on all fours with the present. The letter there is in these terms:—"I am desired to apply to you for payment of the sum of £150. due to myself, on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." Lord TENTERDEN there said—"There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." His Lordship said that the letter did not convey any such notice; yet it is much more explicit than the letter in the present case. The other authority referred to by the plaintiffs is the 4th edition of *Bayley on Bills*,—why not the 5th edition? For aught I know, the 4th edition was published before *Hartley v. Case* was decided. This I know, that if the 5th edition had been quoted, there would have been found at p. 257 these words—"And the notice ought to import that the bill has been dishonoured; a mere demand of payment is not sufficient." But it may be said that is more than a mere demand of payment, it is a threat of proceeding, and such a threat shows that a default must have been committed, because an indorser is not liable without a default in the other parties. But let your Lordships read the whole passage, and you will then see that such an argument cannot be used, for the passage goes

(f) See ante p. 45.

(g) 1 T. R. 167, affirmed in the Court of Exchequer. See 2 ed. 186.

(h) Id.

on thus :—‘ And a threat of legal proceedings is not sufficient.’ I feel great displeasure, my Lords, at this. Writs of error ought not to be brought for the mere purpose of delay, and to subject parties to costs. This is a wrong that you are bound to visit with your just displeasure.” The judgment was affirmed. (i)

The case of *Tindal v. Brown*, referred to by Lord Brougham, applied more to the time when notice should be given than to the sufficiency of the notice of dishonour, which as it leads the law at the present day it may be necessary here to notice more particularly.

LORD MANSFIELD there said—It is extremely clear that the holder of a bill, when dishonoured by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact and partly a question of law. (k) It may depend in some measure on facts, such as the distance at which the parties live from each other, the course of the post, &c. But wherever a rule can be laid down with respect to this reasonableness that should be decided by the court, and adhered to by every one for the sake of certainty. In that case the bill was dishonoured on the 5th October, the clerk saw the maker on the 6th, and gave him time during the banking hours of that day, and the plaintiffs did not go at four that afternoon, but waited till the next day. Lord Mansfield said—It has been held (l) that *where the party liable does not live in the same place, the holder must write by the next post after the bill is dishonoured.* (m)

ASHURST J. said, it is of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to deter-

mine this question in all cases, it would be productive of endless uncertainty. The next day at the most is as long as is necessary in a case circumstanced like this. If the parties live at a small distance, this is sufficient time, if at a greater, they should write by the next post. Notice means something more than knowledge; because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that he (the holder), does not intend to give credit. The party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.

BULLER J. said, the numerous cases on this subject reflect great discredit on the Courts of Westminster. They do infinite mischief in the mercantile world; and this evil can only be remedied by doing what the Court wished to do in the case of *Metcalfe and Hall*, (n) by considering the reasonableness of time as a question of law and not of fact. Whether the post goes out this or that day, and what time, &c. are matters of fact: but when those facts are established, it then becomes a question of law on those facts, what notice shall be reasonable. (o)

As to giving time, the holder does it at his peril. And in no case has it been determined that the indorser is liable after the holder of the note has given time to the maker.

With respect to notice I concur in the opinion which has been given by the Court and particularly for the reason given by my brother ASHURST. The purpose of giving notice is not merely that the indorser should know the note is not paid, for he is chargeable only in a secondary degree; but to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. A case might easily

(i) 2 Clark & Fin. 96. S. C.

(k) 5 Dougl. 497.

(l) Lord Ellenborough considered it as a question of law and fact. See 6 East, 4.

(m) See LORD MANSFIELD'S observations in *Haylin v. Adamson*, 2 Burr. 609.

(n) Trin. 22 Geo. 3. B. R.

(o) See Mr. JUSTICE BULLER'S observations in *Muilman v. D'Eguino*, 2 Hen. Blacks. 569.

put, where the indorser might have notice in the holder and yet would not be liable. Though there is no prescribed form of this kind of notice, yet it must import that the holder looks on the indorser as liable, and expects payment from him that he may have a remedy over by an early application. When it becomes his business to take up the bill. But notice of having given credit to the maker will discharge the indorser. The notice by another person to the indorser can never be sufficient; but it must proceed from the holder himself.

This doctrine agrees with *Marius* and other general writers, who say that, the notice ought to be transmitted by the next day after it is received.

The general rule as collected from the case of *Tindal v. Brown* and other cases seems to be, that with respect to persons living in the same town, notice should be given the next day; and with regard to such living at different places, that it should be given by the next post. But if in any particular place the post should go out so early as to receive a receipt of the intelligence, as that it would be inconvenient to require a strict adherence to the general rule then, that a notice by the second post would be reasonable, per *LAWRENCE J.* in *Darbishire v. Darbishire*, 6 East. Rep. 11.

As to what is reasonable time the Court of the proper judges. For what is contrary to reason cannot be consonant to law, which is founded on reason: and therefore, the reasonableness in these and the like cases depends on the law, and is to be decided by the judges. (p)

The following form is submitted as sufficient to meet all the cases.

FORM OF

NOTICE OF DISHONOUR.

120, Lombard Street, May 30, 1840.

To A. B.

The Bill of Exchange for £                      dated

(p) Per *Willes, C. J.*—see *Willes*, 204-6.

the                      day of                      , drawn by you upon, and accepted by C. D. and payable to your order, at three months after date, at Messrs. E. F. Bankers, London, was on the                      day of                      , presented for payment at the Banking House of Messrs. E. F. in Lombard Street, when it was dishonoured; the answer given by the Bankers being “no effects,” of which I now give you notice, and inform you, that I hold you liable for the amount of the bill, and the expences occasioned by its dishonour, and now demand of you immediate payment. G. H.

PROBLEM V. VOL. IV.

TRUSTS.

WHAT TRUSTS ARISE BY OPERATION OF LAW.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM 25. VOL. 3.

BY E. A.

(Continued from page 54.)

BILL IN CHANCERY.—On what subjects may relief be obtained by a bill in Chancery?

Having said (it is hoped) sufficient to give a general idea of the jurisdiction exercised by Courts of Equity in cases of fraud, it will now be my province to consider—

4. *Infancy*.—Upon the abolition of the Court of Wards the care which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feudal view, but resulted to the King in his Court of Chancery, together with the general protection of other infants in the kingdom. When, therefore, a fatherless child has no other guardian the Court of Chancery has a right to appoint one, and from all proceedings relative thereto an appeal lies to the House of Lords, and subject to such correction by appeal, the court may, if it thinks circumstances render its interposition necessary, exercise its authority, although the child be *not fatherless*, and even so as totally to supersede the parental guardianship, though this is never done without cautious reluctance. The Court of Exchequer can only appoint a guardian *ad litem* to manage the defence of the infant if a suit be commenced against him; but when the interest of a minor comes before the court judicially in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant, and the Court of Chancery, out of that property, will provide for his suitable

maintenance, if the minor's father is not in circumstances to support and educate his children according to their expectations of fortune. Without such assistance, Lords Eldon and Redesdale did not think it discreet as a general rule to allow maintenance except upon a bill filed; though where the property is small the order is often made on petition, in order to save an expense the estate could not conveniently bear. What the precise limit is to which this practice may be extended does not clearly appear (see 3 Bla. Com. p. 426 & n.) There are different decisions as to the amount of property which will render the institution of a suit necessary, but I believe there is no case in which a bill has been dispensed with where the property exceeded £300. a-year, and there are cases where a bill has been required where the property exceeded £100. a-year. But it may now be taken to be the practice that where the property does not exceed £300. a-year the court will act on a petition without a bill being filed. (Gray's C. C. Pract. 190.)

The Court of Chancery, representing the King as *parens patriæ*, has a jurisdiction now perfectly established to control the right of a father to the possession of his child whenever the welfare of that child imperatively requires so strong a measure. In the words of Lord Eldon, "the court has interposed in many instances of this sort, but the application is one of the most serious and important nature; the interposition of the court stands upon principles which it ought not to put into operation without keeping in view all the feelings of a parent's heart and all the principles of the common law with respect to a parent's rights." (*Wellesley v. the Duke of Beaufort*, 1 Rus. 19.)

Infants are made wards of court by the filing of any bill to which they are or ought to be parties (Ambler, 303), and when thus brought within the protection of the Court of Chancery its control over the property of infants, who are made its wards, is of course absolute, and many statutes (the Marriage Act and others) recognise the Chancellor as the constitutional depository of that part of the King's prerogative or paternal duty, (whichever it may most properly be called) which consists of the guardianship of his infant subjects.

Should a guardian attempt to remove an infant confided to him by the court, out of its jurisdiction, or become insolvent, or there being more guardians than one, they should disagree as to the management of the ward, the guardianship will again devolve on the court, by whom it will be referred to the master to approve of some other person to be appointed.

It rests also with the court to determine what sum (if any) shall be allowed out of the ward's estate for maintenance (see *ex parte Myerscough*, 1 Jac. & W. 151), and with reference to the ju-

risdiction exercised by the court in excusing a father from maintaining the ward. I will mention an instance where Sir W. Grant (M.R.) thought that a nobleman with £6,000. a-year was not liable to provide for his children, who had become the object of a testator's bounty, while the possession of only half that income by a private gentleman would assuredly entail that duty upon him (*Jervoise v. Silk*, Coop. 52.)

In the marriage of infants, who are wards of the court, it exercises a very jealous interference not only requiring the consent of the guardian but its own as well (*Leeds v. Barnardiston*, Sim. 538). Upon an affidavit that an infant ward is about to contract an improper marriage the court will restrain all communication with such infant by letter or otherwise, (*Pearce v. Cruchfield*, 14 Ves. 206.) All persons instrumental in the unauthorised marriage of a ward are punishable for contempt. The court will, in all such instances, oblige the husband to execute a proper settlement in favour of the wife, and if he refuses will commit him to prison until he complies, (*Winch v. James*, 4 Ves. 386.—*Wells v. Price*, 5 Ves. 398 & notes.) Indeed the jurisdiction of the Court of Chancery is constantly raised by anything affecting the interest or any way concerning an infant ward.

Where estates are vested in infant trustees the conveyance of such property is provided for and placed under the jurisdiction of the Court of Chancery, by 11 Geo. 4, and 1 Gul. 4, c. 60.

When a ward comes of age the guardian is bound to give him an account of all that he has transacted on his behalf, and must answer for the losses occasioned by his wilful default or negligence. In order therefore to prevent disagreeable contests with young gentlemen it has become practice for many guardians, of large estate especially, to indemnify themselves by applying to the Court of Chancery, acting under its direction, and accounting annually before the officers of that court,—for the Lord Chancellor is the right derived from the crown the general and supreme guardian of all infants as well as idiots and lunatics, that is of all such persons as have no discretion enough to manage their own concerns. In case, therefore, any guardian abuses his trust the court will punish and check him, nay, sometimes proceed to the removal of him and appoint another in his stead (1 Bla. Com. 462.)

5. *Mistake*.—Errors and deficiencies occasionally arise in deeds and wills, which if allowed to remain uncorrected would work hardship to an individual against the intention of those concerned. Thus the imperfect execution of a power is in certain instances relieved in equity (see *ante* p. 44) where some direction which ought to have been followed in the execution of a power has been omitted, as where a power of appointment by will was to be executed in the presence of three wi-

uses, and it was executed in consideration of marriage by two only, the defect was supplied by the court (1 Madd. Chan. 53). But Equity will not supply the non-execution of a power; and a party to whom a power is given does nothing denotes an intention of exercising it there is no ground for the interference of the court, and if a power of appointment is confided to a party it is immaterial whether he will exercise it or not, and therefore the non-exercise of it cannot raise the jurisdiction. Where a mortgage in fee was made by way of feoffment, and no livery was given, this defect in the conveyance was supplied in equity, (Id. 50). In cases, too, of agreements, which have been reduced into writing in a sense contrary to the intention of the parties, relief will be given, (*the Marq. of Townshend v. Stan- som*, 6 Ves. 328). But the proof in these cases must be of the strongest nature, and such to leave no doubt in the minds of the court.

If a person, having a right to an estate, purchase it of another person, being ignorant of his title, Equity will compel the vendor to refund the purchase money with interest from the date of bringing the bill, although no fraud appears (*Bingham v. Bingham*, 1 Ves. 126).

Equity has as much jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against fraud, but in these cases there would be the strongest proof possible, (*Henkle v. the Royal Exch. Ass. Office*, 1 Ves. 317): and in a case much agitated before Lord Thurst, that Chancellor laid down the rule with great latitude—"That if a mistake appears it is as much to be rectified as fraud," (*Taylor v. Todd*, cited, 5 Ves. J. 595).

Where, at the time of the contract, the purchaser was fully aware that the vendor could not execute the agreement, and consequently could not enforce the performance of it, Lord Redesdale determined that the agreement must be presumed to have been executed under a mistake, and the purchaser could not insist upon a performance as to the interest to which the vendor would be actually entitled (*Lawrenson v. Butler*, 1 H. & Lef. 13). But it is no bar to a specific performance that the conveyance will not have the effect which the vendor thought it would, (*Milmay v. Hungerford*, 2 Vernon, 243). Where a purchaser has by mistake given an unreasonable price for an estate, the court will, in a proper case, relieve him by totally rescinding the contract (*Morsehead v. Frederick*, Sugden V. P. App. 10). But, it must be observed, that a deed will be rectified in Equity on the ground of mistake or fraud to the prejudice of a bona fide purchaser, without notice; neither will he be prejudiced by the mistake or ignorance of any of the parties to a conveyance of their right in the estate (see *Thomas v. Davis*, 1 Dick, 301, and *Walden v. Menill*, 2 Atk. 8).

Here I must take occasion to introduce a few cases where even at law the palpable mistake of a word will not defeat the intention of the parties. In a case in the Common Pleas, where the condition of a bond was that it should be void if the obligor did not pay, and performance being pleaded, on the ground of literal expression, the court held the plea bad. (Anon. Doug. 384, cited.) It seems clearly settled, that words evidently omitted in a will by mistake, may be supplied both at law and in equity. (*Tollett v. Tollett*, Amb. 194; *Cayton v. Hellyer*, 2 Burr. 923, cit.; *Doe v. Michlem*, 6 East, 486. See *Lane v. Goudge*, 9 Ves. jun. 225; and *Philps v. Chamberlain*, 4. ib. 45-51.) But however evident the mistake may be, the words will not be supplied if the testator's manifest intention would be defeated by the insertion of them. (*Chapman v. Brown*, 3 Burr. 1626. See 2 Ves. jun. 365.)

Mistakes in wills, which, owing to the ignorance, misinformation, and weakness of many testators, are not only very likely to occur, but do occur, and that very frequently, and such mistakes are relieved on probable presumption. Thus where a testator gave a sum in Bank Annuities to his wife, and it happened that at the date of the will he had no other stock than Long Annuities, the court directed the legacy to be paid out of the latter. (*Selwood v. Midmay*, 3 Ves. 306.) Mistakes, too, in the christian and surnames of legatees will be rectified upon reasonable proof given of the identity of the person intended to be benefited. (*Parsons v. Parsons*, 1 Ves. 266; and note, *Beaumont v. Fell*, 2 P. Williams, 141; *Standen v. Standen*, 2 Ves. 589.)

(To be continued.)

## ANSWER TO THE SAME PROBLEM,

By GUILIELMUS.

(Continued from p. 63.)

*Account*.—Generally whenever it is competent for a person to file a bill in Chancery for an account he is entitled to his remedy at common law; it is, therefore, natural to ask how the Court of Chancery obtained a concurrent jurisdiction with those of common law; and how it has become the tribunal to which matters of account are most frequently referred. The reason is discoverable in its mode of proceeding, which presents peculiar advantages for investigating matters of this kind, and compelling payment of the balance due to the party entitled. (See *Mistf.* p. 120.) Here it may be observed, that a court of equity will not entertain a suit if the subject be capable of proof, and a matter of set-off at law. (*Dinwiddie v. Bailey*, 6 Ves. 136. Where, by means of misrepresentation, securities have been obtained from an inexperienced and young

man, a bill for an account may be filed between a tradesman and his customer. (*Long Courtenay v. Gödschall*, 9 Ves. 473.) Bills for account are filed most commonly in cases of partnership transactions, and against persons standing in the characters of mortgagee, agent, auditor, land steward and manager, and executor. The court will not allow a *stated* account to be unravelled, unless where fraud has been mixed up with it. (*Vernon v. Vauodrey*, 2 Atk. 119.) Bills for tithes are, as matters of account, very frequent in the Court of Chancery. Tithe causes, however, do not fall under the natural jurisdiction of the Chancellor.

3. *Fraud*.—Under this head come a great variety of cases; here, as in the former part of my answer, I shall aim at the utmost conciseness consistent with practical utility. In the necessarily limited portion of your columns devoted to these answers, Mr. Editor, it is impossible to do full justice to the present problem: it is, therefore, my endeavour, by a judicious selection, to give a general idea of the subjects relievable by Bill in Chancery rather than point out every, or even the majority of cases, in which this method of proceeding may be practicable. It is a general principle, that when persons invested with a fiduciary character purchase the estates of parties for whom they hold, the court will, on bill filed, set aside such sales if completed, and if not, will interfere to prevent their taking place. "With a view to prevent fraud, a trustee is not permitted to become a purchaser from himself of part, or the whole, of the trust estate; nor can the solicitor of a trustee purchase the trust estate. Commissioners, assignees, and solicitors, under a commission of bankruptcy, whether bidding for themselves or others, are within the operation of this rule, and are not allowed to purchase the bankrupt's estate. (1 Madd. 110.) If a trustee for sale for the benefit of an infant is desirous of purchasing the trust estate, he must file a bill to carry the trust into execution under the direction of the court, and apply for leave to purchase, offering to give more than any other person. (*Campbell v. Walker*, 5 Ves. 681.) It seems an auctioneer comes within the rule; but I do not know of any positive decision to this effect. A court of equity regards the conduct of solicitors and attorneys, whilst managing the business of their clients, with great jealousy; therefore, if an attorney purchase property of his client, it is incumbent on him, in order to support his purchase, to show that he paid the full amount he could have obtained from any other person. (*Harris v. Tremendhere*, 15 Ves. 42.) But if the relationship between them has ceased, and with it all influence, then a client may, even by a voluntary conveyance, make over part of his property to his solicitor as well as to any other person. (*Wells v. Middleton*, 1 Cox, 112; *Wright*

*v. Proud*, 13 Ves. 138.) And, in the absence of fraud, and with long acquiescence under certain circumstances, the court will not disturb a sale made during the existence of such relationship; as was decided in the recent case of *Rudd v. Sewell and another*. (*Legal Guide*, vol. 3. p. 359.) Here, the solicitor sold the property again, in the course of a few weeks, for £300. more than he gave for it. The decision, however, was grounded on the peculiar circumstances of the case, and the Lord Chancellor observed, "Nothing that the court did with reference to the present case would in the slightest degree affect the principle of the authorities on that important subject, and it ought to be well known to all professional men that they never could be allowed to take any gain from such transactions, while there was the greatest risk of their losing much in professional character." The bill was dismissed with costs. Expectant heirs are equally protected against all the world in dealing with their expectancies, as are *cestui que trusts* against the purchase of their estate by trustees; and if a suit be commenced, it will lie on the purchaser to show that the transaction was a fair and *bona fide* one. (*Goldsmith's Equity*, p. 27, and cases cited.) The court manifests a like jealousy of conveyances between persons in the relation of guardian and ward. (1 Ball & Beatty, 230; *Hylton v. Hylton*, 2 Ves. 547.) But it will not set aside a reasonable grant as a reward for care and trouble, if the ward, when he becomes *sui juris*, thinks fit to make any. (*Darson v. Massey*, 1 Ball & Beatty, 219.) For the prevention of fraud the court will, in numerous instances, on bill filed, grant prohibitory writs called injunctions; with these, I conceive, I have little to do in this answer. Where a person has a right which may become the subject of litigation between various persons at different times and by different actions, he may file a bill called a *Bill of Peace*; and the court will thereupon prevent a multiplicity of suits by directing an issue to determine the rights, and ultimately an injunction. (1 Madd. 166.) Bills of this kind are most frequently between Lords of Manors and their tenants, and between the tenants of one manor and another; for in these cases there are several rights common to many parties, and resting upon the same principles.

A *Bill of Interpleader* is resorted to when a person in possession of an object, to which he lays no claim, is in danger of being harassed by the conflicting demands of other persons, claiming in different or separate interests the same object, and knows not to whom he ought to deliver it up. The bill prays that the parties may *interplead*, in order that the court may adjudge to whom the property belongs, and that the plaintiff may be indemnified. Perhaps it will be unnecessary to enter upon the consideration of the

in which it is eligible to proceed by bills certiorari, to perpetuate testimony, of discovery, *Quia Timet*, and some others of a peculiar character, because their object is not so much to give relief as to prevent anticipated injuries or losses. "Frauds on powers are often the subject of relief in equity. A party, for instance, will be allowed to execute a power for his own benefit, which was intended for the benefit of others; as where a person having a power of appointment amongst children, and thinking one of his children was in a consumption, appointed in favour of that child, with a view, as the court supposed, to take the chance of getting the money administrator of the child, the appointment is set aside." (1 Madd. 311.) Private Acts of Parliament, when obtained on fraudulent suggestions, have been relieved against. Where a decree of a legal demand has been obtained by fraud, it will be set aside. (*Pascoe v. Pascoe*, 12, 109.)

(To be continued.)

## Imperial Parliament.

HOUSE OF COMMONS.—May 15.

### NEW POSTAGE.

Mr. C. B. HAMILTON requested to know from the Chancellor of the Exchequer, whether any provision existed on the part of her Majesty's Government to issue an order respecting the disallowance of prepayment of postage? An impression had gone abroad, that after a certain number of letters would not be received at the Post Office unless they were stamped or enclosed in one of the figured envelopes. The report of a proceeding on the part of the Government having an injurious effect on the retail stationery trade, which had already suffered to a considerable extent, and therefore, if there was no such intention on the part of the Government, it might be as well to have it stated publicly. The CHANCELLOR of the EXCHEQUER replied, there was no such intention on the part of her Majesty's Government.

May 28.

### THE MARRIAGE ACT.

Mr. LANGDALE rose to move for leave to bring in a bill, the object of which was to remove an inconvenience occasioned by the interpretation put upon one of the provisions of this Act. In consequence of the opinions of the advisers of the crown to that effect, the registrars were directed to grant certificates to parties to be married elsewhere than in a place of worship in the district in which one or other of them resided. In some cases this operated as an absolute bar to marriage, because in many instances there was

no place of worship belonging to the communion to which the parties were attached in the district in which they resided. He proposed to remedy this inconvenience by enacting that the registrar should have power to issue no certificates to be married elsewhere than in the district in which the parties resided, but with this exception, that it should be competent to the parties to prove that there was no place of worship of their persuasion in the district in which they resided, and that upon that proof he should grant the certificate to be married in the nearest place of worship in their district. He moved for leave to bring in a bill authorising the solemnisation of marriages in a place of worship in or near the district in which the parties reside.

Mr. SHAW thought it worthy of consideration whether the proposed change might have the effect of invalidating any of the marriages solemnised under the act as it at present stood.

Dr. LUSHINGTON said the act was so framed, that no change of the law could affect the validity of marriages solemnised under it. Had there been the slightest possibility of the present bill producing such a result, he should have felt it his duty to warn the House of it.

Lord J. RUSSELL said, that, after what had fallen from his right hon. and learned friend, no doubt could exist as to the point raised by the right hon. gentleman (Sir F. Shaw). It was sufficient, however, to read the clause in the act itself, which was sufficiently decisive on this head. With respect to the bill of the hon. member for Knarborough, he had no objection to its introduction, because, in fact, it was long supposed that the law really was what the hon. member now proposed to make it. He would advise the hon. gentleman, however, to consider of some closer definition of the words "in or near," as those words would certainly give rise to doubts as to what would be considered as near. It would be better to state at once within what limits certificates should be allowed to have effect.

Leave given to bring in the bill.

### MARRIAGE ACT.

The following correspondence, relative to the Marriage Act, has lately passed between a clergyman and the registrar-general of marriages, &c.:—

(No. 1.)

"—Rector, 30th April, 1840.

"Sir,—Application has been made to me to marry a couple in the church of S——, under the following circumstances. The man lives in the parish of St. J——, in ——. The woman in the parish of N——. The banns have been published before the board of guardians of the poor law union, in which all the three parishes are situated; and I have received the usual certificate from the registrar, because the notice



stated that the marriage would be solemnised in S—— church. I have objected, however, to marry the parties in this parish, because, although the act of 1 Vict. cap. 22, sec. 36, authorises the publication of banns before the board of guardians of the poor law union, I conceive that it does not allow the marriage to be solemnised at any parish church within the union at the option of the parties, but that the previous act for preventing clandestine marriages still remains in force, which requires one or other of the persons about to be married to be living in the parish where the ceremony is to be performed. The superintendent-registrar tells me, however, that I am in error. May I therefore request an answer at your earliest convenience, informing me whether, in your opinion, a clergyman is either compelled, or has the option, in the present state of the law, to marry, in his parish church, parties whose banns have been published as herein stated, provided neither of them be living in his parish? I am, Sir, your very obedient servant.

"To the Registrar-general of Marriages, &c.,  
London."

(No. 2.)

"General-register Office, May 1, 1840.

"Rev. Sir,—I have the honour to acknowledge your letter of the 30th ult., and in reply to inform you, by direction of the registrar-general, that it is the opinion of the legal authorities whom he has consulted on the subject, that, notwithstanding the provisions of the 36th section of the act of 1 Vict., c. 22, a clergyman is not compelled to marry parties in his parish church on production of a superintendent-registrar's certificate, unless one of them be living in the parish in which his church is situate. I am, Rev. Sir, your obedient servant,

"THOMAS MANN, Ch. Clk.

"Rev. —, S. Rectory, near T——."

(No. 3.)

"S—— Rectory, May 4, 1840.

"Sir,—I am much obliged by the prompt attention which has been paid to my letter of the 30th ult., and I regret having to give any additional trouble on the subject, but the letter of the 1st inst., which you have directed to be sent to me, refers only to one of the questions I had submitted to you. It informs me that 'in the opinion of the legal authorities you have consulted, &c.,' a clergyman is not *compelled* to marry parties, &c. (see letter No. 2); and this opinion, if generally known, would *practically* set the point at rest, because very few, if any clergymen, would consent without compulsion to such a deviation from ecclesiastical order and custom as to marry persons in their church who do not *reside* in their parish. But as the subject is one of

considerable importance, and your attention appears to have been already directed to it, perhaps you may have no difficulty in stating whether, in the opinion of the legal authorities you have consulted, a clergyman *has the option* to marry the parties if he think fit. On reference to the clause in the Act, it appears to me that he has *not* that option; for the words seem intended to state, that the registrar's certificate of publication before the board of guardians shall place the parties in precisely the same, but *in only the same situation*, with reference to the Marriage Act, as if the banns had been published in church. But the banns can only be published in church, and the parties be married consequent on that publication in the parish church where the parties actually reside; and if they live in separate parishes, the marriage cannot be solemnised unless the banns be published in both parishes, and a certificate be produced of that fact. If, therefore, by the publication before the board of guardians an *option* is given to the incumbent or curate of each of the numerous parishes of which an union may consist to marry parties living in any of those parishes, a power is conferred beyond that which previously existed, and which tends in effect to annul those clauses in the Marriage Act which were framed to prevent clandestine marriages. I submit these observations to your notice with great respect and deference, and I trust the necessity of having a subject of so much public interest properly understood will be accepted by you as my apology for this intrusion. I have the honour to be, Sir, your very obedient servant.

"To the Registrar-general of Marriages, &c."

(No. 4.)

"General-register Office, 5th May, 1840

"Rev. Sir,—I am directed by the registrar-general to acknowledge the receipt of your letter of the 4th instant, and in reply, to inform you that he has *not taken a legal opinion* upon the specific question which you have therein submitted to him.—I have the honour to be, Rev. Sir, your obedient servant,

"Rev. —. THOS. MANN, Ch. Clk."  
Taunton Courier.

The following is an extract from the clause mentioned in the foregoing letters:—

"Be it enacted, that the giving of notice to the superintendent-registrar, and the issue of the superintendent-registrar's certificate, as in the said act and by this act provided, shall be sufficient, and stand instead of the publication of banns, for all intents and purposes, where no such publication shall have taken place; and every vicar, minister, or curate in England shall solemnise marriage after such notice and certificate as aforesaid, in like manner as after due publication

banns: provided always, that the church wherein any marriages according to the rites of the Church of England shall be solemnised, shall within the district of the superintendent-rector by whom such certificate as aforesaid shall have been issued."

### RESTRAINTS ON MARRIAGE.

We beg to call the attention of our readers to advertisement in another part of our work, relating to restraints on marriage, which we hope will be shortly placed upon some certain basis, consistent with sound reason and good sense.

### Law Reports.

#### COURT OF CHANCERY.—May 2.

##### CLAPTON v. BULMER.

##### APPEAL from the VICE-CHANCELLOR.

*quest by a Testator "to the nearest of kin of his own family for ever." After the decease of the Testator's Child without issue—CONSTRUCTION.*

This was an appeal from a decree of the Vice-chancellor made on the 24th January last.

It appeared by the pleadings, that William Clapton, by his will, gave the residue of his personal estate, to trustees, upon trust, out of the dividends to pay to his wife an annuity of £150. per annum, and to pay the surplus to his daughter Rebecca Johnson, (afterwards Amelia Johnson White) for life; but, in case of the death or intermarriage of his wife, then he directed the whole of the dividends to be paid to his daughter for life, for her sole and separate use, and after the decease of his daughter, then, upon trust, to assign and transfer the said trust monies unto all and every the child and children of his daughter in manner therein mentioned. He followed this proviso:—"Provided always, I declare my will and mind to be, that in case my said daughter should happen to die without leaving any issue, then I will and direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall, upon her decease without issue, raise and pay the sum of £3,000. to such person or persons as she shall in and by her last will and testament in writing, or any writing purporting to be her last will and testament, or codicil thereto, nominate, give, direct, or appoint. And in case my said wife shall happen to survive my said daughter, and my said daughter shall die without issue, then I will and direct that my said trustees shall, upon the decease of my said daughter, and such failure of issue as aforesaid, raise and pay out of the said trust monies the further sum of £2,000. unto my said

wife, to and for her own absolute use and benefit. And I will and direct that my said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall assign and transfer the residue of such trust monies, and of my personal estate, unto the nearest of kin of my own family for ever." The testator died, leaving his wife and daughter, and John Martin Bulmer, his next of kin, him surviving. The testator's widow died in the lifetime of her daughter. The testator's daughter intermarried with Percival White, and died without issue, and appointed by her will the £3,000. in favour of her husband, Percival White. The bill was filed by the trustees against John Martin Bulmer and Percival White. The master made his report, and found that the defendant, John Martin Bulmer, was the next of kin of the testator, and of the testator's daughter at her death, which was absolutely confirmed. The cause now came on for further directions. The question was, whether the testator intended that his residuary estate should vest in his next of kin at the death of his daughter without leaving children, in exclusion of his daughter herself, in which case the defendant Bulmer would be entitled as such reported next of kin; or whether it should go to his nearest of kin who should be living at his death, including his daughter, in which case the defendant White, her husband and legal personal representative, would be entitled.

The VICE-CHANCELLOR, at the hearing before him said, I think it is plain there is not an intestacy, because after the testator has made that disposition of the residue of the property which consists in the fact of giving the daughter an interest, and making the provision for her children, then he proceeds in this manner: "Provided always, and I do declare my will and mind to be, that in case my said daughter shall happen to die without leaving any issue, then I will and direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, upon her decease without issue as aforesaid, raise and pay the sum of £3,000. to such person or persons as she my said daughter shall in and by her last will and testament in writing, or any writing purporting to be her last will and testament, or any codicil thereto, nominate, give, direct, or appoint." That is one proviso; one part at least of what he directs under the general head of the provision. And then he says, "And in case my said wife shall happen to survive my daughter, and my daughter shall die without issue as aforesaid, then I will and direct that my trustees shall, upon the decease of my said daughter, and such failure of issue as aforesaid, raise and pay out of the said trust monies the further sum of £2,000. unto my wife." And

then he says, "And I will and direct." Then he proceeds to complete the ultimate proviso, by declaring that he does direct "that the trustees shall assign and transfer the residue of the trust-moneys, and the residue of my personal estate, unto the nearest of kin of my own family for ever." I consider, therefore, there is no intestacy; it is a gift: and it can be no intestacy unless it is made out that these words necessarily have no meaning; if they have the meaning which either one or other of the counsel contend for, then there is no intestacy; he says, "unto the nearest of kin of my own family for ever." Now, if he had meant to say his own nearest of kin, how simple it would have been to have said, "my nearest of kin;" but it is plain he did not mean that, because, if that which is said to be a man's intention is obviously easy to execute, and the party does not execute it in the obvious and easy manner, I think it is a fair inference to hold that he really meant something else than that which is so obvious and easy; he says, "the nearest of kin," *not of myself*, but "of my own family for ever." Now, I cannot but think, if he had used the words "in the event of the death of my daughter, and failure of issue of my daughter," and so on, "the trustees shall transfer it to the nearest of kin of my family," that would have been a gift to the daughter. And when he says "the nearest of kin of my own family," I cannot but think that the most natural construction of the words is, to make the persons of whom the nearest of kin are spoken of, those persons who, according to ordinary language, would be his family, that is, his daughter; and I am more inclined to think that this is the meaning of the phrase, because, though the construction has been put by courts of law upon the words "*relation*," and so on, which has been established by that series of cases beginning with the case of *Harrington v. Harte*, (a) I believe, out of the courts of law, nobody would think that that is the construction; and the multitude of cases shew the willingness to dispute the point where it is disputable. Now, the words, therefore, of themselves, of necessity implying his own next of kin, are his own relations, by the testator having thought proper to use that phrase, which appears to me to be truly singular, for I never remember to have heard it before. For the purpose of construing this phrase, which here has received a legal construction, I will look at what he has done by the former part of the will; and there he has given the residue of his property to his daughter for her life, with remainder to her children, obviously only words to make a provision in favour of his daughter; now the issue no longer being able to enjoy the property, and having regard also to the particular circum-

stances of the property, as given by him in these most singular terms (which I never saw before), it appears to me it is *not* a reasonable or rational construction to hold that, under the terms of "the nearest of kin of *my own family*," the nearest of kin of *his daughter* is of necessity the nearest party to take.

Against this decree the present appeal was brought, and now came on for judgment.

Mr. *Wigram* appeared for the appellant, and contended that the testator's daughter took through her representative, or that there was an intestacy, and in either case the husband was entitled.

Mr. *Jacob*, on the part of the respondents supported the view taken by the Vice-Chancellor. It was clear the testator did not intend to give the residue to his daughter, for he had expressly directed that she should have a power of appointment over a certain sum, and then proceeded to dispose of the residue.

The LORD CHANCELLOR said, the words admitted but of two constructions, and must either refer to the nearest of kin at the testator's death who was his daughter, or his nearest of kin at her death. Circumstances showed that his own death could not be referred to, and as the defendant filled both characters, and was nearest of kin both to the testator at his daughter's death and to the daughter herself, he was entitled. His Lordship added, that the decision of the Vice-Chancellor was right; appeal dismissed with costs.

The following cases were cited in the argument for the plaintiff:—*Jones v. Colbeck*, Ves. J. 38; *Briden v. Hewlett*, 2 Myl. & K. 91; *Elmsley v. Young*, id. 82; *Butler v. Bushnell*, 3 id. 232; *Long v. Blackall*, 3 Ves. J. 486.

For the defendant—*Doe v. Lawson*, 3 East 278; *Pope v. Whitcombe*, 3 Mer. 689; *Dun v. Norton*, 2 P. Wms. 390; *Pearce v. Vincent*, 2 Keene, 230; and *Wright v. Atkins*, 19 Ves. J. 299.

#### COURT OF EXCHEQUER, May 13.

JONES v. HUGHES.

ATTORNEYS. *Whether upon a plaintiff and defendant settling an action between themselves, without the plaintiff's attorney, and without paying his costs, the latter may, nevertheless, proceed with the action to judgment as if no such settlement had been made.*

This was an action for work and labour, and goods sold and delivered to the amount of £75 the plaintiff had a verdict for £50.

Mr. *Richards* had obtained a rule nisi on behalf of the defendant, to set aside the verdict which, it was alleged, had been obtained by the attorney for the plaintiff, after the action had been settled between the plaintiff and defendant.

Mr. *Kelly* now showed cause against the rule.

(a) 1 Cox, 131.

It appeared that the plaintiff had fitted up the machinery for the defendant, and having agreed to perform the contract, as the defendant agreed, the latter refused to pay the amount med in the action, which was £75. In the month of March last, a short time previous to assizes, it appears the plaintiff and the defendant met, when the former expressed a strong desire to settle the action without going to a trial, because, as he said, although the defendant had money to go to law with, he (the plaintiff) had not. Being near a public-house at the time, they entered and sent for a mutual friend, and an agreement was drawn up and signed by both parties, the terms of which were that each should pay his own costs, and the defendant was to pay the plaintiff such sum of money as he in honour and conscience considered was due from him to the plaintiff for the work done. The sum then incurred by the attorney of the plaintiff appeared, amounted to £50, for which he proceeded and obtained a verdict.

Mr. Williams also against the rule, now concluded that the attorney had a right to proceed to keep his verdict, because, though it might appear distinctly in the agreement, yet all the circumstances of this case showed clearly that there was collusion between the parties for the purpose of keeping the attorney out of his costs. PARKE, B. observed, that collusion must be clearly shown, because it was well known that an attorney gives credit, and can only look to his client for the payment of his costs, and a plaintiff and defendant had a right to settle the matter in how they pleased. Unless fraud and collusion were proved,—the attorney had certainly a right to look to the defendant for the payment of his costs.

Mr. Williams submitted that the affidavit clearly showed the collusion charged against the parties. The fact was, the plaintiff was a poor man, indeed an insolvent; but the defendant was a rich man. The plaintiff stated the agreement was obtained from him after he had been drinking for some time in a public-house at Brecon, and that the defendant, knowing the amount of costs which had been incurred, said to him. "Oh, never mind the matter; you are a poor man, here is £15 for you and your children; keep it, and don't you trouble Mr. Thomas." It was, therefore, evident the defendant intended to prevent Mr. Williams from obtaining from him the amount of his costs, and thus save himself the sum of £35. Under these circumstances the learned gentleman said he would submit to the court that the rule should stand aside the verdict ought to be discharged.

Mr. Kelly said—It was quite evident that the plaintiff as well as his attorney had been overruled by the defendant. The plaintiff was a poor man, and had been induced by the de-

fendant to sacrifice his own interests as well as those of his attorney. He hoped, that even if their Lordships should think the verdict ought not to stand, they would not give the defendant any costs against either the plaintiff or his attorney, for, at all events, it was clearly a case for strong suspicion.

Mr. Richards, in support of the rule, denied that there was the least colour of a collusion in the agreement between the plaintiff and the defendant. The latter, of course, wished to make the best bargain he could with the former. The defendant denied that the plaintiff had any claim upon him at all, but not wishing to go into court after an arrangement which had been in progress during ten days, they at last entered into an agreement by which it was stipulated that each party should pay his own costs. He would ask whether there was any thing like collusion in such an agreement? He had affidavits showing that the plaintiff, both on the evening of the day the agreement was entered into, and four days afterwards when he had been paid the £15 by the defendant, said to several friends that he had entered into an arrangement which was perfectly satisfactory to him. In making the arrangement his principal object was to settle the action, and he urged that he should have to pay the costs against an argument that he ought to have more money from the defendant.

Mr. Petersdorff followed, and submitted that there was no pretence for saying that in this case there was any collusion between the plaintiff and the defendant to defraud the attorney, and according to the doctrine laid down in all the cases, such a charge must be positively and distinctly proved in the affirmative before the court could act upon it.

PARKE, B. said there was no doubt upon the law of the case. A plaintiff was certainly master of his own actions, although attorneys appeared very often to forget that fact, and thought the action was brought merely for the purpose of recovering their costs, and not any damages to which their client might consider himself entitled. The law was clear, and he was of opinion that it was clearly made out in this case, that the agreement was entered into in fraud of the attorney but not of the plaintiff. Here was a poor man, whom the defendant knew to be in insolvent circumstances; he was well aware that the plaintiff could not pay the costs to his attorney, and he tempts him with £15, telling him at the same time to never mind his attorney, but keep the money for himself and his family. It was, therefore, clear that there was an intention to keep the attorney out of his costs. The verdict must be reduced to one shilling damages, which will carry the attorney's costs.

The Court gave the costs of the present motion to the plaintiff.—*Rule discharged with costs.*

May 12.

SAUNDERSON v. WESTLEY AND ANOTHER.

WARRANT OF ATTORNEY.—*Effect of ONE ATTORNEY being employed by both parties.*Mr. *Thesiger* had obtained a rule nisi to set aside a warrant of attorney.Mr. *Platt* now showed cause against the rule.

It appeared that one of the defendants, Miss Walters, when she came of age would be entitled to some property. The defendant Westley (who was her brother-in-law) had negotiated with the plaintiff a loan of £400 upon the security of Miss Walters. When the security for the money, which was a *warrant of attorney*, was taken to Miss Walters for her signature, she expressed a wish that it should be prepared by her attorneys, Messrs. Walters and Reeve. She was, however, told that those gentlemen would not allow her to complete the transaction; and having perfect confidence in her brother-in-law, she went to the office of Mr. Goddard, the plaintiff's solicitor, where a paper was read over to her, but she did not understand it, and signed it as a security for her brother-in-law. Mr. Goddard, it was stated, did not explain the nature of the instrument, and Miss Walters stated in her affidavit that he had not, upon any occasion, acted as her attorney, nor was any one present then on her behalf. In answer to this, Mr. *Platt* said he was furnished with the affidavit of the plaintiff, from which it appeared that the £400 had been advanced; that he proposed that Messrs. Walters & Reeve should draw up the instrument, but the defendant declined, and named Mr. Goddard, who acted as the attorney for both parties.

PARKE, B. said it appeared that in this case there was but one attorney acting for both the plaintiff and defendant. It had been held that that would not do. The defendants ought to have their own attorney.

Mr. *Platt* said it was stated in the affidavit that Mr. Goddard prepared the instrument at the request of the defendants, and was employed by them.

Mr. *Thesiger* said, it also appeared that Mr. Goddard was the solicitor of the plaintiff on former occasions; that for this very business the bill of costs was made out against the plaintiff; and that when Messrs. Walters and Reeve applied to Mr. Goddard for an inspection of the security signed by Miss Walters, he refused, and said he could not do so until he saw the plaintiff, his client. It further appeared, from the affidavit of Mr. Westley's father, that Miss Walters was rather silly, and there had been no protection thrown around her by the presence of Mr. Goddard.

The COURT were of opinion that in this transaction Mr. Goddard must be taken to have acted as the attorney for the plaintiff, and not for the defendants. Indeed there was no pretence that he had ever acted as the attorney of the defendant, Miss Walters. Wherever there was one attorney only present at such transactions, it ought to appear very clearly that he acted in no manner for the plaintiff, otherwise the protection intended to be given by the Act of Parliament would be entirely taken away. Here the warrant of attorney was clearly bad, and was, therefore, void and of no effect. Rule made absolute.

## CHANCERY SITTINGS.—TRINITY TERM, 1840.

## LORD CHANCELLOR'S COURT.

Wednesday, May	27	-	-	Appeal Motions and Appeals.
Thursday	— 28	-	-	Petition Day.
Friday	— 29	-	-	
Saturday	— 30	-	-	} Appeals and Causes.
Monday, June	1	-	-	
Tuesday	— 2	-	-	
Wednesday	— 3	-	-	} Appeal Motions and Ditto.
Thursday	— 4	-	-	
Friday	— 5	-	-	
Saturday	— 6	-	-	} Appeals and Causes.
Monday	— 8	-	-	
Tuesday	— 9	-	-	
Wednesday	— 10	-	-	} Appeal Motions and Ditto.
Thursday	— 11	-	-	
Friday	— 12	-	-	
Saturday	— 13	-	-	} Appeals and Causes.
Monday	— 15	-	-	
Tuesday	— 16	-	-	
Wednesday	— 17	-	-	Appeal Motions and Ditto.

Such days as his Lordship is occupied in the House of Lords excepted.

## VICE-CHANCELLOR'S COURT.

Wednesday, May 27	-	-	Motions.
Thursday — 28	-	-	Petition Day.
Friday — 29	-	-	{ Short Causes, Unopposed Petitions, Pleas, Demurrers, Exceptions, and Further Directions.
Saturday — 30	-	-	
Monday June 1	-	-	{ Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday — 2	-	-	
Wednesday — 3	-	-	{ Motions.
Thursday — 4	-	-	
Friday — 5	-	-	{ Short Causes, and Unopposed Petitions, previous to General Paper.
Saturday — 6	-	-	
Monday — 8	-	-	{ Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday — 9	-	-	
Wednesday — 10	-	-	{ Motions.
Thursday — 11	-	-	
Friday — 12	-	-	{ Short Causes, and Unopposed Petitions, previous to General Paper.
Saturday — 13	-	-	
Monday — 15	-	-	{ Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday — 16	-	-	
Wednesday — 17	-	-	Motions.

## ROLLS' COURT.

Wednesday, May 27	-	-	Motions.
Thursday — 28	-	-	Petitions in General Paper.
Friday — 29	-	-	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday — 30	-	-	
Monday June 1	-	-	{ Motions.
Tuesday — 2	-	-	
Wednesday — 3	-	-	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Thursday — 4	-	-	
Friday — 5	-	-	{ Motions.
Saturday — 6	-	-	
Monday — 8	-	-	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Tuesday — 9	-	-	
Wednesday — 10	-	-	{ Motions.
Thursday — 11	-	-	
Friday — 12	-	-	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday — 13	-	-	
Monday — 15	-	-	{ Petitions in General Paper.
Tuesday — 16	-	-	
Wednesday — 17	-	-	Motions.

## AT THE ROLLS.

Thursday June 18 - Short Causes after Swearing in the Solicitors.  
 Causes, Consent Causes, and Consent Petitions, every Tuesday at the Sitting of the Court.

## REVIEW OF NEW BOOKS.

*ART, showing the Descent of Estates and Inheritance in Fee Simple in Possession, Freehold, Copyhold, in Remainder, Reversion, or by Custom upon Deaths, after the day of January, 1834, under the Statute 3 & 4 W. 4. c. 106.* By W. B. D., Esq., one, &c. John Richards & Co., Fleet Street.

This is a very useful Chart of intelligence for the attorney's office, and for the student. It is not alone a mere Chart of Descent, but

the illustrations make it one of practical value, which in these *glorious LAW REFORM days* is much wanted. The following observations of the author are very concise, and will give some idea of his illustrations.

The Act 3 & 4 Will. IV. c. 106, extends to all hereditaments, corporeal, and incorporeal, freehold, and copyhold, and whether descendible according to the common law, or according to the custom of gavel kind, borough English, or other custom.

Descent, or hereditary succession, is that means by virtue of which on the death of the

ancestor intestate the real estates, including heirlooms and other chattels annexed to the freehold, devolve upon the heir. For a person to be lawful heir he must be legitimate, a natural born subject, an alien naturalized by Act of Parliament, or a denizen by the King's letters patent.

Gavel kind lands descend to all the sons equally, and in default of sons to all the daughters in the same manner: females, however, representing males, inherit with males. (Rob. Gav. 113; ed. 1822.) This species of descent extends also to collaterals and to limitations in tail, the male issue of tenants in tail inheriting equally as heirs of the body. (Rob. Gav. 115, 119, ed. 1822.)

Borough English lands descend to the youngest son, and this is the case even should the property be estates in tail. (Litt. s. 165, 1 Inst. 110 b. n. 3.) This custom does not extend to collaterals (Rob. Gav. 118, Cro. Jac. 198); if, therefore, lands descend to a younger brother, and he dies without issue, the eldest brother will be entitled.

As regards copyhold and other customary lands, the statute 3 & 4 Will. 4, c. 106, does not change the descent of those lands which are governed by the custom, unless to such a degree as its enactments may be applicable to them in common with freehold lands.

Estates tail descend *per formam doni*, and are not interfered with by the 3 & 4 Will. 4, c. 106, but are governed by the statute *de donis conditionalibus* (13 Ed. 1, c. 1); this descent is called descent by statute.

The descent of an estate tail must be traced to the first purchaser or donee, and through that description of heirs which is specified in the original gift; the maxim *sesina facit stipitem* does not apply to this estate (3 Rep. 41 b, 2 Ves. s. 364), and there is no exclusion of the half-blood, for the issue in tail are always of the whole blood of the donee. (8 T. R. 213.) Nor is the descent of an estate tail interrupted by attainder, as the issue claim *per formam doni*, and are as much within the intention of the gift and described in it as the ancestor.

*Succession per Stirpes*, or according to the root, is where all the children take the same share as their root, whom they represent, would have done. By this rule the descent is kept uniform and steady.

*Succession per capita* is where the issue claim in their own right, as next of kin to the ancestor, without reference to the stock from whom they sprung.

*Agnatic succession* is where the issue is derived from male ancestors through the father's side. (2 B. C. 236.)

*Cognatic succession* is where the issue is derived from female ancestors through the mother's side. (2 B. C. 235.)

*Lineal consanguinity* subsists between persons of whom one is descended in a direct line from the other, as John Doe, in the table, and his father, grandfather, &c.

*Collateral consanguinity* is something like the former, inasmuch as it agrees with it in this, that they claim descent from the same ancestor, but do not descend one from the other.

"The Purchaser" to mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent. (See sec. 1.)

#### EXAMINATION OF ARTICLED CLERKS AT THE HALL OF THE LAW SOCIETY, TRINITY TERM, 1840.

This examination is appointed to take place on Tuesday, the 9th of June. The Senior Master of the Common Pleas will preside. The testimonials of service are to be left at the Law Society on Tuesday, the 2nd of June. The number for examination is upwards of 160.

#### NOTICE TO CORRESPONDENTS.

J. W.—No.

E. A.—see Western's Conveyancing, Vol. 4, p. 25, n. a.

A Magistrate is not above the law.—Your conduct was correct.—You had the right to conduct the case.

A letter from you *without date* has escaped us. It refers to Problem 25, Vol. 3.—What is the custom of the country?

**RESTRAINTS ON MARRIAGE.**—At a Meeting of parties aggrieved by the existing restrictions upon Marriage, held at the office of Messrs. CROWDER & MAYNARD, No. 3, Mansion House Place, London, on Thursday, the 21st of May, a Committee, consisting of seven of the gentlemen present, was appointed, (with power to add to their number), to take the necessary steps for obtaining a repeal of the OBJECTIONABLE restrictions upon Marriage, and more particularly that which prohibits Marriage with a deceased Wife's Sister; and it was resolved, that the objects of the meeting should be forthwith published in such of the London and Provincial papers as the Committee might think proper, with a view to obtain the active co-operation of all parties interested.—Communications to be addressed to Messrs. Crowder and Maynard, above.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookbinder, 194, Fleet Street, in the Parish of St. Dunstons in the West, in the City of London.—Saturday, May 23, 1840.

# The Legal Guide.

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SATURDAY, JUNE 6, 1840.

[No. 6.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 51.)

OTHIER puts three cases to justify his  
 approval of the doctrine of the *Pan-*  
 (a) *First*, where the thing borrowed  
 greater value than the borrower's own  
 property: secondly, where the things are  
 of the same kind and value; thirdly,  
 where the borrower's own are of the greatest  
 value; and he decides each of the cases  
 in the borrower, admitting the last to

(a) See ante, p. 51.

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be of chief difficulty. He thus reasons upon  
 the last case. It is true that the borrower  
 cannot be reproached with any want of fide-  
 lity; but still the borrower undertakes for  
 extraordinary diligence *tenetur adhibere ex-*  
*actissimam diligentiam*, and by the nature  
 of his contract he engages for all risks, ex-  
 cept losses occasioned by the *vis major*.  
 “*Præstat omne periculum præter casus for-*  
*tuitos seu vim majorem.*” Certainly that alone  
 is deemed to be *vis major*, which cannot be  
 resisted, *vis major, cui resisti non potest*.  
 Although the borrower could not save both  
 his own and the borrowed goods; yet he  
 could have saved the latter at the expense of  
 his own, and therefore they could not be said

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to be lost by the *vis major*. Pothier admits that it would be otherwise, where the tumult is such that the borrower has no choice, and saves what comes to his hands first, without any exercise of judgment. But (he says) there is an implied exception to all these cases of *casualty* and *accident*, which is that they shall be without any default on the part of the borrower; for if they are connected with his default, his responsibility remains. As if a borrower is imprudent enough to leave the high road and pass through some thicket, or unfrequented path, or to travel at an unseasonable hour, or on a road notoriously frequented by robbers, without proper precautions, and a robbery takes place, he will nevertheless be liable for the loss. So, if he rides a borrowed horse on an improper road, and he falls, and is killed by the accident; or if he puts the horse into an improper pasture, and he is stolen by robbers; for accident or irresistible force will not excuse his own rashness. So if a lady borrows jewels to wear at a ball, and by her imprudence they are lost by robbery; or if she exposes them to any other undue perils, by leaving them in an improper place, the loss, though by accident, will be her own. There is, however, this difference, which POTHIER considers very material in solving questions of this nature, that in a like case of borrowed jewels, if they were lost by robbery or by accident, and the borrower used them in a suitable manner, and left them in suitable places only, then the loss must fall on the lender; for, although the lady's wearing them, or leaving them in the particular place, may be said to be the *occasion* of the loss, yet it was not the *cause* of the loss. So passing through a forest with a borrowed horse may be the *occasion* of the borrower being robbed of him there; but in a just sense, if the forest were necessary to be passed in the journey, the borrower passing could not be considered as the *cause* of the loss, as he was guilty of no neglect.

But the *cause* of the loss is correctly to be referred to the robbery. So that the borrower is responsible for the loss, not only when he might have saved the thing by proper care from the accident, but when his own neglect has been the occasion of the accident. Again, if the borrower puts a borrowed horse under a ruinous building, and it falls, and kills or maims the horse, and the borrower might have foreseen this, he is responsible. But if the fall is caused by an unexpected storm, then he is not responsible, if, in ordinary cases, the place would have been safe (*b*). So, again, where a party is desirous of purchasing a horse, obtains the loan of it for the purpose of trial, and employs an inexperienced person to make such trial, the borrower shall be liable to the value of the horse; but if he employs a skilful person who makes the trial, and the horse runs away and is killed, then he is not responsible (*c*).

We may next consider, in this class of bailments, upon whom, in case of any damage or loss to the loan, the burthen of proof rests. Pothier considers that the burthen of proof rests upon the *borrower*; but as in these cases rest upon their own peculiar individual circumstances, it is difficult either to ascertain or lay down any general rule; in some cases it has been held that the burthen of proof rests upon the *lender* (*d*).

We may next inquire, who is to be deemed the owner or proprietor of the thing during the period of the loan, or, in other words, whether the borrower has a special property in it, or only a naked possession. A gratuitous permission to a third person to use a chattel does not, at the common law, take it out of the possession of the owner.

(b) Pothier Prêt à Usage, ch. 2, s. 2, art. 2, § 56, 57. See also Jones Bailm. 67, 68, 69. Dig. 13, tit. 6. l. 5, s. 4.

(c) See *Lord Camoys v. Spar*, post 90.

(d) See *Rez v. Marsh*, 2 Barn. & Cresk. 720; *Ellis v. Packwood*, 3 Taunt. 264.

(e) 2 Saund. R. 47. b.; *Smith v. Mills*, 19 480; *Lotan v. Cross*, 2 Camp. R. 484; see also *Bridge v. Phillips*, 2 Stark, Rep. 544.

and this rule agrees with the civil law. The lender still retains the sole proprietary interest, and nothing passes to the borrower but a mere right of possession and user of the thing during the continuance of the bailment. The possession of the borrower is in fact the possession of the lender. "*Rei commodatæ possessionem et proprietatem retinemus. nemo enim commodando rem facit ejus cui commodat*" (f); so that an action for trespass or conversion will lie in favour of the lender against a stranger, who has obtained wrongful possession, or has made a wrongful conversion of the thing loaned; and although the borrower has no special property in the thing loaned, still it seems, that if the injury done by a stranger is of such a nature that the bailee would be liable over to the lender, the latter may maintain an action of trespass, and even trover, founded upon wrongful possession, to recover damages (g). A lender bailee has a sufficient interest to sue over (h).

(To be continued.)

#### PROBLEM VI. VOL. IV.

##### FIXTURES.

What constitutes a Fixture—Show the rights of fixtures as between Landlord and Tenant—Outgoing and an incoming Tenant—Trade fixtures, and Ornamental Fixtures—What effect has the bankruptcy of the Tenant on the Tenant's fixtures?

THE EDITOR OF THE LEGAL GUIDE.

#### ANSWER TO PROBLEM 25. VOL. 3.

(Continued from p. 73.)

**IN CHANCERY.**—On what subjects may relief be obtained by a bill in Chancery?

**Infants.**—In matters relating to infants, the Court has most commonly been called upon for its aid with regard to one of these three classes; 1. Guardianship; 2. Maintenance;

3. Marriage. But frequently in these matters the method of proceeding is by petition, and the object sought is frequently not relief in its strict sense; we may, therefore, treat this division of our subject with all possible brevity. As respects guardianship, there is little applicable to our subject—the most usual form of application being by petition. If, however, a testamentary guardian has taken the trust upon him, and it is desirable he should be removed for misconduct, a bill must be filed. (*O'Keefe v. Casey*, 1 Sch. & Lefr. 106.) The right to guardianship will be decided only on bill, and not on petition. (*Ex parte Hopkins*, 3 P. Wms. 152.) Maintenance is sometimes granted on petition in very special cases; but, as a general rule, a bill should be filed. If a child has property left to it independently of its father, and the father be not of ability to maintain it suitably with its expectations, the Court will decree an allowance during the child's minority. (*Buckworth v. Buckworth*, 1 Cox, 80.) It is not necessary to show that the guardian or father of such child is in distressed circumstances. (*Roach v. Garvan*, 1 Ves. 100.) Where maintenance is allowed, it is always paid to the parent out of the child's estate; and there is no instance of its being deducted out of a legacy left by a father to the child, or out of a debt due from the father though insisted on by creditors. (1 Madd. 344.) Generally, trustees will not be allowed to break in upon the capital of an infant's fortune, though the capital be so small as not to leave a comfortable maintenance and education; and it is very rarely that the Court itself will do this. (*Walker v. Wetherell*, 6 Ves. 474.) Although the Court will assume the right of controverting the direction of the bill in cases when, under an accumulation clause, the children have an equal chance to take the capital with the accumulation, that is, if all persons interested consent, and it is for the benefit of the children; yet, if it is provided that the share of any child dying under the age of 21 years leaving issue, shall go to such issue, maintenance will not be allowed. (*Errat v. Barlow*, 14 Ves. 203.) With respect to the marriage of infants (*being wards in Chancery*), it will suffice to remark that the most common applications to the Court are for leave to marry, and for a reference to the master to see whether the settlement proposed is proper. It is sometimes necessary to file a bill for an order on an infant trustee to convey. (*Ex parte Vernon*, 2 P. Wms. 549.)

**Specific Performance of Agreements.**—“Equity looks upon things agreed to be done as actually performed.” It is on this principle that the Court of Chancery enforces the specific performance of agreements. Therefore, when a

Dig. Lib. 13, tit. 6. l. 6, 8; Ayliffe's Pand. B. 6, p. 517; Domat. B. 1, tit. 5, § 1, n. 4. *Burton v. Hughes*, 2 Bing. R. 172; *Sutton v. Taunt*, R. 302; *Rooth v. Wilson*, 1 B. & Ald. 453; *Lord Raym.* 911; 2 Bl. Com. 453. *Burton v. Hughes*, ante; see also *Ogle v. Atkinson*, 759; *Amory v. Delamirie*, 1 St. R.

contract has been entered into for the sale of an estate, equity regards the vendor as a trustee for the purchaser of an estate sold, and the purchaser, as a trustee for the vendor, of the purchase money; and if the vendor or vendee die before the time appointed for completing the contract, it is immaterial. (Sug. V. & P. 160; Gold's Equity, 69.) I need not, perhaps, remind your readers that the equity maxim, above given, is not altogether without exception. Those who wish to examine the exceptions may refer to the cases cited by Mr. Maddock (C. P. V. I. p. 370.) It is stated as a general rule that agreements which the Court will decree to be specifically performed must be, 1. According to the forms prescribed by law; 2. Between parties able and willing to contract; 3. They must be certain, equal, and fair. The forms, above alluded to, depend upon the statute of Frauds (29 Car. 2, c. 3, § 6); by a liberal interpretation of this statute, a letter containing the terms of the agreement has been held sufficient (*Kennedy v. Lee*, 3 Meriv. 441); but it must clearly import a *concluded agreement*, and not a mere treaty. Sometimes when there has been part performance of a parol agreement a written contract has been dispensed with; it must, however, be shown that it was the identical agreement which was in part performed. (*Lindsay v. Lynch*, 2 Sch. & Lefr. 8.) Letting the vendee into possession, especially where he has, in consequence, laid out money in improvements, has been deemed part performance. (*Hawkins v. Holmes*, 1 P. Wms. 770.) It is laid down as a general rule, that where a person stipulates to perform that which is either in his own power to do, or in the power of others over whom he can exercise controul in that behalf, the Court will compel him to do it, or procure it to be done. Thus, a married man has been ordered to procure the acknowledgment of his wife of a fine in mortgaged lands. (Gold's Eq. 76; and cases there cited.) The specific performance of covenants is frequently sought in equity. Covenants which run with the land will be decreed to be specifically performed for or against successive owners of the land. (1 Eq. cases, Abr. 473.) If one agrees to sell lands he does not possess, he will be compelled to perform his agreement, should he afterwards acquire them, (2 Cha. cas. 112), a bill will lie for the specific performance of an award. (*Wood v. Griffiths*, 1 Swanst. 43.) It is to be observed, that where a party wishes to compel a specific performance by another, he must make his own part of the agreement precedent: also, that the Court will not in all contracts decree a specific performance. It is only where the party wants the thing in specie (2 Bro. C. C. 341), and where a legal remedy is inadequate or defective, (*Flint*

*v. Brandon*, 8 Ves. 163.) And in cases where the Court usually will grant relief, the party filing a bill must come into court with "clean hands;" for he who seeks equity must do equity. Gross laches will sometimes prove a bar to relief (*Newman v. Rogers*, 4 Bro. C. C. 391). As the rule requires that the parties must be able and willing to contract, agreements, generally speaking, of married women, infants, and lunatics, will not be enforced: nor where one of the parties was intoxicated. The last part of the rule requires little comment; the terms should be explicit, and the consideration not inadequate or unconscionable.

*Trusts.*—These are a very fruitful source of Chancery business in a variety of manners. The infinite number of cases coming under this head precludes my giving it that degree of particular attention, which has been manifested in the former part of the subject. It is a general rule that a trust shall never fail of execution for want of a trustee; and, therefore, when property is bequeathed in trust, but no trustee appointed the Court, in the case of real estate, considers the heir-at-law as a trustee. In the case of personal estate, it considers the personal representative a trustee, and will see to the execution of the trust. (See *White v. White*, 1 Bro. C. C. 12.) The Court is frequently called upon to lend its aid in the execution of the provisions contained in marriage-settlements—to determine upon the extent to which the marital rights of the husband attach to the wife's separate property—to direct in what manner portions may be raised for younger children, and in various other matters of a similar nature to interpose its authority. Mortgages form another source of Chancery business. The principal occasions on which the attention of courts of equity is called to mortgages, is upon bills filed, 1. To redeem; 2. To foreclose; 3. In respect of equitable mortgages. Trusts created by deeds for the payment of debts, or of compositions for debts, are frequent, and courts of equity will assist in enforcement of agreements for a composition obtained without fraud or misrepresentation. (1 Madd. 541.) The Court is often called upon to pronounce a decision upon the meaning of last wills, and otherwise to aid in carrying them into effect. It is not only with respect to wills expressly declared by some instrument in writing that the Court will lend its aid, but it will enforce the execution of *implied trusts*. In regard to these, it is frequently called upon to render its assistance in the administration of assets, and with respect to legacies. As, for instance, by decreeing a distribution of an estate among creditors; or by compelling a sale of devised in trust of lands; or by compelling the payment of bills due by debtors. When, from circumstances, it is de-

to remove a trustee, the proper course is to bring a bill for that purpose. Such are some of the most important subjects on which relief may be obtained by bill in Chancery: but, for more particular information respecting the same, I must refer your readers to the various books of practice.

GUILIELMUS.

# ANSWER TO THE SAME PROBLEM, BY E. A.

(Continued from page 71.)

6. SPECIFIC PERFORMANCE OF AGREEMENTS. Equity also compels the specific performance of agreements, and although this part of jurisdiction was in its origin built upon the foundation of a legal right, the law giving the title (*Halsey Grant*, 13 Ves. 76.) or rather a legal right to the title completed, (*Alley v. Deschamps*, Ves. 228.) yet to this right courts of law, could only adjudge damages for non-performance, had not the means of giving effect been found. Courts of equity interfered, and having long established their jurisdiction to this extent, did not stop here, but laid down another principle, now well settled, prohibiting the forms of law from being made the instruments of injustice, and therefore, as I observed in the beginning of my answer, when advantage is attempted to be taken of any accident or innocent mistake, rendering a strict and literal performance of contracts impossible; if the failure be not substantial, courts of equity will interfere, though courts of law could give no relief, (*Seton v. Slade*, 7 Ves. 4.; *Eaton v. Lyon*, 3 Ves. 693.; *Larnon Napper*, 2 Sch. & Lef. 684.).

By the Statute of Frauds, all parol agreements respecting any interest in or to arise out of real estate, except leases for terms not exceeding three years, are declared void. But courts of equity have long been accustomed to decide in contradiction of this express enactment. The example was set by the House of Lords in the case of *Lester v. Foxcroft*, (Colles, P. C. 108) where it was held to be against conscience to deny a party who had entered and expended money on the faith of a parol agreement, to be treated as a trespasser, and for the other party in breach of his engagement (though it was merely verbal) to enjoy the advantage of the money so laid out, and it was ordered and adjudged that the agreement should be specifically performed. In this decision I need scarcely add is constantly cited upon as authority.

The only justification of an equitable decree in contradiction to the statute of frauds, is the liberality of the great object which the legislature had in view when passing that statute. It is only when it would be a fraud in one of the parties to run from an agreement that parol

evidence of its terms will be received (*Savage v. Carroll*, 1 Ball & B. 282), and that if sufficiently proved, its specific execution will be decreed (*Lockey v. Lockey*, Prec. in Cha. 519).

I have previously stated that a party injured by the non-performance of an agreement could obtain damages in a court of law for the injury; but equity gives a more complete remedy by compelling the party who is desirous of doing an injury to another, by refusal to perform an agreement, to do what in *foro conscientiae* he is bound to do. Relying on its own power to effect this equity considers what is contracted for a valuable consideration to be done as actually performed, (1 Fonb. Eq. tr. 419) and the property contracted to be dealt with, is affected with precisely the same consequences as it would have been, had the contract been *bond fide* executed. Thus A enters into a written contract to sell his land to B, but no conveyance is made, immediately after this contract is signed, A is in equity considered as a trustee of the estate for B, and B as a trustee of the purchase money for A. B is entitled to the rents and profits of the land; A to the interest of the money. In such circumstances the estate is vendible and devisable by B, and if he die intestate, it will descend to his heir at law. So money directed by a will to be laid out in the purchase of land, is in equity considered as land, and though the land be not purchased in the lifetime of the person intended to be benefited, it will not pass as personal estate under a bequest of all his personal property to a legatee.

The original foundation of decrees for specific performance was, that the damages which might be given in a court of law, would not compensate the party to that extent which he was entitled, nor would put him in so beneficial a situation as if the agreement had been carried into execution. On this ground the court, in a variety of cases, has refused to interfere, where from the nature of the case the damages must be commensurate with the injury sustained, (*Errington v. Annesly*, 2 Bro. c. ca. 341.; *Flint v. Brandon*, 8 Ves. Jr. 363, Mitf. pleadings, 109), as for instance in agreements for the purchase of stock, it being the same thing to the party where or from whom the stock is purchased, provided he receives the money that will purchase it. This shows what were the grounds on which courts of equity first interfered, but they have constantly held that a party coming into equity for a specific performance, must come with perfect propriety of conduct, otherwise they will leave him to his remedy at law (*Harnett v. Yielding*, 2 Sch. & Lef. 553). The decreeing a specific performance is a matter of discretion, but it is not an arbitrary nor a capricious discretion, but must be regulated upon grounds that will render it judicial.

I must observe, however, that in cases of agreements the doctrine I am now stating is only applicable to those founded on a *bond fide* consideration, and where the party seeking the assistance of the court has performed, or is willing to perform his part of the contract; there must also be a mutuality and certainty (1 Madd. C. P. 424) in the agreement, and no very great inadequacy in the price. A specific performance will not be obtained if the plaintiff has been guilty of gross laches, and has not evinced any anxiety or readiness to execute the agreement (*Guest v. Homfray*, 5 Ves. 818.; *Ryle v. Swindels*, 1 McClell. 519). And it may be stated as a general rule, that the assistance of the court would be refused in all cases where a specific performance would occasion a failure of justice, or be opposed to public policy, or any of those great ends for which the jurisdiction of equity itself was established (*Powell v. Lloyd*, 2 Y. & J. 372).

*Lastly—I come to speak of Trusts.* The form of a trust or second use gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements, and devises in that form, and of all the long terms (vide Legal Guide, vol. 3, 389) created in the present complicated mode of conveying property. This is a very ample source of jurisdiction, but the trust is governed by very nearly the same rules as would govern the estate in a court of law, if no trustee was interposed, and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of common law (3 Bla. Com. 439).

It was owing to the statute of uses having, as it were, abolished from courts of law the cognizance of trusts, that the courts of equity interfered, and reduced them under its jurisdiction, and this as well as every other advance in the equitable jurisdiction was founded in justice only, because without the recognition and support which they received in equity, such trusts must have been inoperative, and hence it is that they are usually styled "creatures of equity," and lie exclusively within its jurisdiction.

Trusts are either express or implied, and may be created of real or personal estate.

Express Trusts are made by deed or will, and the trustees are either formally designated by name or pointed out by some other circumstance, as the possession of an office. Implied Trusts are created by the construction which the courts put upon the words, acts, or situations of the parties. Executors and administrators are always, and heirs at law sometimes, considered as trustees by the court. If a trust is created by will, but no trustee is named, the heir at law will be held to be a trustee, so far as real estate is con-

cerned, and the personal representative a trustee for the personal estate.

The difference between uses and trusts, since the statute, consists in the Court of Chancery adopting a contrary construction from that which prevailed at law with regard to uses, the difference is not in the principles or rules of decision but in the application of those principles.

If an estate is purchased in the name of one, but the money is paid by another, (unless the case be one of advancement), it is a trust in Equity, although there is no declaration in writing by the nominal purchaser, but unless it appear on the face of the purchase deed that such was the case, the proof of the fact must be very clear (*Ryall v. Ryall*, 1 Atk. 59—*Groves v. Groves*, 3 Y. & J. 171). If two take a conveyance of lands to themselves and their heirs, this is a joint tenancy, and by the *jus accrescendi* or right of survivorship, incidental to and inseparable from such tenancy, in case of the death of either the survivor would succeed to the whole; but if it appear that the purchase money was not paid by the parties in equal proportions Equity will interfere and declare the survivor a trustee for the heirs of the deceased tenant as far as concerns his share (1 Eq. Ca. Abr. 291). Whenever a trustee, mortgagee, or tenant for life, gets an advantage either by being in possession or behind the back of the *cestui que trust* mortgagor or remainder man he must not retain it for his own benefit but hold it in trust (*Nesbitt v. Fredennick*, 1 Ball and Bea. 46). If the executor of a mortgagee purchases the equity of redemption of the mortgaged estate in his own name with the money due on the mortgage and a small advance of his own money he will be considered in Equity as a trustee of the purchase for the benefit of the testator's estate, having credit in the accounts for the sum advanced out of his own funds, (*Forbrooke v. Balguy*, 1 Myl. & K. 231). If such a purchase were made without the application of any portion of the trust funds the decision might be different (*Randall v. Russell*, Mer. 190). Words of request, recommendation, or confidence are sufficient in a will to raise a trust, where the property to be given is certain, and the objects to whom it is to be given are also certain, (*Pierson v. Garnett*, 2 Bro. c. c. 13—*Cruwys v. Coleman*, 9 Ves. 323).

(To be continued.)

## Imperial Parliament.

### HOUSE OF LORDS.—June 1.

#### ADMINISTRATION OF JUSTICE IN EQUITY.

On the order of the day being moved for going into committee upon the Administration of Justice

the Bill, Lord Brougham declared his adherence to the opinions he had formerly given upon the subject, which were opposed to the large increase of judicial force which was proposed by the present bill. There had been, indeed, a great increase in the number of bills filed and petitions presented, which were the main sources of business in the courts of equity, but this increase had been occasioned by the clearing off of arrears between 1831 and 1834, by which the obstruction of justice which formerly existed was removed. The labour since the time of Lord Hardwicke had increased three-fold, so in proportion had the business increased. An arrear, however, still existed, but that was merely temporary; and it would, therefore, be unnecessary to appoint judges who, after having disposed of the arrear, would have but little else to do. There would be, indeed, additional business transferred to the Court of Chancery from the Equity Exchequer Court, and there would be, doubtless, more delays when there was a certainty of a speedy decision upon their causes; but that increase could only be very small, in proportion to the number of additional judges which it was proposed to create. It had been asked, why was there not a board regularly sitting, to which the appellate jurisdiction should be confined? But it must be remembered, that if the members of this board were only judges of appeal, they would be comparatively less able to transact appeal business. If, on the other hand, the board was to be composed entirely of the judges of other courts, it followed that there could be no permanent sittings, and he was, therefore, of opinion that a board should be formed, to consist partly of those who, as judges of the inferior courts, had experience in matters of ordinary practice, and partly of men who should act only as judges of appeals, the great law officer of the Crown, of course, presiding over the court.

The LORD CHANCELLOR, after stating the great delay which suitors must unavoidably experience in the present state of the Court of Chancery, observed upon the great danger of a failure in justice when the judge had only in view the rapidity with which he could get through his causes. The time of the court was principally occupied by the hearings, and it was by the comparatively small number of these alone that Lord Hardwicke had been enabled to get through his business. The House had at present not only to provide for the arrear which now existed, but for the immense number of suitors who would resort to the court when they knew that their business would be speedily despatched. The details of the bill had been alluded to, but these he thought might be more profitably discussed in committee.

Lord LYNTHURST said, he was quite satisfied

that the House could come to no satisfactory decision upon the bill, except by referring it to the consideration of a committee up stairs. One judge in addition would, at least, be necessary to dispose of the present arrears, and his only doubt was whether one judge only would be sufficient.

The LORD CHANCELLOR expressed his entire acquiescence in the motion for referring the bill to a select committee.

Lord DENMAN thought their Lordships were perfectly competent, after all the inquiries which had taken place upon this subject, at once to form an opinion as to the best remedy for an universally admitted evil without sending this bill to a committee upstairs. At all events, he hoped the committee would proceed with its inquiries forthwith, and report as speedily as possible. He had come, with great reluctance, to a full conviction that it was necessary to increase the judicial strength of the Court of Chancery, and the sooner that remedy was applied the better. A state of transition in courts of justice was one of the worst for the suitors that could possibly exist.

The bill was then referred to a select committee.

Lord LYNTHURST presented a petition from 410 solicitors of the city of London, praying that the bill might pass into a law, as far as related to the appointment of two additional judges, and the abolition of the equity jurisdiction of the Court of Exchequer; two petitions with a contrary prayer, as far as related to the Court of Exchequer, from a conveyancer of eminence, and some country solicitors; also petitions from various classes of officers in the Court of Exchequer, for compensation in case the equity side of the Exchequer should be abolished.

The petitions were referred to the committee on the bill.

## Law Reports.

### COURT OF CHANCERY.—May 27.

#### BUSINESS of APPEALS from the VICE-CHANCELLOR and MASTER of the ROLLS.

The LORD CHANCELLOR said it had become indispensably necessary to lay down some general rule in cases where new evidence was offered on appeals against orders proceeding from the other branches of the court. They were, in fact, not appeal motions at all; and, though he would not refuse to hear them, they would henceforth be regarded as *original motions*, and instead of receiving precedence they would be postponed until all the appeals were disposed of.

## COURT OF QUEEN'S BENCH.—MAY 22.

*Sittings at Nisi Prius.*

REGINA V. AHRENFELD AND OTHERS.

CONSPIRACY TO DEFRAUD a Merchant of goods by false representation of character.—INDICTMENT.

This was an indictment against four defendants, Ahrenfeld, Cussel, Lassel, and Scholefield, for conspiring together to induce Messrs. Rayleigh and Co., of Manchester, warehousemen, by false representations of the character and property of Lassel, to sell him £1,770. worth of goods on credit.

The defendants pleaded not guilty. Lassel had absconded.

It appeared that Lassel carried on the business of a merchant in Muscovy-court, Trinity-court, Trinity-square, and in the month of June, last year, sent his clerk, George Daniell, to Manchester, for the purpose of seeing Mr. Sichell, who held his dishonoured acceptance, to ask him not to mention the circumstance of the dishonour, and give Lassel an extension of the credit which he usually gave him. Daniell, when at Manchester, met Ahrenfeld, who was a Manchester warehouseman, and having told the object of his visit to Manchester, Ahrenfeld said he could give him the names of several houses which would give Mr. Lassel credit, but he must not mention his (Ahrenfeld's) name. Ahrenfeld then mentioned among the different houses that of Rayleigh and Co., and Daniell on the following day called there and looked out goods to the amount of £2,000., and gave as references Mr. Sichell and Lees, Kershaw and Co., with whom Lassel had had dealings. Rayleigh and Co. required further references, and Daniell mentioned the name of Scholefield, who had long carried on a respectable business as a Manchester warehouseman in Watling-street, and a Mr. Brislaw (one of the witnesses for the prosecution, a teacher of languages). Mr. Goode, a partner in the house of Rayleigh and Co., accordingly came up to London and saw Scholefield, who it was alleged gave Lassel so excellent a character as to satisfy Mr. Goode of his respectability, and he agreed to furnish the goods. Mr. Goode then returned to Manchester, but his partner entertaining suspicions of Mr. Brislaw, Mr. Goode again came to London and saw Brislaw and Scholefield, and stated the suspicions of the firm. Ahrenfeld, who was in the habit of sending up goods to Scholefield, was then referred to, and he gave Brislaw a good character, and took Mr. Goode to Cussel, who also spoke well of Brislaw's means. It was finally arranged that Lassel and Brislaw should give bills for part of the value of the goods, which amounted to £1,770., and that Scholefield should give a bill at nine months' date for £590. The goods were then sent to Scholefield's warehouse. The circumstances then took place on

which the case for the prosecution principally rested. On the day after the goods arrived, it was stated that Lassel and Brislaw called on Scholefield relative to them, and for a certain balance which was to come to them, it was alleged, by agreement. Scholefield then handed them a statement, by which it appeared he claimed to appropriate to himself the sum of £590., the amount of the bill he had given Rayleigh and Co.,—£300. odd; a debt which Lassel owed him, £500. odd for loss on the sale of the goods, and £100. odd which Brislaw owed, and five per cent. commission, and the balance of £120. he handed over to Lassel. It was supposed by Rayleigh and Co. that the goods were to be sent to Gibraltar; but instead of that, they were sold three days after they reached the warehouse of Scholefield, to Messrs. Fever and Cracknell, for £1,140. Scholefield paid his bill to Rayleigh and Co. for £590. He afterwards became a bankrupt, as did Ahrenfeld and Cussel, and Lassel absconded. Fever and Cracknell also became bankrupts. It was contended on the part of the prosecution that all the parties knew of the insolvent state of Lassel, and that they gave the false representation of his circumstances with the view of procuring payment of the debt which he owed to Scholefield, and also of the debts of Brislaw and Ahrenfeld, and evidence was given to show that Cussel, when he gave the character to Brislaw, claimed to be paid out of the goods of Rayleigh and Co. the sum of £100. which Brislaw owed him.

The case for the prosecution was chiefly made out by Daniel Brislaw and Mr. Goode.

On the part of Scholefield, his warehouseman and clerk were called, and the former stated that Mr. Scholefield expressly told Mr. Goode that he could say nothing in favour of Lassel to induce him to give him credit, and also showed his books and a dishonoured check of Lassel's which he then held. They described Scholefield as in no way connected with any of the parties except in business, and that he had always carried on business in an honourable and respectable manner.

Several witnesses were called, who gave the defendants a good character, especially Mr. Scholefield, whom they said they had known some fifteen, and others twenty years, and they considered and always found him a man of the strict integrity and honour.

LORD DENMAN told the jury if they thought the defendants had one common object in view—viz., by false representations to induce Rayleigh and Co. to part with the possession of the goods to Lassel, then the case was made out and they would return verdicts of guilty; if, on the other hand, they entertained doubts, they would, of course, give the defendants the benefit of them, and find them not guilty.

Guilty against all the defendants.

*Sittings in Banco.*

SAVORY V. CHAPMAN.

IN RE DAVIE V. CRESSWELL.

**ANNEY AND CLIENT.**—*Whether the defendant should be allowed to defend himself having permitted the escape of a prisoner his custody at the suit of a judgment debtor, on the ground that the plaintiff's attorney in the original suit had authorized such release, the plaintiff himself being become a bankrupt after the time which the prisoner had been lodged in custody of the defendant?*

This was an action brought by the assignee of a bankrupt against the defendant, the marshal of Queen's Bench Prison, for having permitted the escape of a prisoner of the name of Cresswell, who had been in his custody at the suit of the bankrupt. In answer to the action the defendant pleaded as a justification, that he had discharged the prisoner under an authority from the attorney of the plaintiff in an action that had been brought by the bankrupt before his bankruptcy, in which he had obtained a judgment, for which Cresswell was charged in execution, and the bankrupt's attorney in that action was named upon the record. The replication back was that before Cresswell was discharged the plaintiff in the action against him had become bankrupt, and the plaintiff in this action was his assignee, and that consequently the authority of the attorney was revoked. To this the defendant pleaded a demurrer, which now came on for argument.

LORD DENMAN said, that the simple question was whether the defendant should be allowed to defend himself for having permitted the escape of a prisoner in his custody at the suit of a judgment creditor, on the ground that the plaintiff's attorney in the original suit had authorized such release, the plaintiff himself having become a bankrupt after the time at which the prisoner had been lodged in the custody of the defendant. It appeared in some of the old books that the authority of the attorney for the plaintiff terminated with the judgment, and that the authority of the attorney for the discharge was enough. According to the later books it appeared that the authority of the attorney lasted for one year from the date of the warrant of attorney, and that the defendant possessed the right to take the debtor in execution and detain him twelve months if the debt was not paid, and remain unsatisfied. In the present case it was thought sufficient had not been shewn to revoke the authority of the attorney from the duty of retaining and the responsibility of discharging the prisoner. The whole statement of the defendant was, that the attorney for the plaintiff had expressed a desire for the discharge of the prisoner, without the defendant going forth either that the debt and costs had

been satisfied, or the special authority of his client that such discharge should take place. If the defendant had been deceived on this occasion, it was most fortunate for him. The plea was, in reality, no answer, no defence, to the action; it did not amount to a sufficiency of justification. It had not been argued that the defendant would have been subject to an action for false imprisonment if he had detained the prisoner; but if that had been the consequence, and the defendant had been sued for false imprisonment, and it had been shewn on the trial that the original plaintiff himself had not authorized the discharge of the prisoner, then that action must have failed.

PATTERSON, J., concurred, and cited Mr. J. Holroyd's opinion in *Corver v. Pillking and another* (a), to show that the Marshal has a right to detain a prisoner to satisfy himself that the debt has been paid after an order of discharge left with him.

The other judges also concurred.

*Judgment for the Plaintiff.*

The Attorney-General, for the demurrer, cited—*Withers v. Howley*, 3 Buls. 96.; and *Slackford v. Austen*, 14 East, 408, in which LORD ELLENBOROUGH held that the party who sues out the writ may agree to the liberation of the prisoner.

Mr. R. V. Richards, for the plaintiff, cited—*Ex parte Kemshead*, 1 Rose, 149—Com. Digest, tit. Attorney, B. 10. 1 Roll, 306.

## BAIL COURT—JAN. 15.

DOE DEM SABINE V. SABINE.

**ATTORNEYS EXECUTORS.**—*Whether a Bill of Costs delivered by the Executors of an Attorney, upon which he had brought no action, can be referred to the Master for taxation?*

In this case the attorney for the lessor of the plaintiff had died. After his death his executor had delivered a bill of costs, and had obtained an order of LITTLEDALE, J. that it should be referred to the Master for taxation. A rule was obtained to shew cause why this order should not be rescinded, on the ground that the bill was not taxable, and that the Judge consequently had not the power to refer it for taxation.

Cause was now shown, and the following judgment was given by the court:—

PATTERSON, J.—The recent cases in all the courts have repudiated the notion of any general power in the courts to refer a bill for taxation, independently of the statute of Geo. 2. *Clarkson v. Parker* (a), takes the distinction between compelling an attorney to deliver a bill and refer-

(a) 4 Baitn. & Cress. 96.



ring such bill for taxation where there were no taxable items. The Court of Exchequer recently refused to refer a bill without taxable items, although an action had been brought on it. This brings me to the point, that the commencing of an action of itself does not give the court jurisdiction. Though in *Curling v. Sedger*, (b) the Common Pleas uses expressions seeming to lead to a different conclusion, (but there that bill was itself taxable); yet in *Penson v. Johnson*, (c) that Court ordered a bill, delivered by an executor of an attorney, after action, to be taxed,—altering their practice, which was otherwise, according to two cases in Barnes' Notes, by reason of the practice of the King's Bench. I do not think that it can fairly be collected from the cases that they proceeded upon the distinction of action or no action, but rather that they may be taken as authorities generally that such a bill may be taxed. However, it having been determined that the executor of an attorney is not within the statute 2 Geo. 2 as to delivering a bill a month before action, nor as to paying costs of taxation where more than one-sixth is taken off, which points are clear. I think that it should also be held that he is not within that statute for other purposes. (1)

Rule absolute.

The following cases were cited in the argument. Against the Rule:—*Penton v. Johnson*, 4 Taunt. 724; *Dagley v. Kenlish*, 2 Barn. & Adol. 411.

For the Rule:—*Weston v. Poole*, 2 Str. 1056; *Gregg's case*, 1 Salk. 89. In re *Cole*, 2 Sim. & Stu. 463.

(1) The question was decided by LORD COTTENHAM, C., in *Maddeford v. Austwick*, 3 Myl. & Cr. 423, which was an appeal from an order of the VICE-CHANCELLOR, who had made an order against the personal representatives of a deceased solicitor that the solicitor's bills of costs should be taxed under the 2 Geo. 2, c. 23. The LORD CHANCELLOR said, What is the use of a jurisdiction to tax, as against the representatives of a solicitor, if there is no power to compel payment? Such a jurisdiction would be perfectly nugatory, because, if the client comes in as a creditor, he must institute a suit for that purpose, and the court will not let him recover without having the state of the assets ascertained, as well as having the claim in-

vestigated. Sir John Leach has expressly decided, that the penal provision in the 23rd section of the Act, does not apply in the case of the executor, or administrator, or the assignees of a solicitor. Besides, I do not see how it is possible to work out the summary remedy, given by this order, in such a manner as to be consistent with the rights of other creditors.

The question is a very important one, and it seems singular that it should not have been raised before. It was not necessary to consider it, and in fact it was not raised in *Waters v. Taylor*, (2 Myl. & C. 526,) the party who then appealed asking relief upon that point. The order complained of must be discharged.—EDITOR.

June 2.—Sittings at Nisi Prius.

LORD CAMOYS v. SCUR.

BAILMENTS.—*Whether where a person obtains a horse for trial, employs an experienced person to make the trial, and the horse runs away and is killed, the borrower is responsible for the value of the horse.*

This was an action brought to recover damages to the amount of £47. 5s. the value of a horse of the plaintiff, which had been killed while in the care of the defendant, on trial, previous to an intended purchase. It appeared that in June, 1839, Lord Camoys bought the horse from Mr. Shackel for £57. 15s. On the 4th of January of the present year he sent it back to Shackel's to be sold, and the price fixed on it was £45. The defendant, who is a minister of the established church, and in every respect a good judge of the merits of a horse, took a liking to this, and on the 18th of January took it for the purpose of becoming practically cognizant of its merits. He was not, however, satisfied with riding it himself, but entrusted it also to a groom of General Dyson, and that person so managed that it met with a severe accident in Hyde-park, the result of which was its speedy death.

Mr. Kelly for the plaintiff submitted that the defendant was to be considered as having the loan of the horse on this occasion, and he was not justified in permitting a third party to interfere with it, as had occurred in this instance. The case of *Bringloe v. Morice* (1) set that question quite at rest. Evidence was given on the part of the plaintiff that the horse was an excellent temper, by the horse dealer and his groom.

(a) 7 Dowl. 87.

(b) 4 Bing. N.C. 743.

(c) 4 Taunt. 724.

Mr. Platt, for the Rev. Mr. Scur, submitted his confidence to his lordship that in this case the defendant had the mare in his possession solely for the purposes of trial, and with that object in view had been justified in making use of the services of an experienced rider. The groom, whom he had allowed to ride the mare, was a favourite servant of General Dyson, and was noted as a skilful horseman. On the morning when the accident occurred, from which the groom arose, Mr. Scur had taken out the mare to Mr. Shackel's, and had ridden it quietly to a place, opposite the house of his friend, in general, but it had shewn considerable temper, and General Dyson had recommended him, for prudence-sake, to allow the groom to try it in the Park. He did so—the animal continued to display unquietness, and eventually ran away. The groom did all in his power to restrain it, but in vain, and it rushed against the posts of the gate near the gate-house at Hyde Park-corner, and its rider several yards forward over its head, and severely injured its own chest. The man did not recover his senses for a considerable time, and would probably feel for the rest of his life the injuries he then received. The mare was led to the stable of a veterinary surgeon in Park-lane, where she shortly afterwards died. The quality in regard to temper had been wholly misrepresented, and had the defendant been on her back instead of the groom when she ran away, it was probable that his life also would have been sacrificed.

Hobart, the groom of General Dyson, deposed that the mare showed an irritable temper from the moment that he saw her. When he mounted at his master's recommendation and Mr. Scur's instigation, he rode her partly walking and partly in a trot to the park. Then as he went towards the gate-gate, she shied at a carriage and ran. He exerted all his energies to stop her, but was unable. He tried to turn her head up the inner ring-road, and afterwards up the line to Kensington Barracks, but still without effect. She rushed up against the metal post of the fence of the gate-house, and he was thrown violently over her head. He was thoroughly stunned, and coming to himself found that the mare had taken away.

The groom in the service of Her Royal Highness the Duchess of Kent, who happened to be near the catastrophe occurred, and also the gate-keeper of the park, saw the mare and groom as they came along, and agreed in deposing that the courage and judgment displayed by the latter in endeavour to keep the animal on a safe path had been conspicuous.

General Dyson deposed that the Rev. Mr. Scur was on a visit at his house at the time when the transaction occurred. He saw his friend on the mare. He rode her several times up and

down before his house. She appeared to be hot and very difficult to manage. He thought his friend was not competent safely to try her powers. He recommended the latter to assign that task to his groom, Hobart. This man had been in his service for several years. He was an admirable horseman. When down at Cheltenham, Hobart had distinguished himself by riding a celebrated Irish horse, remarkable for its power of jumping.

COLERIDGE, J. left it for the counsel for the plaintiff to consider whether they could go further after this evidence. He did not go with them in their view of the law as applicable to the case. The defendant had had the horse upon trial, and it would seem that the most careful trial was to be effected, not by himself alone, but by his putting on the back of the animal a man of well-known powers as an equestrian. The only question he could put to the jury was, whether the defendant had been right in allowing the groom to ride, and he would tell them that, in his opinion, he had been.

(1) 1 Mod. Rep. 210.; 3 Salk, 271. S. C. where an action of trespass for immoderately riding the plaintiff's horse. The defendant pleaded, that the horse was lent to him by the plaintiff, and license given to him to ride him, and that by virtue of the license the defendant, and his servants, alternately had ridden the animal. The plaintiff demurred. And the Court, on the demurrer, held, that the license was annexed to the person of the defendant, and could not be communicated to another for this riding was matter of pleasure. And Lord CHIEF JUSTICE NORTH took a difference, where a certain time is limited for the loan of a horse, and where not. In the 1st case the borrower has an interest in the horse during that time, and in that case his servant may ride; but in the other case not. A difference was also taken between hiring a horse to go to York, and borrowing a horse. In the first place the party may allow his servant to ride; in the second not. The case is obscurely reported. But the real meaning of the Court seems to have been, that in cases of a mere gratuitous loan, the use is to be deemed strictly a personal favour, and confined to the borrower, unless a more extensive use can be implied from other circumstances.—EDITOR.

## COURT OF COMMON PLEAS, May 22.

*Sittings at Nisi Prius.*

GRAHAM v. BUNN.

**HUSBAND and WIFE.**—*Liability of the Husband to the Father of his Wife for the expense of her support, after an agreement that the Father should receive her back to his own house in case of her misconduct.*

This was an action by the father of the defendant's wife to recover 45 weeks' board and lodging, supplied her at 12s. per week. It appeared that the plaintiff was formerly a publican, but had retired, and now resided at Edmonton: the defendant was a publican in the Kingsland Road. In 1835, the latter married Mr. Graham's daughter, with whom he lived until May, 1839. During that time he had treated his wife with great cruelty. On one occasion it was stated that he beat her violently on the face, and that she had repeatedly marks of blows given her by the defendant. At length, in May, her clothes were packed up, and Bunn ordered her out of the house, and compelled her to go to her father. The latter had since then supported her.

The case for the defendant was, that Mrs. Bunn was given to habits of intemperance, which had previously induced him to separate from her. He, however, again consented to live with her, on her promise to abandon those habits, an arrangement being at the same time made that the father would receive her back to his own house, if she resumed her intemperate mode of life. She did return, but having recurred to her former habits, the husband was obliged to take her from his own house to her father's.

TINDAL, C. J., said, that the question was whether there had been such violence on the part of the husband as had been alleged by the plaintiff; or whether he had turned her out of his house against her will. If such had been the case, the verdict must be for the plaintiff. But if an agreement had been entered into between the parties, to the effect that the father was to take her back if she returned to her habits of intemperance, the defence was an answer to the action.

Verdict for the plaintiff—damages, £27.

## COURT OF EXCHEQUER.—Jan. 12.

*Sittings in Banco.*

SEMPLE v. TURNER.

**WRIT OF ERROR, CORAM VOBIS.**—*Whether a Supersedeas of Execution without leave of the Court.*

Mr. Mellor moved for a rule to show cause why a writ of *Ca. sa.*, and all proceedings thereon, should not be set aside.

The defendant had sued out a writ of *error coram vobis*; notice of which was served on the plaintiff, who, nevertheless, obtained a judge's order to issue execution, and the defendant was arrested. In *Levy v. Price*, (a) it was determined that a writ of *error coram vobis* is a supersedeas of execution from the time of notice and not merely from the time of the allowance of it.

ALDERSON, B.—A writ of this kind is a supersedeas; but it is necessary to apply to the court to engraft upon it the leave to issue execution; it is unreasonable that the plaintiff should have the power to issue execution after a writ of *error coram vobis* had been sued out, and consequently while a question is depending, by the decision of which his right of action may be destroyed altogether. That is stated by Lord Ellenborough in *Birch v. Triste*, (b) as the principle on which the practice proceeds.

Rule refused.

*Sittings in Banco.*

EYRE v. SHELLEY.

**ATTORNIES—Entry of their CERTIFICATES.**—*Whether they may maintain an action for costs where they have not entered the Certificate according to 37 Geo. 3. c. 90. s. 27.*

The plaintiff, an attorney, brought his action against the defendant for a bill of costs. The defendant pleaded that as to part of the demand it was for work done before the 16th of November, 1833; and that although during that time the plaintiff was an attorney, duly admitted and enrolled, yet he had not, during any part of that time when the work was done or in progress, obtained or entered the certificate required by law in that behalf, authorizing him to practise as such attorney during any part of that time, pursuant to the statute; and the plaintiff during that time wrongfully and wilfully neglected to take out and obtain, and was without such certificate, and never had obtained or entered the same, contrary to the form of the statute. In replication, that before and during all the time in the plea mentioned, the plaintiff had duly obtained the certificate required by law in that behalf, authorizing the plaintiff to practise as an attorney during the whole of that time, pursuant to the statute, &c. To this was a demurrer, that the replication only stated that the certificate had been obtained, and took no notice of the allegation in the plea that it had not been entered.

Mr. Petersdorff, in support of the demurrer.

(a) 2 Moo. & Wels. 633.

(b) 8 East, 412. See Walker v. Stathe, Carth.

ed the 37 Geo. 3, c. 90, s. 27, and contended that therefore the replication was bad.

Mr. Peacock contended that the only effect not entering a certificate is to subject the party a penalty, but does not prevent him suing for fees.

PARKE, B.—The statute expressly says that shall not maintain any action, without obtaining and entering his certificate. The plea is arly double: it contains two distinct defences, nely, that the plaintiff either has not obtained certificate at all, or, if he has, that it has not entered pursuant to the statute.

Mr. Peacock cited *Bowler v. Brown*. (a)

PARKE, B.—The Court of Queen's Bench ided that case, on the supposition that the rds "with the intent to evade the higher du- t" overrode the whole clause. That decision however, somewhat doubtful. In declaring a reversion, the nature and existence of the ersion would frequently involve difficult ques- as of law; yet, in pleading, it is not necessary state the precise nature of the reversion ich the plaintiff had. The question in the e is, whether the omission to enter a certificate n answer to an action for business done at y time during the year to which the certificate lies? Upon these pleadings, we must as- ne, that if the business was done in one year, ween the 15th of November and the 15th of umber, there was a certificate duly obtained, never entered; if in two or more years there re two or more certificates, but each omitted be entered; and the question is, whether the ission to enter a certificate deprives the plain- of his remedy by action for business done nry part of the year. If there be a part of year, during which the plaintiff might do nness in the conduct of suits lawfully, so as make a legal contract for payment of his ser- es, without having duly entered his certificate, plea is bad in substance, so far as it relates the not entering the certificate, inasmuch as it s not aver that the business was not done in t part of the year or years embraced in the eral terms of the declaration. And upon a did review of the statutes on the subject, ich raises a question of some nicety, we think t it was not illegal, in this sense, for a certifi- ed attorney to carry on a suit between the 15th November and the first day of Hilary Term in r year without having entered his certificate; ough he would have been liable to a penalty, after having so carried it on during a part, he not enter his certificate before the expiration that interval. The first statute requiring a tificate was the 25 Geo. 3, c. 80, which icts, "that every attorney admitted or en-

rolled in the King's Courts at Westminster, shall, previous to his prosecuting or defending any suit, have a certificate of his admission or enrolment, upon which a stamp duty is to be charged." In order to obtain it, he is to deliver a written paper, stating his place of residence, to the proper officer, named in the 4th section of the statute, which written paper is to be duly stamped, according to his place of residence; and the officer is to enter the name, &c. of each attorney producing such paper, and to subscribe to the paper a certificate that such attorney is duly enrolled. These certificates are to remain in force from the 1st of November to the 1st of November, and be renewed ten days before they expire. By sect. 7, any one who shall sue out any writ, or prosecute or defend an action for reward, without having obtained such certificate, shall forfeit £50.; and is disabled from suing for any fee or reward for prosecuting or defend- ing such action. Under this statute, the entry was of the name and residence, and preceded the certificate; and all practising without a certificate was not merely subject to a penalty, but no re- muneratation could be recovered for it. The 37 Geo. 3, c. 90, s. 26, completely changes the machinery for obtaining the stamp duty; and requires the certificate to denote the fact of pay- ment of the duties and not of enrolment, and to be given by the commissioners of stamps; and after it has been obtained, makes it necessary that it shall be entered with the officer of the court mentioned in the 25 Geo. 3. The time for taking it out is varied. It is provided, that every attorney, admitted and enrolled, shall, an- nually, between the 1st of November and the end of Michaelmas Term then next following, during such time as he shall continue to prac- tise, or before such person shall commence, pro- secute, or defend any action or suit, obtain a cer- tificate to denote the payment of duties. The certificate, to be issued between those dates, is to bear date on the 2nd of November; and at every other time, on the day when it is issued; and is to determine on the 1st of November. Those days are afterwards, by 54 Geo. 3, c. 144, al- tered to the 15th of November and 16th of De- cember. The 27th section provides, that every certificate shall be entered within the time there- inbefore prescribed (viz. between the 1st of No- vember and the end of Michaelmas Term), or before such person shall be permitted to practise; and by the stat. 44 Geo. 3, c. 59, s. 3, this part of the 37 Geo. 3, is repealed; and it is provided, that any person who by that act, 37 Geo. 3, is required to obtain such certificate in any year after the first day of November, may enter the same at any time before the commencement of Hilary Term then next following; and the certi- ficate so entered shall be as valid as if it had

(a) 4 Nev. & Man. 17.; 2 Adol. & Ell. 116.

been entered within the former time. The 30th section imposes the penalties for non-compliance with the previous enactments. If any one shall prosecute or defend without obtaining a certificate, or without entering the same, he shall forfeit £50. ; and is made incapable of maintaining any action or suit for fees, &c., for prosecuting or defending any suit, *without such certificate as aforesaid*. The question in the case depends on the construction of these clauses, the 30th and 27th. The 30th does not use the terms "without having entered his certificate, or without such certificate so entered as aforesaid"; it prohibits the suit for fees, only if there is *no certificate*. It does not use the language of the 25 Geo. 3, without having *obtained* a certificate; and probably for this reason, that, under that statute, the certificate was required to be obtained before any business was done. Under this, the business may be done between the 1st of November and the end of Michaelmas Term, and the certificate antedated, so as to render it legal; but it seems, that unless there be a certificate obtained before, or so antedated, the action could not be maintained, in respect even of business done in that interval. It appears to us that this prohibitory clause applies to the *want of certificate only*. Is the practice, then, rendered illegal by the 27th section, so as to disable the attorney from suing for it? Every practising which is prohibited by penalty at the time it takes place is illegal; but that which is not prohibited at the time it takes place, is not—though the attorney be liable to a penalty for a subsequent neglect or omission. The 27th section inflicts the penalty upon an attorney for not entering, which must be either within the time aforesaid (that is now between the 1st of November and the first day of Hilary Term), or before such attorney shall be permitted to practise. Now, in all cases falling within the second branch of this alternative, by which the practice is prohibited, unless there be not only a certificate but an entry thereof, before it takes place, it is clear that the practice is unlawful without entry, and no action will lie to recover a compensation for it; but in the cases falling within the first branch, it appears that it is enough to make the entry before the end of the limited time. In the meantime the practice is lawful; a contract to pay the price is lawful; the price may be sued for the instant it is due; and the want of the subsequent entry cannot render it illegal by relation; but if at the end of the prescribed time for entry there is no entry, then the attorney is liable to a penalty. It appears to us that the business done between the 15th of November and the first day of Hilary Term falls within the latter alternative; any business done at any other time of the year, within the former.

And the plea is bad, as it does not show that the business was of this description; for it is consistent with every averment in the plea, that the business was done between the 15th of November and the first day of Hilary Term, in one or more years.

*Judgment for the plaintiff.*

#### PREROGATIVE COURT—JUNE 1.

##### WILL OF RICHARD HILLIER, DECEASED. NEW WILL ACT—ATTESTATION CLAUSE.

Mr. Richard Hillier, the deceased, two days before his death, executed a will, which purported to be regularly attested by two witnesses, who professed to have signed their names in the presence of the deceased. Some irregularity on the face of the paper induced the Registrar (in conformity with the order of the court) to require an affidavit of the circumstances, when it appeared that the drawer of the will had taken the will away after it had been signed by the deceased, attested it in his absence, and obtained the signature of the other attesting witness, who never saw the deceased at all, believing (as he stated) that the attestation clause was a mere form.

Upon motion for probate being made,

Sir H. JENNER expressed much surprise at the conduct of the witnesses, which but for a mere accident would have procured probate of a paper that had no validity. He rejected the paper, and regretted that the Court could not punish the drawer of the will by condemning him in the costs.

*Probate refused.*

#### INSOLVENT DEBTORS' COURT—May 27.

##### CASE OF HORATIO HASTINGS.

*Insolvent out upon Bail, and not appearing at the day appointed for his hearing.—To what extent the recognisance of the Bail shall be put in force, and in what manner the money may be obtained.*

We have before reported this case, (a) which embraced an important question as to the jurisdiction of the Court to issue a distress warrant against the bail of an insolvent, who neglected to appear at the day appointed for his hearing.

The insolvent had been a tailor in High-street, Poplar, and was, on the 18th of April, admitted to bail on a recognisance entered into by Mr. Sunderland, a woollen warehouse-man, and Mr. Bruce, a licensed victualler, in the sum of £150. The insolvent did not make his appearance on the 1st May, and it was soon afterwards ascertained that he had absconded; he was pursued by Mr. Bruce, accompanied by one of the clerks.

(a) *Ante*, p. 29.

Mr. W. R. Buchanan, of Basinghall-street, attorney for the bail (who had been attorney for the insolvent in the court), into Staffordshire, as he was not discovered, nor had he been heard by the sureties. The affidavit read on the part of the bail showed the efforts made to capture the insolvent on a warrant issued by the Court for his apprehension, and placed in their hands. An affidavit made by a person named Beason exposed some curious disclosures respecting the arrest and the concealment of property. It was stated that the arrest by the detaining creditor had been collusive, and that the alleged creditor, who had been paid a sum of money, brought the insolvent on one occasion a schedule, which he would initiate him in the art of "schedule saving." The Court, in addition to the warrant, granted a rule on the sureties to show cause why the recognisance should not be put in force for the sum stated.

It was contended by Mr. Woodroffe, on the part of the sureties, that the Court would not enforce the recognisance for more than the single amount, as had been the usual practice in the superior courts. It was also contended that the Court had the power to fix the sum after the recognisance had been taken.

Mr. Cooke, on the part of the assignee, called on the Court to obtain the amount entered into the sureties on the recognisance, and urged that they had no power, under the 38th section, and 2 Vic., c. 110, to alter the amount from the sum fixed at the time bail was given; and, further, that there was no analogy between the law in this and the superior courts, the amount be recovered being for the benefit of the whole of the creditors in the schedule.

Mr. Commissioner Bowen thought it would be a gross injustice on the sureties if the Court had not the power to fix the amount to be recovered after the insolvent had disappeared.

The CHIEF COMMISSIONER said, the question in this case was, to what extent the recognisances could be put in force, and in what manner the money should be obtained. The question turned on a part of the 38th section, by which it was provided, that in case any insolvent who had been discharged on sureties should not appear on the day fixed for his hearing (not being prevented by illness, or other lawful impediment), the recognisance entered into should be forfeited, and the amount secured thereby should be recoverable in summary way, by a distress and sale of the goods of the sureties, as the Court should direct. The Court, on consideration, were of opinion, that as the recognisance was declared on the non-appearance of the insolvent to be forfeited, that they had no power to alter the amount, and consequently the sureties in this case must pay the sum of £164 for the benefit of the creditors. The Court would, therefore, order the warrant to

be issued for a distress to the amount of £164 (payable by the two sureties), but it should remain some days in the office, as it was understood the money would be paid. The sum to be recovered was £164.

Mr. Commissioner BOWEN remarked, that in his great anxiety to relieve the bail he had, on the argument of the rule, taken a wrong view of the subject. He now concurred in the opinion delivered.

Mr. Cooke applied for costs, and said a good deal of property had been recovered.

Mr. Woodroffe observed that some of the debts in the schedule had been fabricated, and it was believed that a portion of the money to be paid by the bail would be returned after the *bond fide* creditors had been paid.

The COURT thought the expenses should be allowed, and the assignee had better apply for them on the audit.

The warrant was ordered to issue, but to remain in the office until Friday, 12th June, by which time it was said the bail would pay into court the sum of £164.

THIS COURT IS ADJOURNED UNTIL THURSDAY, JUNE 11.

**LAW OF MARRIAGE.**—We beg to call the attention of our readers to an advertisement in another part of our paper relating to restraints on marriage, which we hope to see shortly placed upon some certain basis, consistent with sound reason and good sense.

#### GENTLEMEN CALLED TO THE BAR, EASTER TERM, 1840.

##### LINCOLN'S INN.

Adamson, James  
Bailey, Philip James  
Baker, Henry Sherston  
Burrell, Walter Wyndham  
Buller, William Charles  
Bruce, The Hon. Frederick William Adolphus  
Curzon, Hon. Edward Cecil  
James, Samuel  
Kilner, Kenelin  
Power, David  
Ryder, William Dudley  
Soady, Robert Williams  
Wickens, John

##### INNER TEMPLE.

D'Eyncourt, Louis Charles Tennyson  
Greenside, Charles Knowlys  
Hardy, Gathorn  
Walker, William Buttle  
Warburton, Thomas Acton

##### MIDDLE TEMPLE.

Allnut, George Stevens  
Brett, Wilford George  
Burn, Richard  
Cripps, Henry William

Debary, Peter Francis  
 Denton, Hughes Ridgway  
 Edmondes, Henry  
 Gawtress, William  
 Little, George  
 Lutwyche, Alfred James Peter  
 Meller, Henry James  
 Perch, Thomas  
 Reynolds, Charles Andrew  
 Robinson, Benjamin Coulson  
 Russell, Robert  
 Scott, Montagu David  
 Schroder, Edward  
 White, Cornelius Swan Scarbrow  
 Whitely, George

## GRAY'S INN.

Bluett, John Courtenay  
 Carr, John  
 Hart, Robert  
 Hill, William Alfred  
 Sutherland, Charles Garstin.

## COURT OF EXCHEQUER.

SITTINGS IN EQUITY.—TRINITY TERM, 1840.

Tuesday, June 9.—Causes and Further Directions, Pleas, Demurrers, and Exceptions.

Saturday, June 13.—Petitions and Motions.

## NOTICE TO CORRESPONDENTS.

A SUBSCRIBER—near Derby—and a CONSTANT SUBSCRIBER, & one, &c.—Derby.—Can you expect us to answer questions, and pay double postage for your communications?—Surely, when a party requires a service performed he should at least take care not to inflict a *personal* on the party who is to perform the service.

Richard Roe.—Certainly not.

Newportiensis.—Your question does not fall within our rules,—the parties can apply to counsel for advice.

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## ADDENDA

To the Original Essay in the Last Number.—a. see *Strange v. Price*, ante Vol. II. p. 40; *Hedger v. Stevenson*, 2 *Mee & Wils.* 7 & 9; *Burgh v. Legge*, 5 ed. 420.

**LAW.**—A Gentleman, who has had considerable experience in both Town and Country Practice, also thoroughly acquainted with Magisterial business, and qualified to represent the Principal in his absence, is desirous of a permanent engagement in an Office of respectability, either in Town or Country. The highest testimonials for assiduity, integrity, and ability, can be given. Address to C. D., at Mr. Clifford's, Law Stationer, 5, Inner Temple Lane, Fleet Street.

**LAW OF MARRIAGE.**—At a Meeting of parties aggrieved by the existing restrictions upon Marriage, held at the Office of Messrs. CROWDER & MAYNARD, No. 3, Mansion House Place, London, on Thursday, the 21st of May, a Committee, consisting of seven of the gentlemen present, was appointed (with power to add to their number) to take the necessary steps for obtaining a repeal of the objectionable restrictions upon Marriage, and more particularly that *which prohibits marriage with a deceased Wife's Sister*; and it was resolved, that the objects of the Meeting should be forthwith published in such of the London and Provincial Papers as the Committee might think proper, with a view to obtain the active co-operation of all parties interested.—Communications to be addressed to Messrs. Crowder and Maynard, as above.

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# The Legal Guide.

Vol. IV.]

SATURDAY, JUNE 13, 1840.

[No. 7.

Price Sixpence.

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## THE ATROCIOUS ATTEMPT TO ASSASSINATE HER MAJESTY. ADDRESS OF BOTH HOUSES OF PARLIAMENT.

WE consider it a duty we owe to the SOVEREIGN of these realms to express our horror and indignation at the atrocious and treasonable attempt made on Wednesday last upon the LIFE of HER MAJESTY, as well as upon that of Her ATROCIOUS CONSORT, which, by the aid of DIVINE PROVIDENCE, was happily frustrated. We sincerely join in the universal expression of congratulation to Her Majesty and to Her Royal Consort that they have escaped the danger intended for them by the assassin.

L. IV.

The following is the Address agreed upon yesterday (we are writing on *Friday*) by the two Houses of Parliament, and which is now being presented to Her Majesty:—

“We, your Majesty’s most dutiful and loyal subjects, the lords spiritual and temporal in Parliament assembled, beg leave to approach your Majesty’s throne to express our horror and indignation at the late atrocious and treasonable attempt against your Majesty’s sacred person, and our heartfelt congratulations to your Majesty, and to our country, on your Majesty’s happy preservation from so great a danger; to express to your Majesty the deep concern which we feel at there having been found within your Majesty’s dominions a

H



person capable of so flagitious an act; and that we make it our earnest prayer to ALMIGHTY GOD that he will preserve to us the blessings which we enjoy under your Majesty's just and mild government, and continue to watch over a life so justly dear to us."

### ESSAY.

## ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 83.)

WE have closed our observations upon the *second* class of LORD HOLT's Bailments—*commodatum*, or lending *gratis*, and will now proceed to the *third* class—*Locatio rei*, or lending *for hire*, defined by his Lordship, "Where goods are lent to the bailee to be used by him *for hire*." This the Roman law called *locatio* and *locatio-conductio*,<sup>(a)</sup> which may be thus defined:—*Locatio-conductio est contractus quo de re fruendâ vel faciendâ pro certo pretio convenit*(<sup>b</sup>), or as defined by POTHIER, a contract by which one of the contracting parties allows the other to enjoy or use the thing hired during the stipulated period, for a compensation which the other party engages to pay.<sup>(c)</sup> *Locatio* (letting) and *conductio* (hiring) are in fact equivalents, distinguishing the relative situation of different parties to the same contract. *Locator* in the civil law, and *locateur louer*, or *bailleur*, in the French law, is defined as being a person who, being owner of a chattel, lets it out to another for hire or compensation. *Conductor* in the civil law, and *conducteur, preneur, locataire* in the French law, is defined as being a person who borrows, and has the use of, the chattel, and pays a compensation for the hire.<sup>(d)</sup>

(a) Ayl. Pand. B. 4, tit. 7. p. 480.

(b) Inst. Lib. 3, tit. 25.

(c) Contract de Louage, ch. 1, n. 1.

(d) Id — Jones's Bailm. 90. Wood's Inst. B. 3. p. 230.

There is a great nicety in the Latin language in making use of the words *locator* and *conductor*, which is particularly noticed by Sir Wm. Jones,<sup>(e)</sup> as well as by Heinecius.<sup>(f)</sup> The employer who gives the reward is called *locator operis* (the *letter* of the work); but *conductor operarum* (the *hirer* of the labour and services), while the party employed, who receives the pay, is called *locator operum* (the *letter* of the labour and services) but *conductor operis* (the *hirer* of the work), and this nicety is felt by the poverty of the English language (tongue),<sup>(g)</sup> though not to any very great extent. There are three things which constitute the essence of this contract,<sup>(h)</sup> viz. :—

*First*—A thing to be let.

*Secondly*—A price for the hire.

*Thirdly*—A contract possessing a legal obligation.

In this class of bailments LORD HOLT says the bailee is bound to use the *utmost care*.

Bracton<sup>(i)</sup> says the hirer is to take *all imaginable care*, and to restore it at the time and he is bound to the *utmost diligence*, such as the most diligent master of a family would use, which care if he so useth he shall not be bound. Bacon, in observing upon this passage,<sup>(k)</sup> says now the most diligent man is liable to be robbed, and therefore I collect that if he be so careful, as according to Bracton's definition, and be robbed, he shall not be liable. The doctrine of Bracton copied from Justinian,<sup>(l)</sup> when speaking of a *hirer*—"Talis ab eo desideratur custodia qualem diligentissimus paterfamilias rebus adhibet," which doctrine was, as stated in the Proeme to the Institutes, taken from the Commentaries of GAIUS, who, in treating of the liability of a person employed to transport a column for breakage, says "Culpa autem abest si omnia facta sint q"

(a) Bailm. 90. n. (r.)

(f) Pand. Lib. 19, tit. 2, n. 320. n.

(g) See Gibbon Rom. Emp. vol. 8, p. 84.

(h) Pothier Louage, n. 2. (i) 68.

(k) Tit. Bailments, D. 520. (l) Inst. 3. 2.

*diligentissimus* quisque observaturus fuisse." (m) SIR WM. JONES urges that the operative "*diligentissimus*" is used alone by LAECUS, on the subject of hiring, other writers using the *positive*, and he ascribes it to his peculiar style. (n) GOTHOFRED (o) and VINTRUS (p) use the word "*diligens*."

POTHIER says, in every case the hirer is bound to prove that the loss was without any default on his part, for the law makes no resumption in his favour. And in case of loss by fire, if the fire is in the house of the hirer, he seems to think that that circumstance alone raises a presumption of negligence. (q) The French law throws the burden of proof upon the hirer of leased property to show that the loss has not been by default: and it makes him responsible for losses occasioned by fire, unless the fire be by inevitable casualty or superior force, communicated by the burning of a neighbouring house. (r)

The Scotch law throws the burthen of proof upon the hirer, where any specific injury has occurred not manifestly accidental. The expression of LORD HOLT that the hirer is bound to use the *utmost care* is too strong, for it would place a hirer who pays for the use of the goods on the same footing as a borrower; (s) and, indeed, Lord Holt justifies it by citing immediately after the passage in *Bracton* we have before quoted, being copied from *Justinian*, in whose words Sir Wm. Jones proves that it must have been used to signify not *extreme* but *ordinary* diligence. The bailment of hiring (*locatio-conductio*) being mutually beneficial, it is contrary to principle to require the same

extraordinary care as from a borrower, who has the chattel solely for his own benefit. This rule was adopted in *Dean v. Keate*, (t) where the diligence required from the hirer of a horse was such as a prudent man would have exercised towards his own, and therefore having himself prescribed to it instead of calling in a veterinary surgeon, he was held responsible. (u) The same distinction is laid down by HUBER:—"Contractus vel ineuntur in utriusque commodum vel in alterutrius utilitatem duntaxat. Qui utriusque partis utilitatem continent *mediocri diligentia* contenti sunt, levemque culpam recipiunt; qui unius saltem commodum spectant, hi vel continent utilitatem ejus qui de damno queritur, vel in ejus gratiam initi fuere qui damnum fecit. Priori casu nil nisi *lata culpa* præstatut posteriore *levissima*." (v)

This leads us to enquire upon whom, in England, the burthen of proof of negligence or of repelling it is thrown. We have shewn the rule laid down by POTHIER—the French and the Scotch law. A case occurred in England where an action was brought by a *bailor* (*letter*) against a *bailee* (*hirer*) for not taking proper care of a hired horse, whereby his knees were broken. (w) The burthen of proof was thrown upon the *bailor*, to give some positive evidence of negligence. It

(t) 3 Camp. 4.

(u) See *Davy v. Chamberlain*, 4 Esp. 229.; *Reading v. Menham*, 1 Moo. & Rob. 234.

(v) Præl. Jur. Civ. lib. 3. tit. 15. 10.

(w) *Cooper v. Barton*, 4 Campb. 5, n. The following note is appended to that case: "In *Coggs v. Bernard* it is laid down by Lord HOLT, that if goods are let out for a reward, the hirer is bound to the *utmost* diligence, such as the *most diligent* father of a family uses; and in Bull, N. P. 72, it is said, that the hirer is to take *all imaginable* care of the goods delivered to hire. According to this doctrine, he would be answerable for *slight negligence*. But on a review of all the authorities upon the subject, it will be found that this extraordinary care is required only of a *borrower*, and that from the true construction of the contract of *locatio conductio rei*, the *hirer* is required to use no more than that degree of diligence which *prudent men*, that is the *generality of men*, use in keeping *their own* goods. If Caius, therefore, hire a horse, he is bound to ride it as moderately and treat it as carefully as any man of *common discretion* would ride and treat *his own* horse. See Jones on Bailm 86."

(s) Dig. l. 19. tit. 2. 25, 7. (n) Bailm. 80.

(o) Gloss. Dig. (p) Inst. lib. 3. t. 25, 5.

(q) Pothier *Louage*, n. 194. 199. 200.; but see *Man v. Gallini*, in the case of musical instruments hired to be used at the Opera House, and destroyed by fire there—the *hirer* was held *not* to be liable, *Abbott on Shipping*, 844; nor is a warehouseman answerable for a loss by fire, *Garside v. T and Mersey Navigation Company*, 4 Term Rep.

(r) Civ. Code, Art. 1732, 1733, 1734.

(s) Sir Wm. Jones *Bailm*.

was held that it was not enough for him to prove that the animal was returned by the hirer with his knees broken, although he had often been let out to hire before without having fallen down.

According to this it would seem that, with certain exceptions as to innkeepers and carriers (x) in ENGLAND, the burthen of proof of negligence is on the bailor, and proof merely of the loss is not sufficient to put the bailee on his defence. LE BLANC, J. said in the case last quoted, the plaintiff *must give some evidence of negligence*, and as he had given none he must be nonsuited; and the same rule was held in a case against a depositary for hire, where the goods bailed were stolen by the hirer's servants. (y) There are, however, some discrepancies in the authorities upon this. (z)

(To be continued.)

#### PROBLEM VII. VOL. IV.

##### POSSESSIO FRATRIS. Describe it.

TO THE EDITOR OF THE LEGAL GUIDE.

#### ANSWER TO PROBLEM 25. VOL. 3. BY E. A.

(Concluded from page 85.)

The whole jurisdiction of Courts of Equity in the administration of a deceased person's assets is founded on the principle, that an executor or administrator who has the property in his hands is a trustee, and as such bound to apply that property first in discharge of the debts due and owing from the deceased, and the surplus according to the will, or in the case of intestacy according to the statute of distributions. The sole ground upon which Equity proceeds in matters of this kind is the execution of a trust, and the cases on the subject shew that trusts are enforced, not only against those persons who are possessed of trust property, as original trustees, but also against all persons who come into possession of the property bound by the trust with notice of that trust (*Adair v. Shaw*, 1 Sch. & Lef. 262. *Ripley v. Waterworth*, 7 Ves. 452. *Chambers v. Minchin*, 7 Ves. 197).

(x) *Bennett v. Mellor*, 5 Term Rep. 273.

(y) *Finucane v. Small*, 1 Esp. 314.

(z) See *Harris v. Puckwood*, 3 Taunt. 264. *Marsh v. Horne*, 5 Barn. & C. 822.

Under this head, I hope it will not be irregular to notice trusts for the separate use of a *feme covert*, which are peculiarly within the jurisdiction of the courts of equity. In this court a married woman has for more than a century past been considered as capable of possessing to her own use, independent of her husband; such property is called her separate estate, and in respect of it she is considered in this court as a *feme sole*, enjoying and capable of exercising her right as such. The property may be acquired either by contract with the husband before the marriage, or by gift from him or any stranger, wholly independent of such contract, so far as his legal right as husband may interfere. The court will treat him as a trustee, and property held by or for the wife for her separate use, if unaccompanied by any restraint, is subject to her power of alienation and the other incidents of property held by men or single women (*Legal Guide*, Vol. 3, 225). The law on this subject has been much disturbed of late, much litigation and expence, and, I may say, needless expence occasioned, for the result of the whole has been to decide what was settled long before and undisputed, viz.:— That it is lawful to give property to the separate use of a woman married or unmarried; and the practice of the profession has been according to this rule, without any variation (*Id.* 258). I shall neither trouble you nor your readers any further on this all-important subject, but refer to the preceding volumes of this most useful publication, where from experience I can state that the subject is elaborately, clearly, and amply treated of.

The Courts of Equity, when a trust is once created, assumes as it were to itself a power of seeing that it is enforced; for, if trustees either expressly named or merely implied refuse to take the trust upon them, it devolves to the court, and it appoints a proper person to fill the office. This part of equitable jurisdiction gives rise to the maxim "That a trust shall not fail for want of a trustee" (1 *Mad. Chy.* 459). The general rules of equity in regard to trusts bear very hard upon the trustee, the office is considered an honorary one and cannot be made one of emolument any further than is expressly provided for in the instrument creating the trust (2 *Feo.* 176). If he carry on the trade of his testator, nothing will be allowed him in return for the time and labour he has bestowed upon it (16 *Ves.* 170). He is besides liable for any losses justly attributable to his negligence, caprice, or obstinacy. As when trustees lend money upon personal security, which is no security at all, and in such a case as that the court would deal with the trustees as if they had the money in their own pockets (per Sir L. Shadwell, V. C. in *Dalton v. Hobhouse* and another; 1 *Legal Guide*, 390; see also *Angli*).

*Davis*, 2 *Legal Guide*, 308); and where persons undertake to be trustees they are not entitled to act with caprice, but if they find the trust property involved in complicated questions which they did not contemplate when they undertook the trust, they have a right to come to the court for relief, and it will judge of the circumstances.

*Greenwood v. Wakeford*, 2 *Leg. Guide*, 372) at where the trust funds have been misapplied placed in an insecure state through the instrumentality of the *cestui que trust* the court will afford relief to the trustees (*White v. Smith*, Id.). On the other hand a trustee is entitled to be reimbursed for all such charges and expenses have been fairly incurred in the execution of trusts, and the courts are now less severe than formerly in cases of loss where no dishonest intention is suspected, lest an over severity in such matters should deter men from accepting so full but at the same time so dangerous and riskless an office. But one trustee shall not be answerable for the acts or defaults of his co-trustee, unless a proviso to that effect be inserted in the final settlement or not (see vol. 3, 379).

Trusts then are peculiarly within the jurisdiction of Equity. Its vigilance is ever on the watch, and its powers are always available to obtain the full complete execution of the objects of the trust, to secure to those intended to be benefited all the advantages designed for them, and to compel those in whom confidence has been reposed to render an account of their stewardship, as well as to punish those by making them liable for neglect, &c., who have performed the trust in an unworthy manner.

I have now touched upon the relief to be obtained by bill in Chancery, under the distinct heads of accident, accounts, fraud, infancy, misfeasance, specific performance, and trusts as proposed by introductory observations in the beginning of my answer; but as you are pleased to admit that the subject is worthy of consideration, and that you will agree with me that it is to be treated as one of great importance, I will, before concluding it, briefly state a few of the subjects cognizable in that court, which I have not reduced to any of those heads. They will be found to consist of fourteen sorts,—the first of which is Lunacy. 2. Charities, over which the Chancellor, as keeper of the King's conscience, has the general superintendence.—3. Matters of bankruptcy,—for, although by & 2 W. 4, c. 56, a distinct Court of Bankruptcy was erected, yet from that court an appeal lies to the Lord Chancellor on matters of law and equity, or on the refusal or admission of evidence.

4. Partnership and mercantile transactions with debtors, receivers, factors, and agents. 5. The Court of Chancery has a concurrent jurisdiction with the Court of Dower, and will act in aid of an ad-

mitted legal title, (*Mundy v. Mundy*, 2 *Ves. Jr.* 129). 6. It restrains a defendant from committing waste by felling timber or pulling down buildings, ploughing meadows or ancient pastures, or from obstructing ancient lights, &c.—7. It restrains parties, in whose names stock is standing in the books of the Bank of England from selling out or transferring such stock.—8. Bills are filed to redeem mortgaged estates. 9. Also to foreclose or bar a mortgagor from all equity of redemption. 10. Every bill in Chancery to which an answer is required is in one sense a “bill of discovery;” but that which is usually called a *bill of discovery* is not filed for the purpose of obtaining any relief from the Court of Equity, but merely for a discovery of facts within the knowledge of the other party, or of deeds or writings, or other things in his custody or power, and the discovery is most frequently sought for to enable the party requiring it to prosecute or resist an action at law brought by him against the party from whom the discovery is required, or against him by that party.—the knowledge obtained from a party by a bill of discovery may be read against him in an action of law, (*Gray's C.C. Pract.* 69.) 11. Where a party is desirous of preserving the evidence of witnesses touching a matter which cannot be immediately investigated in a court of law, or where he is likely to be deprived of the evidence of a material witness by his death, or departure from the realm, before the questions on which it will be material can be investigated, the course is to file a bill in *perpetuam rei memoriam*, or to perpetuate the testimony of witnesses, (*Id.* 71). 12. Bills of partition are filed by one joint tenant, copartner or tenant in common against the other or others, to compel a division of the estate so held by them, in order that each may hold his or her share in severalty. 13. A bill must be filed, before a party having an equitable demand, can obtain a writ, *ne exeat regno*, against his debtor; and, 14. Bills called injunction bills, are also frequently filed to restrain a defendant from *pirating* the plaintiff's copyright or infringing his patent.

I shall close my answer to this problem with a few remarks on the nature, usefulness, and jurisdiction of the Courts of Equity as at present established, for the prevention of fraud, the remedy of injuries, the enforcement of good faith, and for the protection of those who from infancy, the loss of their senses, or any other cause whatsoever, are unable to manage their own concerns.

Equity, then, in its true and genuine meaning, is the soul and spirit of all law. *Positive law* is construed, and *rational law* is made by it. In this equity is synonymous to justice, in that to the true sense and sound interpretation of the rule, natural justice is the rule by which, where

positive law is either silent, defective, or not clearly defined, the decisions of Courts of Equity are guided, and it is in such cases only, the remedial and just powers, peculiarly confided to these courts, can be interposed where the will of the Legislature has been clearly pronounced with regard to all the circumstances which belong to a case as a general rule. Equity can neither take it up where the law leaves it nor extend the remedy farther than the law allows. Hard, therefore, was the case of bond creditors, whose debtor devised away his real estate; rigorous and unjust the rule by which a devisee was put in a better condition than the heir. Hard was the common law, till very lately subsisting, that land devised or descending to the heir should not be liable to simple contract debts, although the money was laid out in the purchase of the very land. Hard was it also that the father should never immediately succeed as heir to the real estate of his son. The like might be said of the descent of lands when they devolved to a remote relation of the whole blood, or even escheated to the Lord in preference to the owner's half brother. Hard was also the total stop put to all justice by causing the *parol* to *demur* when an infant was sued as heir or was party to a real action, and though the justice of modern times has induced the Legislature at length to abolish these instances of hardship and delay of justice, yet a Court of Equity could give no relief. It was not, as hath been erroneously stated, the business of a Court of Equity in England to abate the rigour of the common law; a Court of Equity possessed not the slightest power to interpose. In all such cases of positive law Courts of Equity as well as Courts of Law must say with Ulpian, (Ff. 40, 9, 12), "*hoc quidem perquam durum est, sed ita lex scripta est.*"

But Equity, as well as Law, determines according to the spirit of the rules, and not according to the strictness of the letter, and where cases arise which are out of the letter of a statute, if they are construed to have been contemplated by the Legislature, they are within its equity. These are the cases, then, of which Grotius says, "*Lex non exacte definit, sed arbitris boni viri permittat,*" in order to find out the true sense and meaning of the lawgiver. There is no rule of interpreting laws which is not equally used in both courts; the construction in both is the same, each endeavouring to adopt the true sense of the law in question, cannot vary that sense in a single tittle.

It is true that when a new case comes before the court which there is no preceding decision to decide by, unless the Judge disclaims all jurisdiction in the matter thereof, he must decide it and decide according to the workings of his own conscience. Now, however alarmed we may be disposed

to feel at a jurisdiction like this, yet when we consider how various, how refined, and how salutary the checks are, impossible upon, or correctives applicable to hasty decisions, we must admit with pleasure that every opinion, sentiment, and conception of corrupt abuse must vanish. For, though proceedings in Equity were said to be *secundum discretionem boni viri*, yet when it is asked, *Vir bonus est quis?* the answer is, "*Qui consulta patrum qui leges juraque servat.*" That discretion which is exercised in Courts of Equity is not an arbitrary discretion; it is a discretion governed by the rules of law and equity. This discretion has in no case the power to contradict the principles of law, as has been sometimes ignorantly imputed to the court: a discretionary power of such a description, is neither in this or any other, even the highest court acting in a judicial capacity, by the constitution entrusted with. (See Western's Com. 168).

Again, neither a Court of Law nor a Court of Equity can, generally speaking, alter men's agreements. Both courts will construe them equitably but neither pretends to have, or assumes to itself the power to control or change a *lawful* stipulation or engagement, and where the subject matter is such as requires to be determined *secundum æquum et bonum*, as generally upon actions of the case the judgments in the Courts of Law are guided by the most liberal equity.

The Courts of Law and Equity principally differ in the modes of administering justice in each in the mode of proof, the mode of trial, and the mode of relief; add to these two other grounds of jurisdiction, in which the narrowness of the decisions of Courts of Law drove the parties to seek relief in Equity, (viz. the true construction of securities for money lent, and the form and effect of a second use), and then we have the main pillars upon which hath been gradually erected that structure of jurisprudence which to this moment prevails in our Courts of Equity, and which is inwardly bottomed upon the same substantial foundations as our legal system, and however may differ from it in outward form that difference is only attributable to the different taste of the architects. (See the last chapter in 3 B. Com.)

Having claimed your indulgence thus far I detain you no longer, but conclude this answer which I fear I have made unnecessarily long with the words of that able lawyer, Sir E. Sugden, cited in Western's Coms. 168: "As the law of property is now administered in the different forums, allowing for the imperfection of human laws, it exhibits a most splendid and comprehensive code of jurisprudence, and the man will deserve ill of his country who shall ever attempt to confound the rules by which the Courts of Law and Equity are severally guided."

I am, Mr. Editor, your obliged and humble servant,  
E. 4

CHANCERY REFORM.

LETTER FROM COMMISSIONER FANE TO  
LORD ABINGER.

My Lord,—I observe that in the late debate on Chancery Reform, your Lordship is represented to have spoken of the delays of the Court of Chancery as *disgusting*. Allow me to lay before your Lordship and the public a case which has lately come under my notice whilst performing my duty as Commissioner of the Court of Bankruptcy, and which seems indeed to justify that strong expression.

In auditing the accounts of a bankrupt's estate, I found that £3000. had remained in the hands of assignees 10 years. Upon inquiry I was informed that the money could not be disposed of till a Chancery suit was decided, which, though instituted in 1828, was still pending. I sifted for the papers in the cause, and by wading through 500 folios of Chancery verbosity, I learnt the following facts:—

R. B., a London tradesman, died in 1814, leaving a large family, to whom he bequeathed some accumulations, and, as some of his children were under age, he appointed two trustees to manage the property. One of the trustees became bankrupt in 1828, and it then appeared that some of the funds were not forthcoming; upon which a bill was filed in Chancery against the bankrupt trustee and his assignees, and against the solvent trustee, praying that the usual accounts might be taken, and that the solvent trustee might make good the loss. Upon such a bill, as your Lordship well knows, it is of course customary to refer it to a master in Chancery to take the accounts, yet the plaintiffs did not arrive at this ordinary decree until two years and upwards had elapsed. The cause lingered in the Master's office just eight years and one month, and then the Master made his report!

The plaintiffs were dissatisfied, and took 16 deceptions, which now stand for argument; and I am told that their turn of hearing will arrive in this year, or early in 1841. If the cause could then be finally settled, this unfortunate family will have undergone only 13 years of misery; if, as I fear, a reference back to the Master should be found necessary, their misery may be prolonged indefinitely. I fear the latter, because I observe that the Master states in his report that he has abstained from taking certain parts of the accounts, because the decree did not authorize him to do so.

Does not this case justify your Lordship's expression? Is it not "*disgusting*?" But, my Lord, the most "*disgusting*" part remains to be told. The whole of these proceedings were, for every practical purpose, useless. The only real question between the parties was, whether the

non-acting trustee was responsible for the loss; and yet, to get at this question, the Court of Chancery, according to its system, was compelled to direct most voluminous accounts, extending over the period from 1814 to 1830, and the most minute inquiries upon subjects, some of which were in dispute, and the Master was compelled to make a report, which extended to 200 folios and upwards.

Such is the Chancery system, the main characteristics of which are delay, expense, and substantially a denial of justice. What, then, is the remedy?

If a loaded waggon stuck in the mire, what would a rational man do? He might put on more horses, or lighten the load, or do both. If I might venture an opinion, I should say that in dealing with the broad-wheeled Chancery waggon, the Legislature should adopt the last of these alternatives—it should put on more horses and lighten the load. The Lord Chancellor proposes to put on more horses, in other words, to have two new judges; but will this suffice? Will not such reform be mere delusion? What would have been the effect of such reform upon the case above referred to? Had the two new judges been in existence in 1830, would they have prevented the cause from lingering eight years and a month in the Master's office?

The first great object should be to get rid of writing, when writing could by possibility be dispensed with; and with this view, the legislature should provide that in all cases where an account was required of a trust fund, not exceeding £1000. the business should begin and end in the Master's office, subject of course to appeal; for this purpose the Master should be made a judge, and should be armed with all necessary powers.

To some, this will no doubt appear a startling proposal, yet in proposing it, I propose nothing which is not of every-day occurrence in bankruptcy. There, if the trust fund, in other words, the bankrupt's estate, amount, not to £1000. but even to £10,000. or £100,000., and even if it consists of the most complicated interests in real estate, the whole administration is entrusted, if in London, to certain salaried officers called commissioners; if in the country, to three or four attorneys of some neighbouring town; and the whole business is conducted from beginning to end without the interference of any other jurisdiction. Why should not the same course be pursued in Chancery? It is curious to observe how differently the law provides for that judicial interference which becomes necessary upon a death or a bankruptcy. If a man die in Northumberland, and disputes arise about his assets, those disputes are brought before the greatest court in the kingdom, a court which sits in the metropolis; everything is done in writing; the

matter originates with the court itself; the court makes its first decree in about two years; that decree tells the Master, in endless detail, what he is to do (just as if he required being taught the simplest matters); the decree is drawn up, not by the judge, who might be thought wiser than the Master, but by some deputy-registrar, who, in teaching the Master, frequently omits some material direction; the matter goes to the Master; in eight years the Master makes his report, tells the court what he has found, and what he would have found, if the deputy-registrar had authorized him; and at last the court either acts or sends the matter back to the Master with new directions. Meanwhile, as Lord Bacon observes, "though the Chancery pace be slow, the suitor's pulse beats quick." If, however, instead of dying, the man happens to be an insolvent trader and bankrupt, then the suitor, instead of going 300 or 400 miles to London to find relief, finds it at Alnwick; instead of obtaining relief from the first law officer of the Crown, the Lord Chancellor, he obtains it from three or four attorneys of his neighbourhood; instead of the Chancellor referring the suitor at the end of two years to the Master, with long detailed instructions, he refers him at once to the attorney-commissioners, with no other instructions than such as would correspond with the usual mercantile instructions, "do the needful;" instead of everything being done in writing, scarcely anything is done in writing; and instead of the Master doing nothing and reporting everything, the commissioners do everything and report nothing. And what is the result of these different systems? In Chancery, it is delay, expense, misery to the suitors, and disgrace to the court; in Bankruptcy (at least, within that district to which reform has extended), it is speedy justice, moderate expense, and universal satisfaction amongst those most interested, namely, creditors.

And why should a Master in Chancery be trusted, and a Commissioner of the Court of Bankruptcy be trusted; the salary of a Master in Chancery is £2500. a year, that of a Commissioner is only £1500.; why then should not the office of a Master be filled with persons as competent to carry out a decree for an account and direct the distribution of the assets, subject to appeal, as a Commissioner of the Court of Bankruptcy is supposed to be? why should the Master be instructed in all the details of his duty, just as if he were not endowed with common sense, and why should the Commissioner be trusted to do his duty, without any instructions at all, except such as his own common sense and knowledge of his profession will furnish him? No man can answer these questions satisfactorily, or justify such gross anomalies.

But of course, there are many cases in Chancery where writing is indispensable, and cannot something be done to diminish the length of Chancery papers? Must the law continue to encourage lengthiness by making the fee for drawing a legal document depend upon the length of the document when drawn? This mode of remuneration, it is true, has been in existence from time immemorial, but it has been condemned by all who have thought on law reform, by Lord Bacon 200 years ago, and, as I well remember, by your Lordship a few years since. Under it the fee of the Chancery barrister increases as the bill or answer which he draws lengthens, so also does the charge of the solicitor, so does that of the registrar, who draws the decree, and so also does or did the remuneration of the Master in Chancery and all his clerks. Is it surprising that, under such a system, law papers have lengthened, until the searching for the sense of them is like looking for a needle in a bottle of hay—for a grain of wheat in a bushel of chaff.

The Legislature should reform this, and should so arrange, as that lawyers should gain by speed and brevity, not by delay and prolixity. Probably the best mode of effecting the object would be, to issue a commission to certain solicitors of London (selecting such as were of opinion that a plan of remuneration better than the present could be devised), authorising them to prepare a plan. It is impossible that they could prepare one more mischievous than the present.

Another main principle of reform would be, to revise the law of parties to suits in Chancery, and make it somewhat more conformable to the dictates of common sense. Under the present system, Chancery now swallows a camel, now strains at a gnat. To-day the court shall be asked to direct an account of the personal estate of a deceased person, and, if any one were to say that the person entitled to the residue of the deceased ought to be present at the taking of the account, as they were so deeply interested in the result, the court would say, "No, the personal representative represents and protects every one, creditors, legatees, and the parties entitled to the residue." Here the court swallows the camel. To-morrow it shall be asked to make a decree involving an account and distribution of the real estate of a deceased person, and then, although crowds of devisees are parties to the suit, so many that there cannot be the slightest fear but that the accounting parties will be carefully watched in the Master's office; yet, if it shall appear that an infant has been just born who will be entitled to any portion of the proceeds of the real estate, the court will order the cause to stand over, in order that he may be made a party to the suit! Here the court strains at the gnat. The rule is the same.

death or marriage create any new interest, so that, unless there be neither births, deaths, or marriages amongst such a crowd of parties during ten years, which is the average duration of a Chancery suit, there is an endless succession of suits, called bills of revivor and supplement to bring new parties before the court. The Legislature should reform this; and, as the personal representative represents all interested in the personal estate, as assignees in the bankruptcy represent all persons connected in the bankrupt's estate, as the governing power in a corporation represents all persons interested in corporate property, as the officers of a joint stock company represent all persons interested in a joint stock company, and as in an endless number of other cases such a number of the parties interested as will suffice to ensure a fair and honest discussion of the points in debate, being present, are permitted to represent the absent, so in the case of a suit for the administration of a real estate, some one or the few of the parties principally interested, should be permitted to represent all.

Many other essential principles of reform might be suggested, but the length of this paper warns me to stop, and I shall, therefore, conclude with expressing a hope, that neither your Lordship nor any other member of the Legislature will sanction the delusion, that so feeble an effort of reform as the multiplication of judges or courts will ever abate the Chancery nuisance, and beg to subscribe myself, with great respect, your Lordship's obedient servant,

C. FANE.

Court of Bankruptcy, 26th May.

## Imperial Parliament.

## HOUSE OF LORDS.—June 2.

## REAL CASE FROM THE COURT OF CHANCERY IN IRELAND.

*cases for LIVES.—Whether, from the circumstance of repeated renewals, a covenant for perpetual renewal shall be implied.*

SMITH v. NANGLE.

This was an appeal from an order of the Lord Chancellor of Ireland. The question in dispute between the parties was, whether a lease executed in 1672 contained a covenant for a perpetual renewal.

In the year 1672, Henry Packenham, of Tully, in the county of Westmeath, Esq., executed a lease for three lives to Bartholomew Cooper, his heirs and assigns, of certain lands of Tully and Fiermore, at a small yearly rent, payable half-yearly. It appeared that the lessees of the lease was many years ago accidentally

destroyed by fire, which precluded the respondents from producing it, or even a copy; but it was admitted by the appellants, that there was an endorsement on the lease in these words:—  
“And it is hereby agreed between the parties aforesaid, that upon the renewing or inserting of any life or lives, there shall be paid by the said Bartholomew Cooper, the father, his heirs or assigns, unto the said Henry Packenham, his heirs or assigns, the full sum of £16. 16s. 4d., current and lawful money of England;” which endorsement, the respondents submitted, was made on the lease in consequence of some inaccuracy or uncertainty in the statement of the amount of the renewal fine in the body of the lease, or to supply some defect or omission in the covenant for perpetual renewal. The lease has, since it was first executed, been renewed seven times, the last renewal having been occasioned by the death of his late Majesty George III., one of the lives in the preceding renewal, dated 1768. In the month of October, 1830, the lessor's interest in the fee and inheritance of the lands of Maine became vested in the appellant, who suffered a common recovery, and notice was served upon Christopher Nangle, one of the *cestui qui vires*, the father of the respondent, J. H. Nangle, demanding possession. On the death of Christopher Nangle, which took place in June 1836, an application was made on behalf of his son, requiring a renewal of the lease, which, after some correspondence, was declined by the appellant, the Rev. Thomas Smith, who alleged, among other matters, that Mr. Nangle held too much land. A bill in the Irish Court of Chancery was accordingly filed by the respondent, praying that the Court would decree that the lease contained a covenant for perpetual renewal, and that directions should be issued by the court to oblige the appellant to renew the lease. When the cause was heard, the Lord Chancellor directed two issues to be tried by a special jury of the county; first, whether the lease was renewable for ever; and secondly, whether, independent of the endorsement upon the lease as to the payment of £16. 16s. 4d. on the renewal or inserting of any lives, it contained “any clause, covenant, or agreement relating to the renewal of the said lease, to the said lessee, his heirs and assigns.” Against this order of the court the appellant brought the present appeal.

It was contended on behalf of the respondents that the order of the Lord Chancellor of Ireland was consistent with equity and justice, and ought not to be disturbed.

The LORD CHANCELLOR gave judgment.—Decree of the Lord Chancellor of Ireland reversed, and the bill ordered to be dismissed.



## Law Reports.

## COURT OF CHANCERY.—June 8.

APPEAL FROM THE VICE-CHANCELLOR,  
April 16.

IBBOTSON v. IBBOTSON.

DEVISE *where void when the remainder is too remote.*

This case was heard by the *Vice-Chancellor* on the 16th April last. In 1814 Sir Henry Carr Ibbotson made his will. At that time, by virtue of a settlement on his marriage, his mansion-house at Denton-park stood settled to the use of himself for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of his first and other sons, severally and successively in tail male, with remainder to the use of Sir Henry Carr Ibbotson in fee. By his will Sir Henry Carr Ibbotson devised the reversion in fee of his mansion-house to the use of his brother, the late Sir Charles Ibbotson, for his life, with remainder to the use of trustees, to preserve contingent remainders, with remainder to the use of the first and other sons of the said Sir Charles Ibbotson, severally and successively in tail male, with remainder to the use of his brother, John Thomas Ibbotson, in like manner in strict settlement, with remainder to the use of his own daughters severally and successively in tail male, with several remainders for life and in tail, with remainders to his own right heirs. He then gave in the words following—"I give and bequeath unto William Charlton and Matthew Wilson, their executors, administrators, and assigns, all my plate, pictures, books, and household furniture in and about my said mansion-house at Denton-park, upon trust, to permit the same to be used and enjoyed by the person and persons who for the time being shall be entitled in possession to my said mansion-house under or by virtue of the settlement made upon my marriage, or of the limitations contained in this my will, until a tenant in tail of the age of 21 years shall be in the possession of my said mansion-house; and then the said plate, pictures, books, and household furniture, are to go and belong to such tenant in tail. I give and bequeath all the rest and residue of my personal estate and effects, after payment of my just debts and funeral and testamentary expenses and legacies, and subject thereto, unto the person who, at my decease, will be beneficially entitled in possession to my said mansion-house of Denton-park, and I constitute and appoint my said brother, Charles Ibbotson, executor of this my will." He died without issue. In September, 1825, the will was proved by Sir Charles Ibbotson, who, on the testator's decease became beneficially entitled

in possession to the mansion-house, and consequently was his residuary legatee. He had died lately. Before the testator's death, the present Sir Henry Charles Ibbotson, the eldest son of Sir Charles Ibbotson, was born, and has now attained the age of 21. The question is, who became entitled to the subjects of the specific gift?

The VICE-CHANCELLOR said, the words in this case are singular, and unlike the words in any other case. The gift is in the form of a simple declaration of trust, not requiring any settlement to be executed. It has no such qualifying words as are found in the case of *Gore v. Grosvenor*, (a) and other cases, namely, "as far as they can by law," or "as far as the rule of law or equity will permit." The gift referring to the limitations in the settlement and in the will of the mansion-house meant to pass the chattels in succession; but the trust is so expressed that if it were literally carried into effect it might have happened, to use the expression of Lord ELDON in *Ware v. Polhill* (b) that no tenant in tail of the age of 21 years might have been in the possession of the mansion-house for two centuries, and consequently the absolute interest in the plate and other articles would not have vested during that time. In *Marshall v. Holloway* (c) the same great authority says, "The trust in this case for accumulation I think bad, because it may last for ages." And under the will of Sir Henry Carr Ibbotson the suspension of the vesting of the chattels might have endured for ages. The fact that a tenant in tail of the age of 12 years has become possessed of the mansion-house within the space of 21 years from the death of the testator is immaterial, for the validity of the gift must be determined by considering how it stood at the death of the testator, and unless it was then such as that, if it ever took effect at all, it must of necessity have vested the absolute interest in some one within the period allowed by law, it was bad then, and must be so now. For, as Sir W. Grant said in *Lord Southampton v. Marquis of Hertford* (d), an executory devise exceeding the allowed limits is bad in law; and in *Tollemashe v. Earl of Coventry* (e) LORD BROUGHAM says, "to argue from the fact that the person was *in esse* at the date of the will who became Lord Vere is to rely upon an accident. The event might have been otherwise. He would not *ex necessitate* answer the description within the allowed period; the estate must be certain, so as within the time to vest in the person described." And upon the fullest consideration I am of opinion, that so far as the gift

(a) 5 Mad. 337.

(b) 11 Ves. J. 283.

(d) 2 Ves. &amp; B. 62.

(c) 2 Swanst. 420

(e) 8 Bligh, 505.

was framed to take effect after the death of Sir Charles Ibbotson, it was void. Whether it was made as a gift to him for life only, and void as to the remainder after his death, or whether it might be construed as a gift absolutely to Sir Charles Ibbotson, according to what seems to have been the opinion of Lord Brougham upon the gift in Lord Vere's will to the third Lord Vere, it is not necessary to decide, because Sir Charles Ibbotson was residuary legatee. Upon the whole, I think that under the will of Sir Henry Carr Ibbotson, Sir Charles Ibbotson took absolutely the subjects of the specific gift. From this decision the present APPEAL was brought.

For the appellant the following cases were cited: *Tollemache v. Earl of Coventry* (ante) *Prer v. Grosvenor*, (ante) Lord Southampton the Marquis of Hertford.

Against the appeal *Proctor v. the Bishop of Bath and Wells*, 2 Hen. Blacks. 358. and cases were cited.

The LORD CHANCELLOR found great fault with the form of the suit. His Lordship said, the estate of Sir Henry had not been administered, nor debts paid, and here were persons attending about a residue, when it might turn out that no residue at all existed. This attempt to get decisions on points in a case not ripe for hearing, added much to the delays in the administration of justice, and although he would decide this case, because it was heard below, yet in every future case he would refuse to hear, until the cause came on in a proper form.

### ROLLS' COURT, June 3.

#### RAYNER v. GREEN.

**SENDOR and PURCHASER.—Right to specific performance—LACHES—LAPSE of TIME—Bar to relief.**

The bill in this cause was filed by the plaintiff, S. Rayner, to compel the specific performance of an agreement which he had entered into, in 1818, with John Smith, deceased, for the purchase of certain small cottages, gardens, and orchards, situate at Knave's Beech, near Chipping Wycombe, in the County of Bucks, subject to the life interest of the said John Smith and Sarah his wife. The price agreed upon was £50, thirty of which was paid on the execution of the agreement, but no legal assurance was made. John Smith died on the 4th of November, 1823, and, as he was desirous that his wife should know nothing of the sale, he made his will, by which he gave the property to her, and appointed Messrs. Green and Ponsford, the latter of whom alone proved, executors of his will.

Mrs. Smith, by her will, gave the premises to various persons, who in the course of the argument it appeared were not before the court, and died on the 16th of July, 1824. Upon the decease of Mrs. Smith, some negotiation took place respecting the estate, and in 1826 a draft of an assignment was prepared, but was never executed. John Ponsford shortly after died, and it was alleged that Mr. Green took upon himself the management of the property, and entered into the receipt of the rents. The business, however, was thus suffered to rest till the present bill was filed. It was now objected by the defendants that the plaintiff had no right to the performance of the agreement which had been made, in consequence of the lapse of time which had been suffered to pass, but this formed no obstacle, as the last tenant for life did not die till 1824, and two years and upwards were allowed to pass in negotiation. Mr. Green, however, denied that he acted as executor of the will of John Smith; but it was proved that he had been in receipt of the rents, and had acted as the lessor of the premises.

Mr. Pemberton, for the defendant Green, insisted that the neglect to enforce the agreement till 1834 was a bar to relief; there were, however, not proper parties before the court. The property sold was described as freehold. Upon the first hearing, the devisees of Sarah Smith were ordered to be brought before the court. The plaintiff, however, insisted that the premises were leasehold, and had filed a supplemental bill and had brought a limited administrator before the court. In this state, therefore, if the suit was allowed to proceed, no decree could be made, and that more especially as the very evidence of the plaintiffs showed that a part of the property had been taken by the parish officers of Chipping Wycombe, and had been sold by them for the maintenance of one of the devisees of Sarah Smith.

Lord LANGDALE, stopping Mr. Pemberton, said it was clear no decree could be made for the plaintiff, for upon his own evidence it appeared that a part of the estate had been sold and delivered to somebody else. The only thing to consider was, whether the plaintiff ought to have the further indulgence of bringing other parties before the court. The agreement made was to have been carried into effect immediately. The conveyance might have been made, and the purchase-money paid, but nothing was done during the lives either of John Smith, or Sarah, his wife. After their deaths an assignment was prepared, and Green was to have proved the will for the purpose of executing the deed; this, however, went off, and he never became the legal personal representative of John Smith, being nothing more than a formal party, and not bene-

specially interested. It did not appear to him (Lord Langdale) that, if further parties were added, there was any probability of success by the plaintiff, and therefore he considered that he ought to dismiss the suit with costs.

Mr. Parker, sen. said he appeared for Mrs. Ponsford. She was made a party merely because some of the deeds had come into her hands; he trusted, therefore, that his client would be considered entitled to her costs.

Lord LANGDALE thought that she was entitled, and that they ought to be paid.

#### COURT OF QUEEN'S BENCH.—JUNE 8.

*Sittings in Banco.*

##### LORD CAMOYS v. SCUR.

**BAILMENTS**—*Whether where a person obtains a horse for trial, employs an experienced person to make the trial, and the horse runs away and is killed, the borrower is responsible for the value of the horse.*

We fully reported this case in our last week's number, (a) which was an action in which the plaintiff alleged that he was possessed of a mare of great value, and that the defendant had her in his care and custody for the purpose of trying her, and that he did not take proper care of her, in consequence of which she died. The defendant did not try her himself, but placed upon her back an *experienced groom*, who was thrown, and the mare was killed. The question put to the jury by the learned judge who tried the cause (COLERIDGE, J.) was, whether the defendant was right in allowing the groom to ride the mare? The plaintiff was non-suited.

Mr. Kelly moved for a rule to show cause why the non-suit should not be set aside and a new trial granted, on the ground that the defendant had only the plaintiff's permission to try the mare himself, and had, therefore, no right to allow another person to ride her without leave of the plaintiff.

Lord DENMAN said that, according to this argument, if a gentleman wished to purchase a horse for his groom to ride, and said, "Get upon it, and see if you like it," that was to be considered a conversion. This could not for a moment be supposed. The defendant has not abused the leave given to him, and was justified in deputing an *experienced person* to ride the mare for the *bond fide* purpose of trying her paces, in order that he might determine whether or no he would purchase her.

*Rule refused.*

(a) Ante, p. 90.

#### COURT OF COMMON PLEAS.

May 12.

*Sittings in Banco.*

##### PARKER v. MITCHELL.

**RIGHT OF WAY**.—*Construction of 2 and 3 W. IV. c. 71, s. 2.—Pleading.*

This was an action of trespass, to which the defendant pleaded a justification, under the statute 2 and 3 W. 4, c. 71, s. 2, and set up a usage for 20 years and 40 years, by two of his Pleas. It was tried at York before Coleridge, J. who was of opinion that the pleas were not made out, by reason of the evidence not showing user for the last 4 or 5 years, and the plaintiff therefore had a verdict.

Mr. Alexander now moved for a rule to shew cause why that verdict should not be set aside, and a new trial granted on the ground of misdirection, and cited *Payne v. Shedden*, (a) where a plea of 20 years' right of way was held not to be defeated by proof an agreed alteration in the line of way, nor by a temporary non-user under an agreement.

Lord DENMAN, C.J.—Your argument would give you a right if at the distance of 20 years you could shew a user for one year, though there was then a non-user for 19 years; and thus a non-user for 19 years would in fact establish the claim.

PATTESON, J.—*Payne v. Shedden* depended on an agreement, and the non-user was accounted for by that agreement. That is not so here.

COLERIDGE, J.—In a case like that, you need not ask the jury to make any presumption, for the agreement would prove every thing. There is no necessity to prove a user up to the very time of action brought. You might as well argue if you traced back a user for 19 years, you might ask for the presumption of another year's user to be made in your favour; yet it has been decided that that cannot be done.

Lord DENMAN.—User up to the very day of action brought is not required, but user up to a reasonable time must be shewn; and certainly three or four or five years' user cannot be presumed in order to support a plea of this kind.

The rest of the Court concurred.

*Rule refused.*

May 28.

*Sittings in Banco.*

##### MASON v. GRAHAM.

**DISTRINGAS**.—PRACTICE.

Mr. Sergeant Manning moved for a writ of *distringas* in this case to compel the appearance

(a) 1 Moo. & Rob. 382.

the defendant, Captain Graham. It appeared in the affidavit, that repeated attempts had been made to serve the defendant with the writ of summons, but that he had kept out of the way to avoid being served; and on the last occasion but one of the deponent calling to serve him, the defendant gave directions that the next time he called he should be given in charge to a police officer.—Rule granted.

June 3.

*Sittings in Banco.*

THOMSON v. FARDEN AND OTHERS.

REPLEVIN.—JURISDICTION of the SHERIFFS of LONDON.—*Whether it is competent for one of them personally to execute the duties of his office, there being two Sheriffs.*

This was an action on a replevin bond, in which the declaration alleged that the defendant was a tenant of the plaintiff, who had distrained on him; and that thereupon the defendant went to Sir Moses Montefiore, one of the Sheriffs of London, and obtained a replevin upon the usual terms. The case now came before the court on a demurrer to the declaration, on the ground that Sir Moses Montefiore, as one of the Sheriffs, had singly no jurisdiction to grant a replevin.

Mr. Serjeant Goulburn, for the demurrer, raised the question to be, whether, there being two Sheriffs of London, it was competent for one of them to execute personally the duties of the office of both. He cited the statute of Marlborough, 52 Hen. 3. c. 21. and 11 Geo. 2. c. 19. which gave the Sheriffs their power, and contended that according to the provisions of those statutes there was no power given for one of the Sheriffs to grant a replevin bond.

Mr. Peacock, for the plaintiff, cited *Rich v. Thomas Pleyer*, (a) by which it appeared that the Sheriffs were to be considered as distinct individuals, and set up a custom for the Sheriffs of London to grant replevins separately.

INDAL, C. J.—The shrievalty of London is different from that of Middlesex, for the same two persons who are the sheriffs of the former, constitute the office of the sheriff of the latter; and the question is, whether one of them is so far as a joint officer from the other in the city of London, that for the purpose of granting this *inam remedium*, he may give a replevin. If so, there is an end of the case, because the statute of Geo. 2. says, and means to point out the conclusion, that the bond may be taken by the officer who grants replevin. Then is the question done by one sheriff a valid act. That the

two sheriffs are considered as separate officers for some purposes, appears from the authorities before the court. (b) I think, therefore, that the allegations in this declaration are sufficient, and that the plaintiff is entitled to judgment.

MAULE, J.—Here there are two sheriffs, and the name of each of them would satisfy the precise term of that statute. The statute of the 1 & 2 William & Mary, c. 12, provides that sheriffs of shires may grant power under certain conditions to certain persons in their shires also to grant replevins; but that does not apply to cases like this, where the sheriff is sheriff of a city which is made a shire. The object of the provision clearly was to extend the means of securing speedy remedy, and no doubt the reason why it was not made applicable to sheriffs of cities was that in such cases there were two sheriffs to apply to, each of whom might grant replevin, in the same way as each of the agents of a sheriff of a shire might. The statute of Geo. 2, provides that all sheriffs granting replevins may assign the bonds under their hands and seals, and that provision assumes that the assignment and replevin are to be made by one officer. In London the office of sheriff is performed by two persons, but I cannot say that the assignment must be by both of them. I think the case of *Wilson v. Hobday* (c) very material, if not decisive on this point; and this case certainly falls within the line of reasoning upon which that decision was arrived at. I conceive that judgment must be given for the plaintiff.

The other judges concurred.

Judgment for the plaintiff.

COMMON PLEAS.—May 30, 1840.

ORDER.

This Court will, on Tuesday the 23rd of June next, hold sittings, and will proceed in disposing of the business now pending in the paper of New Trials. On the same 23rd of June, and on the six following days (Sunday excepted), commencing with the Country New Trials.

COURT OF EXCHEQUER.—May 29.

*Sittings in Banco.*

LAMONT v. CROOK.

SUBPENA DUCES TECUM.—*Whether, to support an action against an absentee witness, it is necessary that he should have been called upon his subpoena in court.*

This action was brought to recover damages for not obeying a subpoena, and on the trial

(a) Skin. 104.

(b) *Rich v. Sir Thomas Pleyer*.

(c) 4 Man. & S. 120.

before Lord Abinger, at Westminster, his Lordship directed a nonsuit, on the ground that it had not been proved that the defendant had been called upon his *subpoena*, at the time the cause came on to be tried.

The defendant, it appeared, had been subpoenaed to appear and give evidence on the trial of this action for the plaintiff, but when the cause was called on the plaintiff was obliged to withdraw the record in consequence, as it was alleged, of the absence of the defendant, whom he considered to be an essential witness. A rule *nisi* had been obtained for a new trial, and cause was now shown against it by

Mr. Crowder, who contended that the law was consonant with the universal practice, and that there was no obligation cast upon the defendant to appear in court till he had been called by the act of the court. This was an action on an alleged breach of duty, and the question was, what that duty was? This it was urged was to appear when called, and, as the defendant had not been called, it would follow that no right of action accrued to the plaintiff, as no breach of duty had been committed.

Mr. Thesiger, for the rule, argued that the ceremony of calling a witness was not more than evidence of the breach of duty, and not that it constituted the very essence of the matter. The law cast an obligation on witnesses to appear, in order to testify *de die in diem*, until the cause should be called on in its regular course, and if, as was the case here, the witness was not in fact in or near the court, the calling was wholly useless and an idle ceremony. The question was, was he there ready to give evidence? and if not, as his absence had caused the plaintiff to withdraw his record, he was bound by law to reimburse the plaintiff the costs of that delay.

The Court was of opinion that an action was maintainable against an absenting witness, though he might not have been called upon his *subpoena*, if it were proved that he had absented himself in such a way that, even if he were called to appear in court, he could not possibly do so.

Rule absolute.

## COURT OF EXCHEQUER.

### ORDER.

May 27, 1840.

It is resolved by the judges, that when a judge's order is made a rule of Court, it shall be a part of the rule of Court that the costs of making the order a rule of Court shall be paid by the party against whom the order is made, provided an affidavit be made and filed that the

order has been served on the party or his attorney, and discharged.

## COURT OF REVIEW.—June 6.

FIAT against — GREEN.

**SUPERSEDEAS**—*Right of a Bankrupt to a Supersedeas without payment of Fees.*

In this case the bankrupt had compounded with his creditors by a payment of 5s. in the pound, and had obtained the consent of all of them to a supersedeas: a difficulty however arose upon the application made by the bankrupt for the writ, the Commissioners having refused to certify, because the bankrupt had not paid the fees required by the statute.

Mr. Anderton now again applied to the Court on the subject on behalf of the bankrupt and prayed the writ.

Sir J. CROSS.—By a general order, issued in the year 1818, a bankrupt, having obtained the consent of all his creditors, is declared entitled to a supersedeas, and the same rule requires commissioners to adjourn the choice of assignees in order to allow time for such an application. In the present case the commissioner has adjourned the proceedings for that express purpose. The rule does not require the certificate of the commissioner; but, in practice, and for facility, the Court has been accustomed to require it as the best proof of the consent of creditors. Here the commissioner refuses to certify, not because he is unable to do so, but because certain fees are not paid. A right to have a supersedeas is a right belonging to the bankrupt, and if all that is required has been done, it is not in the power of the commissioner to say whether or not the right shall be conceded. I cannot think the bankrupt bound to pay these fees in question, which the Act of Parliament says are to be paid by the assignees out of the estate, and which, therefore, until funds accrue, cannot be paid. It is unjustifiable to refuse to supersede because the commissioner has refused to certify; and I am therefore of opinion, having well weighed the matter, and given it my most attentive consideration, that the petitioner is entitled to have the fiat superseded.

Order for supersedeas, as prayed, allowed.

## PREROGATIVE COURT—May 9.

**WILL OF ALEXANDER ELLIS, Esq. deceased.**

*New Will Act—Attestation clause.*

The deceased died on the 21st of April last. Previous to his decease he dictated his will to

uncle, by which he gave £1000 to each of three sisters, and made his brother, William, residuary legatee. The deceased signed the paper in the presence of his uncle, and informed latter that the execution required to be attested by two witnesses. These persons, unfortunately, did not sign their names in the room in which the deceased was, but carried the paper into an adjoining room, separated only by a passage, the both doors being open. They could hear the deceased breathe, but they could not see him, nor he them.

Mr. Nicholl applied for probate, but admitted his fear that the application was hopeless.

Sir H. JENNER said the Court unfortunately has no discretion, but is bound by the terms of the Act of Parliament, and as the witnesses at the time of attestation were not either actually or constructively in the presence of the deceased, I must reject the motion for probate, though it is a very hard case.

*Probate refused.*

LAW OF MARRIAGE.—We beg to call the attention of our readers to an advertisement in another of our paper relating to restraints on marriage, which we hope to see shortly placed upon some certain basis, consistent with sound reason and good law.

## REVIEW OF NEW BOOKS.

### REPORT OF THE BRAINTREE CHURCH-RATE CASE.

(*See Hey and Joslin v. Burder*) to which is appended *Gaudern v. Silby*. Second edition, by CUTHBERT WILLIAM JOHNSON, Esq. of Gray's Inn, one of the Counsel in the cause. London, RICHARDS and Co. 94, Fleet Street, 1840.

We cannot do better in noticing this book than borrow the opinion of LORD DENMAN. It is "a very able pamphlet," and is written upon a very important subject now in agitation throughout the kingdom. We observe by the advertisement, that the first part of the Report is written by Mr. GEORGE WM. JOHNSON, one of the Supreme Court at Calcutta, and the opinions are printed chiefly from Mr. Gurney's reports, and contain the arguments on the Defendant's side, and the judgment in full given by LORD DENMAN, in the Court of Queen's Bench, on the 1st of the last month. The case came before the court upon a demurrer to a declaration in prohibition, directed to the Judge of the Con-

sistory Court of the Bishop of London, requiring him to proceed no further against the plaintiff for the recovery of a supposed Church-rate laid on the parishioners of Braintree by the Churchwardens alone, notwithstanding the Vote of a Vestry by which the rate was refused. The Consistory Court decided against this defence, and thus raised the question, *Whether the Churchwardens have power to impose a Church-rate against the declared will of the inhabitants in Vestry assembled?*

The work before us gives a very full and able report of the judgment pronounced by LORD DENMAN, from which we select the following extracts.

In debating this question at the bar, the ancient doctrine that by the custom of England, the inhabitants are bound to repair the body of the church, and to enclose the churchyard was not disputed, a doctrine fully stated by Holt, C. J. as quoted by the Queen's Advocate, in arguing the present case in the Consistory Court. "By the civil and canon law the parson is obliged to repair the whole church, and so it is in all Christian Kingdoms but in England, for it is by the peculiar law of this nation that the parishioners are charged with the repairs of the body of the church." (a)

This is undoubtedly a legal truth, as old as any in our books. Lord Coke in his Commentary on the statute or writ of *circumspecte agatis* (2 Inst. 489), and that on the *articuli cleri* (ib. 653), and in numerous other places, distinctly lays it down, and all the authorities are the same way; and though the period of the earliest Church-rate does not appear to be ascertained, we may safely assume that the expence required for this purpose was always defrayed by means of a rate levied on the parishioners, neither was that proposition denied on the part of the plaintiff, or that a Church-rate is matter of Ecclesiastical cognizance, or that the Churchwardens are entrusted with the expenditure of the rate so levied, or liable to spiritual censures for neglect of their duty therein. But, the question is, whether in case of refusal by the parishioners, the Churchwardens are empowered to impose a rate for that purpose, and indeed compellable by spiritual censures so to tax their fellow parishioners.

\* \* \* \* \*

The plaintiff in this present suit, has the right to cast the burden of proof on his adversaries.

(a) *Hawkins v. Ross. Carthew, 360.*

The law requires clear demonstration that a tax is lawfully imposed. No Act of Parliament vests in the parish officers such a power as these have exercised, nor recites that such a power exists, by common law or custom. No book of reports affirms it; no such usage in fact prevails in the land; an opposite usage prevails, the Church-rate is constantly imposed by the inhabitants in vestry assembled.

In *Gibson's Codex* 220, it is said, "Rates for reparation of the church are to be made by the Churchwardens, together with the parishioners assembled, upon notice given in the church. And the major part of them that appear shall bind the parish, or if none appear, the Churchwardens alone may make the rate, because they, and not the parishioners, are to be cited and punished in defect of repairs."

\* \* \* \* \*

Such is the form of the rate in all the books of practice.

On the hearing of the present case before Dr. Lushington, that learned Judge interposing, pointed out many apparent incongruities in the statement of facts, in *Gaudern v. Silby*, saying that it teemed with eccentricity. It is tolerably clear that it was that case alone which induced him to decide the present case as he did. Sitting in the Consistory Court, he felt himself constrained by the decision of the Court of Arches, being a court of superior authority, to hold the present Church-rate legal and binding.

*An able pamphlet has been published since these remarks were made, reporting that case, and containing a statement of facts which appears to remove much of the uncertainty alluded to by Dr. Lushington. (b)*

But the great fundamental objection remains in its full force. However binding on the Consistory Court, and however respectable in itself, an insulated decision by the Court of Arches is not binding in Westminster Hall.

\* \* \* \* \*

The conclusion at which we arrive is, that the Court Christian was wrong in over-ruling the defensive allegation of the parishioners, that the rate was made against the wishes of the majority in vestry assembled, on the ground that this supposed Church-rate was a nullity, as having been made by persons who had no authority to make one in defiance of the declared dissent of the vestry, and that the court decided erroneously in proceeding to give judgment for enforcing it.

(b) Lord Denman here referred to the 1st Edition of this Report.

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J. C. W. 5, Gray's Inn-square, apply at Publishers, and you will receive a satisfactory reply.

**LAW OF MARRIAGE.**—At a Meeting of parties aggrieved by the existing restrictions upon Marriage, held at the Office of Messrs. CROWDER & MAYNARD, No. 3, Mission House Place, London, on Thursday, the 21st of May, a Committee, consisting of seven of the gentlemen present, was appointed (with power to add to their number) to take the necessary steps for obtaining a repeal of the objectionable restrictions upon Marriage, and more particularly that *which prohibits marrying with a deceased Wife's Sister*; and it was resolved, that the objects of the Meeting should be forthwith published in such of the London and Provincial Papers as the Committee might think proper, with a view to obtain the active co-operation of all parties interested.—Communications to be addressed to Messrs. Crowder and Maynard, as above.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookbinder, 134, Fleet Street, in the Parish of St. Dunstons-in-the-West, in the City of London.—Saturday, June 13, 1842.

# The Legal Guide.

Vol. IV.]

SATURDAY, JUNE 20, 1840.

[No. 8.]

Price Sixpence

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 100.)

WE have shown that in England the burthen of proof of negligence is on the bailor, and that proof merely of the loss, is sufficient to put the bailee on his defence. But this is, with certain exceptions, only in innkeepers and carriers, and to which will now direct attention. If we turn to the Roman law, we find the lawyers declared that *Ship Masters, Innkeepers and Stable-keepers*, if they did not prove what they had received to keep safe, judgment should be given against them. *Autæ caupones stabularii, quod cujusque rem fore recipierint, nisi restituent, in eos pecuniam dabo.*" (a) GAIUS says, that although

neither ship masters, nor innkeepers, nor stable-keepers receive a compensation for mere custody; but ship masters for carriage of goods; and innkeepers for entertainment of their guests; and stable-keepers for the keeping of cattle; yet that they were bound for custody of the thing, in like manner as a fuller and tailor are bound for custody of the thing, *ex locato*, although they receive their compensation, not strictly for custody, but for the exercise of their art. (b)

In regard to INNKEEPERS, LORD KENYON thus described their duties—they are bound by law to receive guests who come to their inns, and are also bound to protect the property of those guests. They have no option either to receive or reject guests, and as they cannot refuse to receive guests, so neither can they impose unreasonable terms on them. (c) An Innkeeper, by the common

(a) Pothier Pand. Lib. 4. tit. 9.

(b) Digest. Lib. 4. tit. 9. l. 5. Jones's Bailm. 94.  
(c) *Kirkman v. Shawcross*, 6 Term Rep. 17.



law is liable to answer for all goods lodged in his inn by his guest; he is responsible for the acts of his servants, and also for the acts of his guests; or, according to *the Register Brevium*, by the custom of the realm, he is bound to keep the goods and chattels of his guests which are within his inn, without subtraction or loss, day and night, so that no damage shall come to them, from his negligence or that of his servants. He cannot discharge himself from his liability by alleging that he left the goods under the special care of the guest, by delivering to him the key of the chamber in which they were locked; and it is not necessary to prove negligence in the innkeeper, in order to charge him for the loss of goods in the inn; but he must discharge himself by shewing negligence or fraud in the guest. (d) Where, however, a guest had a private room in an inn, chosen by himself for the purpose of exhibiting his goods for sale, and the host at the same time that he granted the use of it, told him that there was a key, and that he might lock the door, which he neglected to do, it was determined that the host was not liable for the loss of these goods. (e) The custody of goods in an inn may be considered as accessory to the principal contract: and the money paid for the apartments as extending to the care of the box or portmanteau, (f) and the protection is not confined to the goods of persons going to and continuing in the inn as guests; for if a person carry a horse to an inn, and leave him there, the innkeeper is liable to make good any loss. (g)

In *Bennett v. Mellor* the plaintiff's servant came to an inn, and desired to have the liberty of leaving his master's goods, which he could not dispose of in the market,

until the next week; that proposal was rejected by the innkeeper, and the servant sat down in the inn, had some liquor, and put the goods behind him, when he got up the goods were missing. *ASHURST, J.*, held, that although this request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest; and *BULLER, J.*, said, although the defendant refused to take charge of the goods until the next week, the circumstances of this case distinguish it from that cited (h) where the innkeeper said his house was full, and refused to take in the guest—that, if true, is a good excuse, and if false the inn-keeper is liable to an action for refusing to take in the guest. But here the request was merely to take care of the plaintiff's goods until the next week: if the defendant had taken the goods upon that request he could only have been liable as a bailee: but that proposal was not accepted, and then this case stands on general grounds. It is clear that the goods need not be in the special keeping of the inn-keeper in order to make him liable; if they be in the inn that is sufficient to charge him. In *Cayle's case* it is said, "although the guest doth not deliver his goods to the inn-holder to keep nor acquaints him with them, yet if they be carried away or stolen, the inn-keeper shall be charged; and therewith agrees '42 Ed. 3, 11. a.'" There it is said that on the writ the inn-keeper is answerable for every thing in his inn, but not for a horse which the owner orders to be put out to pasture. One of the passages cited from *Cam Dig.* (vol. 1, 229,) cannot be supported, taken in a general sense; for all the authorities agree that it is not necessary to prove negligence in the inn-keeper. *GROSE, J.* observed that *Cayle's case* is a good comment on the writ which gives this action well quoting. If indeed the inn-keeper had refused to take in the plaintiff's servant as

(d) 42 Ed. 3. 11 a *Cayle's case*, 8 Co. 32.

(e) *Burgess v. Clements*, 4 Mau. & Selw. 306; *Starkie N. P.* 251. See also *Farnworth v. Packwood*, Id. 249.

(f) 12 Mod. 487; *Jones's Bailm.* 84.

(g) *Yarber v. Green*, 10 Mod. 308. 2 Lord Raym. 874.

(h) *Dyer*, 156. . .

guest, and he had, notwithstanding, gone into the inn, the plaintiff could not have charged the defendant with the loss of his goods: in such a case the inn-keeper refuses at his peril, and if it be without reason, an action lies for the refusal: but in this case there was no refusal of the person; the defendant merely refused to take care of the goods until the next week. And when the plaintiff's servant was sitting in the inn with the consent of the inn-keeper, (for the latter did not object to refuse him) he was in the same situation as any other guest, and entitled to the same protection for his goods.

This decision is founded upon the rule laid down in *Cayle's case*. It is not necessary that the goods should be in the *special* keeping of the inn-keeper; it is generally sufficient that they are in the inn. SIR WM. JONES says, "that rigorous as this rule may seem, and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations ought to yield.—For travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of inn-holders, whose education and morals are one of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them." (i)

This responsibility is said to be founded on the custom of the realm, (h) but it may be traced to the civil law.

POTHIER shows (l) the doctrine of the civil law to be that the inn-keeper is not only bound for good faith, as in the case of ordinary deposits, but also for exact care (unless exact) and that consequently he is responsible for ordinary neglect (*de la faut le-*

gere,) he is liable for losses by theft of his domestics and of his guests, and of persons coming and going to and from the inn. The theft is imputed to his negligence if the goods are put into his custody; but if the goods are not put into his custody he is responsible only in case the theft is proved to have been by his domestics or other persons in his service, and not by other guests or travellers.—And the burthen of proof in such case is on the guest whose goods are stolen. If the guest chooses to keep the goods in his own custody, or if he confides them to another person not authorised by the inn-keeper to receive them, the latter is discharged from all responsibility, and this doctrine of the civil law has been adopted all over Europe. It is the law of France, (m) of Spain, (n) and of Scotland. (o)

(To be continued.)

#### PROBLEM VIII.—VOL. IV.

NEC TEMPUS NEC LOCUS OCCURRIT REGI  
Illustrate this maxim.

TO THE EDITOR OF THE LEGAL GUIDE.

#### ANSWER TO PROBLEM 2. VOL. 4.

##### LANDLORD AND TENANT—RE-ENTRY.

What are the necessary formalities required by the Common Law to enable a lessor to re enter for breach of the proviso, for re-entry on non-payment of rent? Suppose the condition to be that if the rent shall be in arrear for 21 days after any of the specified days of payment.

The formalities required are as follows: 1st. A demand must be made of the rent; but it may be made by an agent, having sufficient authority, which authority he is not bound to show unless required to do so, *Doe dem West v. Davis*, 7 East. 363, and a demand of rent due from the lessee to the lessor, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general to sustain ejectment, for a forfeiture on non-payment of rent being lawfully demanded, *Doe d. Brooks v. Brydges*, 2 Dowl. & Ryl. 29.

2nd. The demand must be of the precise rent due; for if a penny more or less be demanded,

(m) Code civ. Art. 1952, 3. 4.

(n) Moreau & Carlton Partid. 5, tit. 8. law 26.

(o) Ersk. Inst. B. 3. tit. 1. l. 26.

i) Jones's Bailm. 95, 96.

(h) Reg. Brev.

l) Pothier Depôt, n. 76 et seq.

it will be ill. What remains payable after the land tax or a ground rent, demanded of and paid by the tenant, or any other part of the rent agreed upon, has been lawfully deducted by the tenant, will of course constitute the rent due. *Sapsford v. Fletcher*, 4 T. R. 511. In ejectment to recover demised premises for non-payment of rent, under the usual proviso for re-entry on non-payment for 21 days, it appeared that the rent was payable quarterly, and that a demand of more than one-quarter's rent was made on the 21st day at one o'clock; held that only one-quarter's rent should have been demanded, and that at sunset. *Doe d. Wheeldin v. Paul*, 3 Carr & Payne, 613.

3rd. It must be made precisely on the day on which the rent is due, and payable by the lease, to save the forfeiture.

4th. It must be made a convenient time before sunset.

5th. It must be made upon the land, and at the most notorious place of it; therefore, if there be a dwelling-house upon the land, the demand must be made at the front or fore door, though it is not necessary to enter the house; but if the tenant meet the lessor, either on or off the land, at any time of the last day of payment, and tender the rent, it is sufficient to save a forfeiture.

6th. Where a place is appointed, where rent is payable, the demand must be at such place and no other.

7th. A demand of rent must be made in fact, and be averred in pleading, although there should be no person on the land ready to pay it.

If after these requisites have been performed by the reversioner, the tenant neglect or refuse to pay the rent, then the reversioner is entitled to re-enter. See Mr. *Serjeant Williams's note in 1 Saund.* 287. n. 16.

A demand of rent is requisite, both by common law and the statute, as a clause of re-entry will never be allowed to operate further than as a security for rent. *Ludwell v. Newman*, 6 T. R. 458.

A material difference subsists between a remedy by re-entry and a remedy by distress, for the non-payment of rent. Where the remedy is by way of re-entry for non-payment, an actual demand must be made previous to the entry, otherwise it is tortious, and trespass will lie, because a condition of re-entry is no derogation of the grant, and the estate at law being once defeated, is not to be restored by any subsequent payment; but a notice of distress is of itself a demand. *Shep. Touch.* 148. n. 1.

Where a lease contained a proviso, that if the rent should be in arrear 21 days next after the day of payment being lawfully demanded, the lessor might re-enter; it was held that five-

quarters being in arrear, the lessor might enter without a demand, no sufficient distress being on the premises. *Doe d. Scholefield v. Alexander*, 3 Camp. 516. R. J. T.

## QUESTIONS

Put by THE EXAMINERS, to Applicants for Admission as Attornies at the last Examination.—Trinity Term, 1840.

### I. PRELIMINARY.

Where did you serve your clerkship?

State the particular branch or branches of the law to which you have principally applied yourself during your clerkship.

Mention some of the principal law books you have read and studied.

### II. COMMON AND STATUTE LAW, AND PRACTICE OF THE COURTS.

State the names of the principal actions at law.

What action must be brought for—1. A libel?

2. A nuisance (as, carrying on an unwholesome trade?) 3. For seduction? 4. For non-payment of a bill or note? 5. To recover possession of a house? 6. To recover calls on shares?

For what injuries may a distress be levied, what may be distrained, and how are distresses to be disposed of?

If a party borrow money upon personal security, or for a temporary purpose where no mortgage is given, is there any security at common law which can be taken?

Can a minor bring an action; and if so, how?

Is there any and what limited period within which a debt is recoverable?

If a beneficed clergyman incur debts, is there any and what mode of obtaining payment out of the proceeds of his living?

State the course of the proceedings in an action of debt; and in how short a time can judgment be obtained where the proceedings are by default.

Can a person lawfully receive more than five per cent. interest; and if so, on what security?

Can a debtor be arrested on mesne process; and if so, under what circumstances?

Has an attorney any lien upon a judgment; and if so, of what nature?

Is there any particular form required when a party executes a cognovit or a warrant of attorney?

Can a defendant change the venue; and if so, in what actions, and within what time?

After what period will a deed prove itself?

Within what period must application be made for a new trial?

What steps are required to be taken before an attorney can bring an action for his bill?

### III. CONVEYANCING.

On the sale of a freehold estate can the particular and conditions be varied by parol at the auction?

State the conditions, as regard title and conveyance, proper to be made at such sale.

Can a tenancy from year to year, created by parol, be surrendered by parol?

Is a mortgagor bound to give any and what notice to a second mortgagee of a prior mortgage; and will any and what consequences result from the omission?

If a husband and wife mortgage the leasehold estate of the wife, to whom will the equity of redemption belong on the death of the wife?

What covenants are proper to be introduced in a mortgage of leasehold houses?

In what form should the mortgage be to protect the mortgagee from personal liability to the covenants of the original lease?

Is the title to dower, since the act relating to dower, enlarged, and in what instances?

And is it circumscribed in any and what instances?

Do estates held in joint-tenancy, tenancy in common, and in coparcenary, differ in any and what particulars?

How must freehold property be conveyed by a corporation?

What are choses in action; and are they assignable in law or equity?

Is it useful, and if so, in what respect, to take a bond from a mortgagor in addition to the mortgage and covenant for payment of principal and interest?

If the purchaser of one lot of an estate give a deed of covenant for production of the title deeds to the purchaser of another lot, and afterwards sell and convey the property, will his personal liability under the deed of covenant be discharged, or how is it to be provided against, and the production of deeds secured to the covenantee?

If having contracted for the purchase of an estate, devised it to B. but died before the conveyance. By whom must the purchase-money, on completing the contract, be paid?

### IV. EQUITY AND PRACTICE OF THE COURTS.

Can a bill be filed for a specific performance of an agreement, and the only question in dispute relate to the title, is it necessary to set down the cause to be heard, or can any and what shorter course be adopted?

When a claim is made by two or more persons, and the debtor or party in possession of the property is uncertain to which of them it belongs, what course should be taken by him for his own protection?

In what cases is it advisable to file a bill to perpetuate testimony?

In the case of a sale under a decree of the Court, within what period can the biddings be opened, and what will be required before the Court will allow a party to do so?

What is the meaning of an answer being impertinent; and when considered to be so by the plaintiff, what course should he adopt?

If a person appoint a creditor his executor, who proves the will, will such executor stand in any and what better circumstances than other creditors?

What is the course to be pursued by a legatee, to compel payment of his legacy?

When the defence to an action at law arises from facts within the knowledge of the plaintiffs in law, how can the defendant at law elicit such facts from the plaintiffs at law?

What course does the Court usually take to protect property pending a litigation, either in the case of rents, or in the case of money in the defendant's hands?

Is a pecuniary legatee entitled to interest; and if so, from what time, and at what rate of interest, where no time or rate of interest is mentioned in the will?

Is an executor chargeable with profits made by him from the employment of his testator's estate in trade, or is he chargeable with interest only?

Where the personal estate of the testator has been exhausted in paying mortgages and specialty debts, have the simple contract creditors any claim against the real estate?

Is a devisee of a mortgaged estate entitled to have the mortgage paid off out of the personal estate, or is he to take it subject to the mortgage?

Where there are specialty, simple contract, and judgment creditors, are any of them, in the event of a deficiency, entitled to a priority of payment; and if so, state the priorities?

What constitutes an equitable mortgage, and what steps are necessary to be taken to make available such security?

### V. BANKRUPTCY AND PRACTICE OF THE COURTS.

What are the principal acts of Bankruptcy, in respect of which a fiat may be obtained?

Are clergymen prohibited from trading? and is the legality of the trading in this and other cases material, as an exemption from the Bankruptcy Laws; and why?

Are peers and members of the House of Commons liable to be made bankrupts; and if so, under what circumstances?

What are the necessary facts to be ascertained, and steps to be taken, previous to striking a docket?

Can the assignee of a bond be a plaintiff?

- creditor? State the general rule applicable to this question.
- Is there any and what difference between official and creditors' assignees in respect of their appointment, power, and duties?
- Is the separate property of each partner liable to the partnership creditors under a joint fiat; and under what circumstances?
- What is the nature and the effect of the bankrupt's certificate?
- By what means and under what circumstances are fiats annulled?
- By what circumstances is the legal right of the landlord to distrain for rent superseded, after the bankruptcy of his tenant?
- What steps are necessary with regard to the proceedings under a bankruptcy, to render them admissible as evidence?
- Can an act of bankruptcy be committed by a party after he has left off trading? and if so, is the period at which the petitioning creditor's debt accrued in any and what respect material?
- Are the assignees entitled to property which accrues to the bankrupt after the fiat; and if so, is there any and what exceptions?
- Can the separate creditor of one partner in a firm sue out a joint fiat? State the reason for the answer.
- Does personal property held by the bankrupt in trust pass to his assignees with any and what exception?

#### VI. CRIMINAL LAW AND PROCEEDINGS BEFORE JUSTICES OF THE PEACE.

- Will a defendant be allowed to plead *in forma pauperis* to an indictment in the Queen's Bench, on making oath, as in a civil case, that he is not worth £5.
- A statute created a misdemeanor, and the accused attempted to commit the offence, would the attempt be in itself a misdemeanor?
- If a statute enact that the erection of any building within certain limits shall be deemed "a common nuisance," and also give a summary remedy before magistrates, must the offender be proceeded against summarily, or would he be subject to an indictment for the nuisance?
- On an indictment for a nuisance, can the prosecutor be compelled, and by what means, to deliver to the defendant a particular of the acts of nuisance intended to be relied on?
- Can a parish be compelled to repair a road dedicated to and used by the public, although neither such dedication, nor user, have been adopted or acquiesced in by the parish?
- If a person pick up a thing, when he knows he can immediately find the owner, and instead of

returning it to the owner, convert it to his own use, would he be guilty of larceny, or merely subject to a civil action?

If a letter addressed to *J. Wilson*, London, containing a bill of exchange made specially payable to *J. Wilson*, should by mistake be delivered to a person of the same name, would the indorsement of the bill by that person, knowing that it was not intended for him, amount to forgery?

Would the driver of a coach hired for the day be considered the servant of the party hiring it, so as to bring him within the statute relating to larceny by servants?

If *A.* and *B.* be riding fast along a highway, and *A.* ride by without doing any mischief, but *B.* ride against the horse of *C.*, whereby *C.* is thrown and killed, would this be manslaughter in *A.*?

Would raising a window, which is shut down close but not fastened, though it has a hasp which might have been fastened, be deemed a breaking of the dwelling-house?

Would an entry through a hole in the roof of a house, left for the purpose of light, constitute house-breaking?

In an indictment for receiving stolen goods, knowing them to have been stolen by a person named in the indictment, can the receiver be convicted without proof of the stealing by the person named?

Is it competent to a jury to act upon the evidence of an accomplice, without confirmation of his statement?

Would the intoxication of a person charged with murder be a proper circumstance to be taken into consideration, in order to shew whether the act was premeditated, or done with sudden heat or impulse?

It is usual in an indictment for murder, where the death is alleged to be caused by a wound, to describe the length, breadth, and depth of the wound. Is such particularity necessary?

145 Candidates passed this Examination, and we observe it officially stated that "*there were few very excellent.*" Comment would be superfluous.

#### HOME CIRCUIT.

LORD ABINGER and Mr. Justice GUMPERT.  
Hertfordshire, Wednesday, July 15.—At Hertford.

Essex, Saturday, July 18.—At Chelmsford.

Kent, Thursday, July 23.—At Maidstone.

Sussex, Wednesday, July 29.—At Lewes.

Surrey, Monday, August 3.—At Guildford.

## New Reports.

### ROLLS' COURT.

The Master of the Rolls will not sit again till the first Seal day.

### COURT OF QUEEN'S BENCH.

JUNE 8, 1840.

#### ORDER.

This Court will, on the 18th instant, and the six following days, except Sunday, hold sittings, and will proceed in disposing of the business in the Court, and hear the Country New Trials, now in the New Trial Paper, and will give judgment in cases which shall then be pending.

#### Sittings after Trinity Term.

The Court will take Middlesex Special Juries on Tuesday, June 23.

The London adjournment day, Wednesday, July 1.

### BAIL COURT.

re **CECILIA MARIA COCHRANE**, wife of **ALEXANDER COCHRANE, Esq.**

**HABEAS CORPUS.**—*A Husband's rights over the personal liberty of his wife.*

Mrs. Cochrane had obtained a Writ of Habeas corpus, directed to her husband, to bring into court his wife, detained (as was said in his custody), that she might be dealt with as the court should direct. The writ is dated 28th May last. It appeared from the affidavits, in support of the Habeas, that on the 17th Oct. 1833, in contemplation of marriage, a settlement was executed between Mr. Cochrane and his wife (then Miss MacDonnell), by which certain property of Miss MacDonnell was vested in trustees, upon trust for her separate use for her life; after her death, upon trust for her husband for life, with remainder to the children of the marriage. After marriage, Mrs. Cochrane, in consequence of treatment which she had received from her husband, went to reside, and had from that time till within about a week since, resided with her mother, separate and apart from her husband. Not long since, a party representing himself to be a Mr. Warwick, residing at No. 11, Castle-street, Regent-street, stated to her and her mother, that he had just come from America, that his father having been indebted to Mrs. Cochrane's father, he had been deputed to pay the amount; that the money was to be paid partly by himself and partly to her mother: but that he had to have a security against a bond given to his father, before the money was paid, and that she would have to sign such security it was

necessary he should see her marriage settlement, which was in the possession of Messrs. Few, Hamilton, and Few, her solicitors, to see whether she was capable of entering into the security. Placing reliance in this statement, she came from Dublin to England, called upon her solicitors on the 21st May, and requested them to produce her settlement to Mr. Warwick when he should call to see it. She then went to the residence of the supposed Mr. Warwick, and found there her husband who detained her. She contrived to address a letter to a Mr. Woodward on the 22nd of May, informing him that the business relative to Mr. Warwick was all a fabrication, from beginning to end, made up by her husband to entrap her, and that she was then in custody of her husband, who was about to have her imprisoned in Whitecross-street prison for contempt of court, and requesting Mr. Woodward to mention this to her solicitors. A clerk of Messrs. Few and Co. in consequence of this statement on the 23rd May, went to the lodgings of Mr. Cochrane for the purpose of ascertaining whether Mrs. Cochrane was under duress or kept in confinement by her husband. On the door being opened, he enquired if he could see her; and he was desired by the servant to give his name, which he did, that the servant then went up stairs, and returned saying, that Mr. Cochrane wished any communication he had to make should be by letter; he then wrote a note desiring to see Mrs. Cochrane, which was taken up by the master of the house, who returned with a written evasive answer from Mr. Cochrane. The landlord of the house stated, that when he took the note the room door was locked, and was unlocked to take in the note, and that whilst he was waiting for an answer the room door was kept locked, and he could hear Mrs. Cochrane crying in the bedroom, and he believed that she was then kept confined by her husband against her will. On the 27th May, the same clerk again called at the lodgings of Mr. Cochrane, and on asking to see him he was shewn to his room, he did not deny that he was detaining his wife against her will; but stated, that *he was keeping her until he could put her into prison*, that she had run away from him, and he knew she would again if she could, but that he would take care she did not: that he (the clerk), asked to see her, stating that as Mr. Cochrane was taking legal proceedings against her, he surely would not deprive her of the assistance of her solicitors? Mr. Cochrane replied he would not allow him (the clerk), to see her until she gave him a copy of some letter she had the previous morning received from a relation, in order that he might send such copy to his solicitor, and which letter he admitted having read. Mrs. Cochrane hearing the clerk talking with her husband in the sitting room, knocked at the bed-

room door from the inside, (the door having been locked by Mr. Cochrane as soon as the clerk entered), and begged of Mr. Cochrane to let her out, that she might speak with him, saying, he had promised her he would do so when he (the clerk) called; this Mr. Cochrane refused to do, when Mrs. Cochrane stated from the bed-room, speaking so that the clerk could hear through the door, that she had been kept confined by her husband ever since she had last seen him; that Mr. Cochrane had nailed down the window of her bed-room to prevent her escape, and kept the room doors locked: Mr. Cochrane who was present, did not deny the statement of his wife, and on the clerk asking Mrs. Cochrane whether she wished him to take any steps for her release, she said he had her full authority to take any steps for her release he might consider necessary for that purpose, and that she wished him to do so; that the clerk had frequently requested Mr. Cochrane to allow him to communicate with his wife, in order that he might consult with her upon the course to be taken, but Mr. Cochrane wholly refused to allow him to see Mrs. Cochrane or to communicate with her, and finding that Mr. Cochrane would not allow the clerk to do so, he (her solicitor) had been unable to procure any affidavit from her. Mr. Cochrane's pretence for confining her was that he had a writ against her, (a) and that he had fabricated the tale to bring her within the jurisdiction of the court, and that he should detain her.

Sir Wm. Follett appeared to support the *habeas*, and said, this is an extremely hard case on the part of Mrs. Cochrane, who is a young and interesting lady, highly accomplished, and well connected, who was compelled to leave her husband by his ill treatment, and has for the last 4 years lived separate from him, residing with her mother in Ireland. There is one child of the marriage which is with the mother, and the object of the husband in getting possession of the wife is believed to be for the sole purpose of living upon her and her mother, as the latter cannot live separate from her daughter and the husband has no means of supporting himself. Immediately after the separation, he sued his wife for a restoration of conjugal rights, and obtained a decree against her in the Ecclesiastical Court, suing in that court in *forma pauperis*, the proceedings upon the contempt have expired, and he is now trying to revive them, that he may commit his wife to prison if she refuses to live with him, but it is

considered that the proceedings have expired, and that he will not be able to revive them so as to obtain a warrant to commit her for contempt. The court, on the wife being brought up, will discharge her we trust from the confinement in which her husband is now keeping her in, and leave her liberty to go where she pleases, which is all we fear that can be asked.

Mr. Ball appeared for the husband, and shewed cause against the writ.

COLERIDGE, J. observed, that the question for decision upon the rule was, whether, by the common law of this country, a husband has the right, for the purpose of preventing his wife from eloping, to confine her to his dwelling-house, and restrain her from her liberty for an indefinite period, there being no charge against him of using unnecessary cruelty or imposing any hardship or any unnecessary restraint, and is not being alleged that any part of the lady's past conduct was such as to afford any reason to believe that she would avail herself of her absence from her husband's control to pursue any course of conduct which could injure his property or honour. His Lordship went on to observe that it appeared from the return to the writ of *habeas corpus* that the parties had lived together for three years immediately after their marriage upon terms of apparent affection, and had two children, and that the lady had quitted her husband and removed the children and herself from under his protection, without any imputation upon him of immorality, coldness, or cruelty, and had resided away from him for nearly four years; during all or the greater part of which time her place of residence, in Ireland or France, was unknown to him. It further appeared that she had been induced to return to this country and placed in his power by a stratagem only, and that she has repeatedly asserted, and still avows the same intention, "that whenever she has it in her power she will again run away, and that he shall never see or hear of her again." His Lordship proceeded to say, it is but justice to add on the other side that Mrs. Cochrane left her husband either in the actual company of her mother, a widow, who had been residing with her daughter and son-in-law, or that Mrs. Cochrane joined her mother soon after her departure from her husband; that she had resided under her mother's roof since that time; and that there is nothing in the return which justifies the slightest imputation upon her honour. I have not been able to meet in the books with any case which was circumstanced like the present. There can be no doubt of the general dominion which the law of England attributes to the husband over the wife. In Bacon's *Abridgment*, "Baron and Feme," letter B., it is thus stated:—"The husband hath by law power and dominion over his wife.

(a) We are informed by Messrs. Few, Hamilton, and Few, that the writ *de contumace capiendo* had expired, and Mr. Cochrane had neglected to get it returned, and keep it alive under the statute of 5 Eliz. and the Lord Chancellor refused to revive it, on the same day that Mrs. Cochrane was brought up under the *habeas*.—ED.

and may keep her by force within the bounds of civility, and may beat her, but not in a violent or cruel manner; for in such case, or if he but threaten to beat her outrageously, or use her barbarously, she may bind him to the peace by getting a writ of *supplicavit* out of Chancery, or may apply to the Spiritual Court for a divorce *propter savitiam*. But the husband hath by law a right to the custody of his wife, and may, if he think fit, confine, but not imprison her." Now, although by our ancient law the wife was entitled in case of violence inflicted, or only threatened, to sue out her writ of *supplicavit*, the writ in such cases contained an express reservation of the lawful power of the husband. She was to be bound "Quod ipse prefatam A. (the wife) bene et honeste tractabit et gubernabit dampna et malam aliquid de corpore suo aliter quam ad virum suum ex causa regiminis et castimonis uxoris subicite, et rationabiliter pertinere faciet nec fieri procurabit" (a). On the other hand, there are numerous authorities to show that the Court will interpose their protection whenever the husband attempts to abuse his natural power for any improper purpose, or by wanton or excessive exercise of it. The *King v. Leyster* (b) was a case of the former kind, where the defendant, between whom and his wife a deed of separation had been executed, by which some part of her fortune had been made over to him, and the rest settled upon her for her separate use, had seized on her by force, and carried her to a remote place, where he kept her under a guard, and he had declared that he took into his power in order to prevail with her to live with some of her separate maintenance. The Court discharged the lady from her imprisonment, and intimated to the defendant that he would bear a heavy hand over him if for the future he should act contrary to their declared opinion, that his confining her was entirely illegal. And in *Gregory's case* (c) was an instance of the latter kind, where the wife had been very ill-used by her husband, and had upon fled from him to her mother and uncle for security and protection. The husband had brought up by writ of *habeas corpus*, but the Court would not deliver her to him, but told her she was at liberty to go where she thought proper, and at her request gave her a tipstaff to receive her from any insults in her return to her father. The case of *Mrs. Wilkes* (d), under the name of the "*King v. Mary Read*," may be added to that. The Court in that case refused to compel a wife to return to her husband,

where articles of agreement for a separation had been executed between them, and he had covenanted to let her live separate from him, and not to molest her, and she was accordingly living with her mother. But Lord Mansfield put this upon the ground of a voluntary renunciation by the husband of his marital rights, and at the same time strongly asserted the general rule. "The husband," said he, "has, in consequence of his marriage, a right to the custody of his wife, and whoever detains her from him violates that right, and he has a right to seize her wherever he finds her." In the present case it cannot be pretended that Mr. Cochrane has forfeited his rights or renounced them. It is not insinuated that he has abused or will abuse them. But in the argument before me at Chambers reliance was placed upon the expressions of the Court in "*The King v. Leyster*," "That where the wife will make an undue use of her liberty, either by squandering away the husband's estate, or going into lewd company, it is lawful for the husband in order to preserve his honour and estate to lay such a wife under a restraint, but where nothing of that kind appears he cannot justify the depriving her of her liberty. The present case was urged to be one in which the wife had not made, nor would make an undue use of her liberty, and therefore that she was entitled to her discharge. It appears to me that the words which I have cited from "*the King v. Leyster*," must be understood with reference to the case then before the Court, in which violence and actual imprisonment in the popular sense of the term had been used for an unlawful purpose. If they could be fairly extended to such a case as the present, they would deny the general right of the husband to the control and custody of his wife, and restrain it to those cases, comparatively few in number, in which his misconduct made it palpably unsafe to allow her to be at large. This, however, would be inconsistent with the doctrine clearly laid down by the older authorities. The general rule would then be that the wife, as to her residence and manner of passing her time, would be independent of her husband, and the case in which the right of control arose, would only be exceptions to the general rule. But our law has not so limited the husband's rights, nor placed them upon so narrow a foundation. Although expressed in terms which are plain almost to rudeness, the principle upon which it proceeds is broad and comprehensive. It has respect to the terms of the marriage contract and the infirmity of the sex. For the honour and happiness of both parties, it places the wife under the guardianship of the husband, and entitles him for the sake of both to protect her from the danger of unrestrained intercourse with the world, by enforcing co-habitation and a common residence.—

(a) *Fitz Herbert Nat. Brev.* p. 80.

(b) 1 *Strange*, 477.

(c) 2 *Burr.* 99.

(d) *Bengam* 279, and reported in 2 *Burr.*



Mrs. Cochrane has lived apart from her husband for four years, without any imputation upon her character. But she must allow him to say, that her husband, with the highest opinion of her virtue, might yet be excused, even by her, if he felt uneasy when he learned, as stated in the return, that she had gone to masked balls at Paris, with persons whom he did not know. He may well be desirous, and he has a right, to restrain her from the power to frequent such amusements unprotected by his presence, and without his permission. She too, though she might feel secure, was not therefore the more safe at such places, and at any rate she has not the right to bring his honour or her own into possible or even imaginary danger. It is urged that by refusing to discharge her, I am sentencing her to perpetual imprisonment. Cases of hardship must arise under any general rule, and so long as there are unfortunately ill-assorted unions there will be cases in which wives will find it hard to be compelled to reside with their husbands. But our law, for the wisest reasons, allows of no divorce upon such grounds, and I cannot doubt that a greater amount of human happiness is produced in the married state, from the mutual concession and forbearance which a sense of the indissolubility of these unions tends to produce, than would be enjoyed in the carelessness and want of self-government which would be the inevitable consequence of rendering the matrimonial tie less firm and permanent. I express here very imperfectly what has been so wisely and eloquently said by a great master in this branch of the law, and the passage has such a direct, and, I hope, so useful a bearing on this subject, that I cannot deny myself the pleasure of reading it. The learned judge then proceeded to read the following passage from the judgment of Sir W. Scott (afterwards Lord Stowell) in the case of "*Evans v. Evans*." (e) "The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves. To vindicate the policy of the law is no necessary part of the duty of a judge, but if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom and that real humanity which regard the general interests of mankind. For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together except for a very few rea-

sons known to the law, they learn to soften by mutual accommodation that yoke which they know that they cannot shake off; they become good husbands and good wives, from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples that now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of society, might have been at this moment living in a state of mutual unkindness—in a state of estrangement from their common offspring—and in a state of the most unrestrained and licentious immorality. In this case as in many others the happiness of some individuals must be sacrificed to the greater and more general good." But, if there be any thing painful to Mrs. Cochrane in the present state of things, she cannot properly complain of it; for it arises from her own breach of duty, and she may end it when she pleases by cheerfully and frankly performing the contract into which she has entered. The moment that she makes restraint of her person to be unnecessary for keeping in the path of duty the restraint will become illegal, and nothing which I have said to-day will prevent her from again coming to this Court for protection. I am of opinion, therefore, that she must be restored to her husband; but as it was intimated to me yesterday that her mother was ill, and that she was anxious to go and see her, I should hope that Mr. Cochrane will be ready to gratify so proper and reasonable a wish, if she on her part will give a satisfactory pledge that she will return to him at some specified period—a pledge which she ought not to hesitate to give nor omit to keep faithfully. For the present she must be restored to her husband.

#### COURT OF EXCHEQUER—June 4.

##### Sittings in Banco.

KIRK v. DOLBY.

WRITS AND COPIES—ALTERATION OF, AFTER SERVICE—PRACTICE.—*Whether a Judge has power to Order the Amendment of a Writ under the General Rules agreed upon by the Judges of all the Courts after tested by mistake after Service.*

Mr. Martin had obtained a rule nisi in the case to show cause why an order made by GRANEY, B. on the 23rd May last at Chambers that the writ of summons issued herein and served be amended by altering the *teste* to the 4th May, on payment of costs, the defend-

\* 1 Haggard's rep. pages 35, 36.

ing 5 days time to plead after amendment and payment of costs should not be rescinded.

It appeared by the affidavit of the plaintiff's clerk, who prepared and issued the writ, that he, by some mistake, tested the writ and the copy of the writ the 4th April instead of the 4th May, but the *Precipe* for the writ was properly dated the 4th May, and the writ was sued out on the 4th day, and the copy was served upon the defendant on the 6th May.

The action was upon a Bill of Exchange, of which the defendant was the acceptor, which became due on the 1st May. The plaintiff declared, that the defendant applied for leave to plead several matters, amongst which was one, that *bill was not due* at the time of the commencement of the action. This was correct in relation to the date of the writ and copy served, consequently, without the amendment the plea would be an answer to the action.

Mr. Humphrey now showed cause against the rule, upon the ground that the *precipe* was drawn correctly, and that the teste of the writ was a mere clerical error, and which the Court ought to allow under the General Rules agreed upon by the Judges of all the Courts in pursuance of the statute 2 W. 4. c. 39. s. 14. *halmes Term*, 3 W. 4. s. 10. (a) which treats of matters omitted by mere mistake. He cited *Field v. Street*, 2 Dowl. Rep. 740. which affirmed that the Court had the power to amend the writ but not the copy, which is the subject of the party over which the Court has no control; and contended that the Court had the power to amend the writ in this case by making it correspond with the *precipe*.

Mr. Martin called the attention of the Court to several cases on the subject of amendments, and went to show that since the Uniformity of Writs Act, such amendments had been disapproved by all the Courts.

Lord ABINGER said, that as it was very probable there should be a common understand-

ing upon this subject between all the Courts, the case should stand over, in order that the result might be arrived at by the general body of the Judges.

June 16.

Mr. Humphrey again brought this question before the Court.—*Rule discharged*.

The plaintiff to be at liberty to change the venue, and the defendant to have time till Tuesday next to plead.—*Writ to be amended*.

Sittings in Banco.—June 13.

SHAW v. SCARISBRICK.

*SUBPONA duces tecum* — ATTACHMENT against a Sheriff for disobedience of this writ in not producing his warrant at the trial of an action for escape.

An action was brought against the Sheriff of Lancashire for an escape, and was tried before Mr. JUSTICE COLBRIDGE at Liverpool, at the last assizes, when, in consequence of the non-production of the warrant at the trial by the witness who was subpoenaed for that purpose, who was the sheriff's officer, the plaintiff was nonsuited. A rule nisi had been obtained by the plaintiff to set aside the nonsuit, on the ground that the plaintiff had been misled by the warrant at the time of the service of the subpoena. A rule nisi had also been obtained for an attachment against the witness for disobedience of the *subpoena duces tecum*, in not producing the warrant, and the two rules came on for argument together.

Mr. Cresswell, in showing cause, relied on the affidavits in answer, which, he submitted, distinctly negatived the allegation that the plaintiff had been misled by any representation of the witness that he had possession of the warrant at the time of the service of the subpoena. That witness in his affidavit denied that he made any such statement. He contended that the plaintiff had not exercised the necessary diligence, or taken the obviously necessary precautions before going to trial. The warrant had been deposited in the sheriff's office to enable him to make his return to the writ of *capias*, and if the plaintiff had gone to the office he might have found it there.

Mr. Sergeant Atcherley, in support of the rule, said it was necessary, in an action against a sheriff, to produce the warrant, in order to connect the sheriff with the acts of his officer (who was the real defendant). If the manoeuvre which had been practised in this case by the witness, were allowed, a sheriff, against whom an action

) It is FURTHER ORDERED, that if the plaintiff, or his attorney shall omit to insert in, or indorse on the writ, or copy thereof any of the matters required by the said act to be by him inserted therein, or indorsed thereon, shall not on that account be held void, but may be set aside as irregular, upon application to the court out of which the same shall issue, or to any judge.

This rule has been holden to be compulsory on the plaintiff, and it applies to process issued under the 4. c. 39. against attorneys. It has also been affirmed on this rule that a motion to set aside the return of a writ of *distringas* on the ground of an irregularity in the indorsements thereon, &c. must be made within a reasonable time after the service of the writ; and that eighteen days is an unreasonable time in this respect, provided the defendant might have come earlier (*Wright v. Warren*, 3 Mov. and S. 100).  
EDITOR.

had been brought, had only to place the warrant in the hands of some person five minutes before the trial, and then he could at once defeat the action.

ALDERSON, B.—He would be liable to an attachment for that.

Mr. Sergeant *Atcherley* admitted this, but an attachment was not always a competent remedy. The plaintiff did not want an attachment. He had brought his action against the sheriff, and he wanted to recover damages against the sheriff. He denied that the plaintiff ought to have gone to the sheriff's office; it was the duty of the officer to keep the warrant in his possession, so as to be enabled to produce it when called upon to do so.

PARKE, B.—No, no. He may do what he likes with it; only it is usual for the officer to keep it for his own protection.

ALDERSON, B. asked whether the plaintiff would agree to pay the costs of the last trial?

Mr. Sergeant *Atcherley* asked whether his lordship thought he ought to pay the costs?

PARKE, B. said it was clear the plaintiff was out of court upon the affidavits. The rule was obtained on the ground that the plaintiff had been misled by a representation of the witness that he had possession of the warrant at the time of the subpoena; but this allegation was distinctly denied by the affidavit of the witness himself. The plaintiff might, if he thought proper, bring an action against the witness for disobeying the subpoena, and no doubt he would recover damages.

ALDERSON, B. said the fact was, the plaintiff had not taken even ordinary precaution before going to trial; and he thought, therefore, that if the court granted a new trial it must be on the terms of paying the costs of the last trial, and then the plaintiff might go if he thought fit and see if he could do better another time.

The Court said they thought that the allegation in the affidavits, upon which the rule was obtained, had been fully and satisfactorily answered by the affidavits on the other side. The charge of misleading the plaintiff by a representation that the witness had possession of the warrant at the time of the service of the subpoena was negatived, and, therefore, if the plaintiff was to have a new trial it must be on the terms of paying the costs of the former trial. As to the rule for an attachment against the witness there were no grounds whatever for sustaining it, and it must, therefore, be discharged with costs.

Rule for a new trial made absolute upon payment of costs.

Rule for an attachment discharged with costs.

## COURT OF EXCHEQUER.

*Sittings at Nisi Prius, after Trinity Term, 1840.*

### MIDDLESEX.

Saturday	20	} Revenue & Com. Juries (Customs.)
Monday	22	
Tuesday	23	} Revenue & Com. Juries (Excise.)
Wednesday	24	
Thursday	25	} Common Juries.
Friday	26	
Saturday	27	

### LONDON.

Monday	29	} Adjournment Day, Com mon Juries.
Tuesday	30	
Wednesday	July 1	} Common Juries.
Thursday	2	
Friday	3	} Special and Com. Juries.
Saturday	4	
Monday	6	
Tuesday	7	} Common Juries.
Wednesday	8	
Thursday	9	
Friday	10	
Saturday	11	
Monday	13	

The Court will sit at half-past nine o'clock.

### EQUITY.

The Court will NOT sit this day.

### PREROGATIVE COURT—May 1.

#### WILL OF HUGH DONALDSON, DECEASED.

*Whether a Surgeon on board one of His Majesty's Ships belonging to the service of the East India Company, in charge of recruits for the Queen's service, shall be considered "a Soldier in actual Military Service," to come within the exception of the Statute sec. 11.*

The deceased, Dr. Donaldson, was an assistant surgeon in the military service of the East India Company, and had embarked to join his regiment in India, on board a ship in which recruits, also going to India in the Queen's service, and they were placed under his medical superintendence. While on board this ship, he made a will that was not attested, and he died soon after he joined his regiment; and upon application being made for probate, a question arose whether the will came within the exception of the 11th sec. of the New Will Act, he being "a soldier in actual military service."

Sir H. JENNER, said, the deceased could not hold a surgeon in Her Majesty's service, though temporarily in charge of Her Majesty's liegers, because he still remained in the service of the East India Company. It has been held in relation to mariners that the 11th section of the act extends to the Merchant service, and by parity of reasoning, it would seem that soldiers in the East India Company's service should also be included. There is nothing in the clause which can be construed to limit the exception to soldiers in Her Majesty's service. The deceased was in *actual military service* at the time he made his will, and I am of opinion that, according to the decisions already made respecting commissioned officers, (a) as distinguished from persons not commissioned, (a) the deceased, at the time of making his will, "a soldier in *actual military service*," and comes within the provision contemplated by sec. 11 of the Statute. The will does not appoint any executor or residuary legatee.

*Administration granted, with the will annexed, to the mother of the deceased.*

#### SOLVENT DEBTORS' COURT—June.

##### CASE OF FRANCIS FORSYTH.

*Property acquired by power of the Court to order judgment to be entered upon the Insolvent's Warrant of Attorney.*

The insolvent was discharged in March, 1827, and he gave up his life interest in some property which he possessed by the will of his father, under which will he had the power of appointment in regard to other property. He died in 1833, and by his will directed that his debts contracted since January 1831 should be paid, and none others. In 1836, a suit was commenced in the Court of Chancery, to which the persons now before this court were parties, and Lord Chancellor had directed an account of the debts to be taken from the 13th January, 1827, which day the insolvent had petitioned the Court, with a view of payment. The question respecting the creditors in the schedule was sent to this court for their opinion.

THE COURT was of opinion that execution on a warrant of attorney should issue for £151 for the creditors in the schedule (being a share of the property), but not to be enforced without the sanction of the court. The court had no power to interfere with the judgment entered upon the warrant of attorney.

#### CENTRAL CRIMINAL COURT—June 15.

The proceedings of this court re-commenced this day. The Recorder has been seriously indisposed for several weeks, and was prevented from attending the court.

The extraordinary character of several of the cases that have been sent for investigation at the present sessions has occasioned greater interest to be attached to it than has been felt respecting any other since the establishment of the court, and there was an appearance of anxiety and excitement exhibited yesterday of a quite unusual character.

The COMMON SERGEANT delivered the following CHARGE to the GRAND JURY, upon the CASES in the Calendar—for HIGH TREASON, in compassing or imagining the Death of THE QUEEN, (*Oxford's*); for MURDER, (*Courvoisier's*), and for BURGLARY, (*Gould's*).

"Gentlemen of the Grand Jury,—Your duty on the present occasion will oblige you to consider cases of almost every description of crime in law books. The calendar sometimes contains a greater number of prisoners, but a more serious catalogue of offences seldom has been submitted to the consideration of a grand inquest.

"The first cause to which I shall call your attention is that of *Robert Oxford*, who is charged with high treason—the highest crime against human society—bringing with it the most fatal consequences, not only to her Majesty herself, but to the Government, and the peace and happiness of the nation. Every attempt levelled at the person of the Sovereign is levelled at public tranquillity. The offence is the most serious known to the law—it has ever been received as one of the deepest dye, and calling for the most severe punishment.

"The statute 25 Edward I., is the first that declares it to be treason 'to compass or imagine the death of our Lord the King,' within which designation a Queen regnant is included. A subsequent statute in the reign of George III, enacts, 'That if any person shall compass, imagine, design, or intend death or destruction, or any bodily harm, TENDING to death or destruction, or to maim or wound, the person of the King, being convicted thereof, he shall be declared and adjudged a traitor.'

"Gentlemen, the first question for your consideration will be to refer to the evidence which will be laid before you as to the prisoner's 'compassing, imagining, and intending the death of her Majesty the Queen,' and also to inquire into the overt act by which such intention may be manifested. Everything wilfully done or at-

) See re Richard Hayes, deceased, ante, Vol. 2. 9.

tempted, whereby the Queen's life is endangered, is, in law, an overt act of compassing her death.

"It will be proved by several witnesses that they saw the prisoner fire or discharge two shots at the carriage in which her Majesty was sitting; that they observed him take deliberate aim and point the pistol at the Queen and her consort Prince Albert.

"Gentlemen, you will necessarily inquire as to whether the pistols were loaded, and this perhaps may be proved in different ways. If, for instance, it should appear that there are marks in the wall of a ball or bullet in the direction in which the pistol was fired, it will be natural for you to inquire as to the time when those marks were first seen; or if a piece of lead should be produced, apparently having been of the size of a pistol ball (though now quite flattened, as if by concussion against a wall.)

"Formerly, it was always necessary under numerous acts of Parliament made for the benefit of the party accused, that two lawful witnesses should be called to prove the treason, and other preliminary circumstances required that this rule should be extended to the finding of a bill by the grand jury, as well as to the trial in open court; but it was enacted by the 39th and 40th Geo. III., cap. 93 (A.D. 1800), that in such cases this was unnecessary. (Vide the statute.)

"It is true that this statute goes on to negative the acts of Wm. III. and Queen Anne, touching the trials of treason; notwithstanding it is clear that, under the provisions of the 39th and 40th Geo. III., two witnesses are not now necessary to prove treason in any direct attempt against the person or life of her Majesty; and the question is settled by the provisions of a subsequent act—viz., 57th Geo. III., cap. 6, sec. 4.

"Gentlemen, as there are several witnesses in this case, you will have no difficulty, as the equity and justice of our criminal law are here manifest—as there is no more evidence necessary to prove a direct attack upon the person of her Majesty than is required to prove an attempt on the life of either of her subjects, even be he the humblest individual in the land.

"The next case, gentlemen, to which I call your attention, is that of *Francis Benjamin Courvoisier*, who stands charged with the murder of Lord William Russell, on the night between Tuesday the 5th and Wednesday the 6th of May, on which morning the noble lord was found dead in his bed, when a wound was found from the top of his right shoulder to the right side of his throat, of the depth of four inches.

"It cannot be doubted but that this wound was the cause of his lordship's death, and could only

have been inflicted by the hand of another, according to the evidence of medical men, who made a *post mortem* examination; but also from the fact, that no instrument was found in his lordship's bed-room.

"Gentlemen, the case will rest principally *circumstantial* or *presumptive* evidence—it is, on the fair and reasonable inferences that may be drawn from the existence of all the facts and circumstances connected with the transaction.

"This species of evidence is that which is the peculiar province of a jury to deal with; and the question is, whether there be or not circumstances amply satisfactory to induce you to set the case for the investigation of a court and jury.

"In considering this investigation you must first, probably, inquire whether there is any appearance of any forcible entry having been made from *without* the premises, or whether the acts of violence have not been made *within*. If the circumstance will then probably induce you to consider whether this murder could have been committed by a stranger, without the aid or assistance of some person or persons within the house or some of the family of Lord William Russell.

"Gentlemen, the motives and objects of the murderer will naturally next present themselves for your consideration, and you will inquire respecting the property of the deceased—whether any, and what, was missing; and, if missing, where, any, and what, and where it was found. Daily experience teaches us that when men commit crimes of this character, and take valuable property from the parties whom they attack—such property is generally carried off the premises—at all events, such portions of it as are visible, and likely to create the suspicion or to excite the attention of the police.

"It will be proved, gentlemen, that a gold watch and a gold clasped purse, five rings, and several coins, were found behind the skirting board in the prisoner's pantry; a gold seal and a seal ring behind a pipe in the scullery; a gold locket, which had been missed before, under the hearth; and between the board and the leading of the stairs which had been removed from the prisoner's room was also found a gold watch—all the property of the late Lord William Russell, and property which does not appear to have been missed or taken from his lordship before the night of the murder.

"Again, in the portmanteau of the prisoner two pocket handkerchiefs are found, each containing slight spots of blood, and in his shirt are found a pair of gloves marked with spots of blood; but in considering this part of the case, dates may be

immaterial, and, gentlemen, let not the dates of the 6th, 10th, and 13th of May, escape your collection.

[The COMMON SERGEANT here alluded to the fact of the locket having been missed before the time of the murder, and concealed in the same way as the other property subsequently missed.]

"These circumstances (continued his lordship), connected with the places where the property was found, and the appearances from the marks of violence on the door from within, necessarily draw suspicion, to say the least, and deserve inquiry, on those resident within the house.

"The observations and conduct of the party accused, before and immediately after the transaction, in all cases, whether of murder or felony, are always important. On entering on this investigation, gentlemen, you will be good enough to dismiss from your minds anything you may have read or heard before, and draw such inferences as reasonable men may reasonably deduce, remembering that you are not to try the prisoner, but to ascertain whether there is presumptive evidence sufficient to justify you putting the prisoner on his trial.

"Gentlemen, the next case we have to advert to is that of *Richard Gould*, who is charged with the crime of burglary. Burglary is the breaking and entering the mansion-house of another, between the hours of nine in the evening and six in the morning, with the intent to kill some reasonable creature, or to commit a felony. Unfastening and opening a window, pulling down the sash of a window, the removal of a piece of paper affixed to glass, and thereby opening a window, are sufficient proofs of breaking and entering a mansion or dwelling-house.

"On Monday, March 16, Mr. Templeman, who lived in a cottage at Islington, received 19 half-crowns about half-past three in the afternoon.

"On Tuesday, the 17th, he was found murdered, and it appeared that a piece of glass had been taken from a window, by which a button might be turned, and a person enter. A mahogany box appeared to have been opened, as if with a chisel, and the place was found in a state of disorder. On the premises were left two flash notes the 'Bank of Elegance,' one for 50*l.*, the other for 5*l.*

"On Thursday, the 12th of March, the prisoner stated to a witness, who would be called, that he was pinched for money, but he knew of no old gentleman had who got some."

"On Friday, the 13th, he applied to two witnesses for a *screw* and *darkey* (that is a crow-bar and a dark-lantern,) declaring, at the same time, that he must have money, and that he was going

to an old gentleman, in a lonely cottage, not far off.

"On Monday night, (March 16), the prisoner was at the Rainbow public-house playing at skittles, when he had only 1½*d.* in his possession. He won 2*d.* and out of the money he purchased a rushlight, and he did not quit the Rainbow till a quarter to twelve o'clock.

"On Tuesday morning, the 17th, the prisoner returned to Wilson's cottage (about 500 yards from Mr. Templeman's), about two or three o'clock. He went to bed, and got up at half-past seven, and went into the wash-house and water-closet, where he remained about ten minutes in each of those places. He appears to have asked for a towel, and to have done something to his trousers. He left the cottage about eight in the morning, and returned in the evening, when he had a new pair of shoes.

"On Wednesday (the next day), between the tiles and the ceiling of the water-closet, was found a stocking containing 19 half-crowns, 48 shillings and 7 sixpences, making 4*l.* 19*s.* The stocking was identified by the landlady as having belonged to the prisoner. If the prisoner committed the burglary, it must have been done between one and three o'clock in the morning.

"In addition to this evidence a confession has been made by the prisoner to an officer, but before he did so it appears clear that some one had informed him that 200*l.* reward had been offered. It appears most material to the ends of justice that this matter should be fully inquired into.

"If the confession was made under the fallacy of hope, it comes in a questionable shape, and may not be admissible in evidence, the rule of law being that if a prisoner is influenced by any promise the confession cannot be received.

"On the other hand, the law and the practice is, that it is admissible for a witness to say he received a communication from the prisoner.—that in consequence of such communication he went to a certain place, and in that place found the goods or property specified and described. A witness will state that he went in consequence of a statement made to a field, and in a pond there he found a chisel and a lantern, with part of a rushlight in it, and he will tell you that the chisel corresponds with the marks on Mr. Templeman's box.

"Gentlemen, these are circumstances which will come before you, and I am sure will be thoroughly and properly investigated."

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LAW OF MARRIAGE.—We beg to call the attention of our readers to an advertisement in another part of our paper relating to restraints on marriage, which we hope to see shortly placed upon some certain basis, consistent with sound reason and good sense.

## REVIEW OF NEW BOOKS.

**A LAW GRAMMAR, or RUDIMENTS of the LAW.** By GILES JACOB, Author of the LAW DICTIONARY. Eighth edition, greatly enlarged and carefully revised, by JOHN HARGRAVE, Esq. of the Inner Temple. London: WILLIAM CROFTS, 19, Chancery Lane. 1840.

This work, having already passed through seven editions, speaks for itself that it merits attention. The present edition embraces the important alterations which have been made in the Criminal Law, as also in that relating to real property; but the editor has not interfered with those branches of learning which, being now altered by modern enactment, still require to be understood by the student, such as the law relating to Fines and Recoveries. The editor has also made an alteration of great utility, viz. the arrangement, under proper chapters, of the various divisions of the law, and he expresses his object to be to prepare a correct epitome of the existing law, and in such a form as will most benefit the younger branches of the profession. The editor concludes his Preface by quoting a passage from Mr. Preston's work, upon Abstracts of Title. "Any work which is calculated to abridge the labour of the student, by bringing the points together under each head into one view, and under an arrangement enabling him to find that of which he is in search with the least possible delay, is of more value than can be conceived by any but those whose practical experience has taught them its importance."

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ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

# The Legal Guide.

[Vol. IV.]

SATURDAY, JUNE 27, 1840.

[No. 9.]

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 115.)

WE will now turn attention to COMMON CARRIERS for hire. *Locatio operis vendi*, the 5th class of LORD HOLT's Bailments, who says, the law charges this person entrusted to carry goods, against all perils, but acts of God, and of the enemies of the King; for though the force be never great, as if an irresistible multitude of thieves should rob him, nevertheless he is responsible. And this is a politic establishment contrived by the policy of the Law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their business of dealing. (a)

*Coyne v. Bernard*, see ante; Just. Inst. lib. 4. VOL. IV.

*Sir William Jones*, in observing upon this doctrine, says the ground of this resolution is not the reward of the carrier, upon which *Sir Edward Coke* lays much stress; but the public employment exercised by the carrier, and the danger of his combining with robbers, to the infinite injury of commerce and extreme inconvenience to society, he is treated as an insurer against all but the excepted perils, upon that distrust, which an ancient writer has called the sinew of wisdom; (b) or as described by LORD MANSFIELD, "A carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the Act of God, or the King's enemies." (c) A carrier differs in this from a bailee, the latter only engages to

tit. 5.; Vinn. Com. in Just. Inst. lib. 3. tit. 27. text 11 n. 2.; but the COMMON LAW of England imposes much greater responsibility upon carriers than the CIVIL LAW.

(b) *Jones's Bailm.* 104—107.

(c) *Forward v. Pittard*, 1 Term. Rep. 33.



take care of goods as his own, and is not answerable for a robbery, *but* a carrier insures. (d) So Bxsr, C.J., in *Riley v. Horne*, (e) observed, when goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves.

To give due security to property, the law has added to that responsibility of a carrier, which immediately rises out of his contract, to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer.

From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove, that they had happened when they had not—namely, the act of God and the King's enemies.

COMMON CARRIERS are of two kinds.

1. Carriers by land.
2. Carriers by water.

The law relating to both is the same. (f)

Of the first class are the proprietors of stage coaches, trucks, teams, waggons, carts, and other persons who undertake to transport from place to place by land, for hire.

Of the second class are the proprietors of ships, steam-boats, barges, canal boats, and other persons who in like manner undertake to carry goods from place to place, by water, for hire.

The proprietors of stage coaches who only carry passengers for hire, as hackney coachmen, cab-men, and such like, are not deemed common carriers, and consequently are not held responsible for the goods of passengers, *except* where goods are carried as well as passengers. (g)

Nor is the proprietor of a stage coach liable for goods lost by the coachman, unless he is paid for the carriage. This was determined by LORD HOLT in *Middleton v. Fowler*, where the plaintiff took a place in the defendant's coach, and delivered his trunk to the coachman, which was lost on the road. The *Chief Justice* said, that a stage coachman was not within the custom of a carrier is, unless such as take a distinct price for carriage of goods, as well as persons, as waggons with coaches; and though money be given to the driver, yet that is gratuity, and cannot bring the master within the custom; for no master is chargeable with the acts of his servant, but when he acts in execution of the authority given to his master, and then the act of the servant is the act of the master (h); but this does not apply to proprietors of stage coaches who receive the baggage of their passengers without compensation, the custody of the baggage being, as in the case of an innkeeper, accessory to the principal contract, and they may be considered in regard to such baggage as common carriers (i), it appears to be the present doctrine. Common carriers are also responsible for all persons in their employ. LORD MANSFIELD, in *Garth v. Payton*, which was an action against a stage coachman for not delivering a passenger, said, a common carrier, in respect of the premium he is to receive, runs the

(d) 1 Vent. 190. 238; Sir Thos. Raym. 220. S. C.; 1 Mod. 85; *Garvide v. Trent Navigation*, 4 Term. Rep. 582, per Lord Kenyon.

(e) 5 Bing. Rep. 217.

(f) *Rick v. Kneeland*, Cro. Jac. 390; Hob. 17; 5 Burr. 2627.

(g) *Upshere v. Aides*, Com. 25. pl. 16; *Shin v. S. C.*; but see Selw. N.P. 323. n. (d.) *Ad. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 400; see *Sharpe v. Grey*, 9 Bing. Rep. 460.

(h) Salk. 282, see *Lovett v. Hobbs*, 3 Shw. 128.

(i) *Brook v. Pickwick*, 4 Bing. Rep. 218; *C. v. Gray*, 6 East, 663.

and must make good the loss, though it happen without any fault in him, the reward making him answerable for the safe delivery<sup>(k)</sup>. The breaking down of a stage coach is *prima facie* evidence of negligence on the part of the proprietor and his servants to make the former liable for damages and loss<sup>(l)</sup>.

If a vendee of goods orders them to be sent by a particular carrier, a delivery to him or his servant, vests the property in the vendee, who may bring trover against a stranger that detains, or takes them away; or if they are damaged or lost, the vendee must stand to the loss, and the action against the carrier can only be brought in his name. Where a tradesman ordered goods to be sent to him, and in his letter added, "pray be expeditious in sending them, and instead of letting them go by the way of *Bristol*, where many things you have sent me, have been detained, send them by land carriage," the goods were delivered to the book-keeper of the *Birmingham* carrier, to be sent from thence by way of *Coventry* to the vendee, who lived at *Carmarthen*; and it appeared there was no other mode of conveyance by land carriage. The goods being lost, the vendor brought an action against the vendee for the price, insisting that the delivery to the carrier was a delivery to the defendant; but the learned Judge who tried the cause being of a different opinion, nonsuited the plaintiff. However, the Court of King's Bench held that, as there was no other mode of sending the goods by land carriage, it amounted to the same thing, as if the defendant had ordered the goods to be sent by the *Birmingham* carrier, particularly by name; and therefore the delivery being made according to the order of the defendant was a delivery to, and vested the property in, the defendant; and the nonsuit was set aside. *Vale v. Bayle*, Cowp. 294. So where a tradesman in the country gave

an order for goods from *London*, and directed them to be sent by a particular carrier, to whom they were accordingly delivered by the vendor, who had them booked, and paid for it: the goods being lost, the vendor brought an action against the carrier, but was nonsuited, and the nonsuit confirmed by the Court, who held that, by the delivery to a particular carrier according to the vendee's direction, the property vested in him, and of course he must stand to the risk; that the money for booking was paid by the vendor as agent of the vendee, and therefore the action could not be maintained by the vendor, but ought to have been brought by the vendee.<sup>(m)</sup> Delivery of goods by the vendor on behalf of the vendee, to a carrier not named by the vendee, is a delivery to the vendee.<sup>(n)</sup> It was said by counsel in argument, and assented to by LORD CHANCELLOR KING, that if a tradesman in *London* send goods by order to a tradesman in the country by a carrier not appointed by the country trader, if the carrier embezzles the goods, the trader in the country must stand to the loss.<sup>(o)</sup> And this seems to be confirmed by Lord Hardwicke, in *Snee v. Prescott*,<sup>(p)</sup> who says that if goods are delivered to a carrier or hoyman to be delivered to A., and the goods are lost, A. can only bring the action, which shews the property to be in him. But if the vendor agrees with the carrier to pay him for the carriage, the vendor may bring an action against the carrier, because the vendor stands in the character of an insurer to the vendee, for the safe arrival of the goods, and it is no part of the question to inquire in whom the property vests.<sup>(q)</sup> Lord Mansfield, in *Vale v. Bayle*, observes, that if the vendor takes upon himself actually to deliver the goods to the vendee, he stands to all risks;

(m) *Dawes v. Peck*, 8 Term Rep. 330.

(n) *Dutton v. Solomonson*, 3 Bos. and Pull. 582.

(o) *Godfrey v. Furzo*, 3 P. Wms. 185.

(p) 1 Atk. 248.

(q) *Davis v. James*, 5 Barr. 2680; *Moore v. Wilson*, 1 Term Rep. 654.

(k) 4 Burr. 2300.

(l) *Christie v. Griggs*, (ante).

but if the vendee order a particular mode of conveyance, the vendor is excused. (r) 256. See 2 Saund. Rep. by Williams, 47*b*. The extraordinary liabilities of a carrier are thus imposed upon him, in consequence of the public nature of his employment, which renders his good conduct a matter of importance to the whole community. He is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying. (s)

(To be continued.)

## PROBLEM IX.—VOL. IV.

### PRIVATE NUISANCES.

What Acts amount to Private Nuisances?

TO THE EDITOR OF THE LEGAL GUIDE.

## ANSWER TO PROBLEM 8. VOL. 2.

### LIGHTS.

What is the law that governs the free access of light over another's land, and what are the remedies for injuries to lights?

The importance and interest of this problem will, I trust, be a sufficient excuse for my taking up so much of your valuable GUIDE with an answer, in which I shall endeavour to explain—

1. What are Ancient Lights?
2. Right to free access of light?
  - 1st. How acquired.
  - 2ndly. How lost or suspended.
3. Of injuries to lights.
4. The remedies for such injuries.
  - 1st. At law.
  - 2ndly. In equity.
5. By and against whom may such remedies be enforced.
6. The law governing the free access of light as affected by the custom of London.

(r) Cowp. 256. See 2 Saund. Rep. by Williams, 47*b*.

(s) *Jackson v. Rogers*, 2 Show. 327; *Lane v. Cotton*, 1 Lord Raym. 646; *Edwards v. Sherratt*, 1 Bast. 1004; *Batson v. Donovan*, 1 B. and A. 32; see 1 Smith, 101.

### First—What are Ancient Lights?

They are a right which the owner or occupier of premises having ancient windows has to the *exclusive enjoyment* and free access of light over the adjoining land. This right may have its commencement either in consequence of agreement between the owners of the adjoining premises, or from occupancy—uninterrupted for a period of twenty years, and cannot be obstructed or injured without subjecting the wrong doer to an action.

“If I have an ancient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me.” 2 Blac. Comm. 402. Unless the windows be ancient the right does not exist, and consequently no injury is done.

The right only exists so far as the lights originally extended, and not for an increase of light by enlarging the windows recently. 2 Wm. Saund. 115. In the recent case of *Blanchard v. Bridges*, 4 Ad. & Ell. 176. it was so determined. There E., being owner of a house, enlarged it, and inserted a window at one end, in the part added, and at another end, carried out the side walls, between which two windows formerly stood in a straight line, five feet; converting this end into a bow, and inserting two bow windows in the same direction, but not in the same situation as the two former. And the Court, per PATTESON, J., who delivered judgment, held, that whatever privilege against the obstruction of light, the windows of the original house possessed, this privilege did not apply to the three new windows.

### Secondly—Right to free access of light.

#### 1st. How acquired.

The enjoyment of light for a period of twenty years with the acquiescence of the party who ought to have impeded or contradicted the same was, even before the stat. 2 & 3 Wm. 4. c. 71. strong presumptive evidence of a right thereto by some agreement between the parties or otherwise. *Darwin v. Upton*, cited *Yard v. Ford*. 2 Saund. by Williams and Patteson, 175; and *Cross v. Lewis*, 2 Barn. & Cress. 689. But where lights have been enjoyed without interruption, for above twenty years, during the occupation of the adjoining land by a tenant only, it will not conclude the landlord of such adjoining premises without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him; and, consequently, it will not conclude a succeeding tenant, who was in possession under such landlord from building

up against such lights. *Daniel v. North*, 11 East 372.

And, now, by the third section of the before-mentioned Act, it is enacted, that when the access and use of light from any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith, for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary, notwithstanding, unless it shall appear that the same was enjoyed under some consent or agreement, expressly made or given for that purpose by deed or writing.

The right given by this section is absolute, as the 8th section, providing for possession during particular estates does not apply to lights.

Where a party has a house and land adjoining it, and he sells the house, the purchaser thereof has the same right to a free access of light, although the lights be new, as his vendor had before the sale. In *Canham v. Fisk*, 2 Crompt. & Jerv. 128, BAYLEY, J. says, "If I build a house, and having land surrounding it, sell the house, I cannot afterwards stop the lights of that house by building or otherwise. By selling the house I sell the easement also." And the principle of this rule is, as laid down by FROSDEN and WYNDHAM, JJ. in *Palmer v. Fletcher*, 1 Lev. 122. "That no man shall derogate from his own grant." See also 1 Vent. 337; 6 Mod. 116; 1 Price 27.

In the case of *Swansborough v. Coventry*, 1 Bing. 305, where the plaintiff purchased a house of A., and the defendant at the same time purchased of A the adjoining ground upon which an erection of one story high had formerly stood; and in the conveyance to the plaintiff, his house was described as bounded by building ground adjoining to defendant. It was nevertheless held, that the defendant was not entitled to build to a greater height than one story, if by so doing he obstructed the plaintiff's lights.

#### 2ndly. How lost or suspended.

If a party having the privilege of light, shuts up the windows through which such light is admitted, with bricks and mortar, for twenty years, he thereby loses his right. *Laurence v. Obee*, 5 Camp. 514.

On the contrary, the raising and enlargement of a window does not destroy the right for so much light as passed through the window before enlargement, and the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion be admitted than was anciently enjoyed. *Chandler v. Thompson*, 3 Camp. 80.

The right to the enjoyment of light and air

may be lost by non-user, even for a less period than twenty years, unless an intention of resuming the right in a reasonable time be shewn when it was ceased to be used—ex. gra.: If a party build upon the same site, and place windows in the same spot as that upon which a former house stood, or does any other act which manifests that he did not intend to convert the land to a different purpose, in such cases the right would not be lost by a temporary non-user. *Moore v. Rawson*, 3 B. & C. 336; *Garret v. Sharp*, 3 A. & E. 325; *Martin v. Goble*, 1 Camp. 322; *Chandler v. Thompson*, supra; *Roberts v. Macord*, 1 M. & Rob. 330; *Coutts v. Gorham*, M. & M. 396; *Riviere v. Bowes*, Ry. & Mo. 24. And see *Astlett v. Ellis*, 9 B. & C. 683.

The right to the free access of light may be suspended by an unity of possession, and afterwards revived upon a division of such unity. A unity of possession of land *a quâ*, and of land *in quâ*, an easement exists, does not extinguish, but only suspends the easement, where a person is seized in fee of one parcel, and possessed of the residue of a term of the other. *Thomas v. Thomas*, 2 C. M. & R. 34; *Bright v. Walker*, 1 C. M. & R. 219; If there had been a unity of seizen it would have been otherwise, per ALDERSON in *Thomas v. Thomas*. See further on this point *Burton v. Barclay*, 7 Bing. 758 and 1 Rep. 146 b. 144. a.; and per BAILEY, J., in *Boyle v. Tamlyn*, 6 B. & C. 337; Com. Dig. Suspension; *Bracebridge v. Cook*, Plowd. 418; *Large v. Pitt*, Pea. Add. Ca. 152 et notis.

#### Thirdly.—Of injuries to lights.

The stoppage of lights in a house is a nuisance and actionable; but the mere obstruction of a prospect is not, although its effect is to diminish the value of the property, it being only matter of delight; not of necessity. 1 Mod. 55.

In order to sustain an action for such nuisance, it is not necessary to show a total privation of light, for if the plaintiff can prove that by the obstruction he ceases to enjoy the light in so free and ample a manner as he did before, such proof will be sufficient. 4 Esp. 69. But the diminution of light, as a ground of action, must be such as makes the premises to a sensible degree less fit for the purposes of business or occupation. *Parker v. Smith*, 5 Carr & Pay, 438, in which case the plaintiff's witnesses stated that, in their opinion, the quantity of sunlight and air was diminished, and the jury gave only nominal damages, which, per TINDAL, C. J., had no other effect than that of a notice to the defendants that they must pull down the building of which the plaintiff complains.

An action for a nuisance cannot be maintained

for that which would have been no nuisance but for the plaintiff's having opened a new window in his house, and which becomes a nuisance only by the act of the plaintiff himself. *Laurence v. Obee*, ante; and see *1 Moody & R. 230*.

*Fourthly*—What are the remedies?

1st. At law.

2ndly. In equity.

*First*—At law, a person may either maintain an action on the case against the occupier of the adjoining premises for the damage sustained by the nuisance, or he may stand on his own ground and abate it. *Aldred's case*, 9 Rep. 58; 1 Mod. 54. If, notwithstanding the penalty inflicted on the neighbour in the way of damages, the obstruction be continued, a new action may be maintained, and the former recovery would be no bar. *Shadwell v. Hutchinson*, 4 C. & P. 333.

The evidence in actions for the obstruction of light must shew that the plaintiff has possession of the house, land, &c. affected by the nuisance, the continuance or erection of the building causing the privation of light by the defendant, as the circumstances of the case may require, and also the injury sustained. *Selwyn's N.P. 1131*; *Starkie Ev. tit. windows*. And if the possession of such house has been during the occupation of the adjoining premises by a tenant, knowledge by the landlord must be shewn. *Daniel v. North*, 11 East, 372.

The most summary mode of proceeding is to destroy the thing constituting the nuisance, but it is not advisable, for an excess would subject the party thus taking the law into his own hands to an action of trespass. In *Rex v. Papineau*, 1 Strange, 688, which was a case of an indictment for a nuisance, *RAYMOND, C. J.*, said, "You cannot destroy the whole, but only so much of a thing as makes it a nuisance. Suppose a man builds his house up so high as to be a nuisance to his neighbour, by obstructing his lights, or in any other respect arising from its excess, you must not destroy the whole house, but only so much of it as by its excess above what is allowable constitutes the nuisance." And in this opinion *FOSTER, J.* coincided.

*Secondly*—In equity an injunction will be granted *ex parte*, to restrain the owner of a house from making any erection or improvement, so as to darken or obstruct the ancient lights or windows of an adjoining house. *Back v. Stacey*, 2 Russ. 121. But if the nature of the obstruction do not require preventive interposition before a trial at law could be obtained, or the legal right be doubtful, the Court of Chancery will send the parties to law. *Winstanley v. Lee*, 2 Swan. 333.

The foundation of the jurisdiction to interfere by injunction in these cases is such material injury to the comfort of those who dwell in the neighbouring house as to require the interposition and application of a power to prevent, as well as to remedy an evil, for which damages, more or less, would be given at law. *Attorney-General v. Nichol, Jun.* 16 Ves. 338.

*Fifthly*—By and against whom may such remedies be enforced?

If the nuisance be of a permanent nature, and injurious to the reversion, the party entitled in reversion, as well as the tenant in possession, may each of them recover his respective loss. *Leader v. Moxton and others*, 3 Wils. 461.

A devisee may have an action for a nuisance continued after the death of his testator. *Some v. Barwisk*, Cro. Jac. 231.

The remedy is not confined to the action against the party who erected the obstruction, but extends also, after request made to abate it, against his alienee. *Winsmore v. Greenbank*, Willes 583. And where a tenant for years erects a nuisance to the injury of the plaintiff's lights, and then makes an underlease, the plaintiff may have an action against either. *Roswell v. Prior*, 2 Salk. 460.

*Sixthly*—The law as to free access of light as affected by the custom of London.

The custom of the city of London permits houses to be raised upon ancient foundations to any height, notwithstanding such additional elevation may obscure and darken the windows of other ancient buildings, unless there is some agreement restraining such right. See the custom set forth in *Winstanley v. Lee*, *supra*.

However, in the case of *Shadwell v. Hutchinson*, 3 C. & P. 315, *LORD TENTERDEN* held, that the custom ought to be confined to buildings on ancient foundations where all the four walls belonged to the party; and that no one would be justified by the custom in raising an obstruction by means of those walls of his, so as to darken the lights in a fourth wall belonging to his neighbour.

By the Prescription Act 2 & 3 W. 4. c. 71. s. 3. twenty years enjoyment of light, gives an absolute right, any local usage or custom to the contrary, notwithstanding; so that to effect the custom of London since the passing of this act is taken away as to the right of building to any height the owner pleases, on ancient foundations, if by so doing he injures his neighbour's lights. *J. A. M.*

## CIRCUITS OF THE JUDGES.

SUMMER CIRCUITS, 1840.	N. WALES.	S. WALES.	MIDLAND.	HOME.	OXFORD.	NORFOLK.	WESTERN.	NORTHERN.
	Lord Denman.	J. Erskine.	L. C. J. Tindal. J. Littledale.	Lord Abinger. B. Gurney.	B. Parke. J. Williams.	B. Alderson. J. Patteson.	J. Coleridge. J. Maule.	J. Colman. B. Rolfe.
Sat. July 11	-	-	-	-	-	-	-	York
Tuesday 14	-	-	-	-	-	-	Winchester	-
Wednesday 15	-	-	-	Hertford*.	Abingdon	Buckingham	-	-
Thursday 16	-	Cardiff	-	Chelmsford	Oxford	Bedford	-	-
Saturday 18	-	-	Northampton	-	-	Huntingdon	Dorchester	-
Monday 20	-	-	-	-	Worcester & city	Cambridge	Exeter and city	-
Wednesday 22	-	-	-	Maidstone	-	-	-	Durham
Thursday 23	-	Cardmarthen	-	-	Stafford	-	-	-
Friday 24	-	-	Oakham	-	-	-	-	-
Saturday 25	Newtown	-	Lincoln & city	-	-	-	-	-
Tuesday 28	-	-	-	Lewes	-	-	-	-
Wednesday 29	Dolgelly	Haverfordwest	Notting. & town	-	-	Norwich & city	Bodmin	Newcastle & town
Thursday 30	-	[and town	-	-	-	-	-	-
Friday 31	-	-	-	-	-	-	-	-
Sat. Aug. 1	Cardaryon	-	-	Guildford	-	-	-	-
Monday 3	-	-	Derby	-	-	-	-	-
Tuesday 4	-	Cardigan	-	-	Shrewsbury	-	-	Carlisle
Wednesday 5	Beaumaris	-	-	-	-	Ipswich	-	-
Thursday 6	-	-	-	-	-	-	-	-
Friday 7	-	-	Leicester & B.	-	-	-	-	-
Saturday 8	Ruthin	Breton	-	-	Hereford	-	Wells	Appleby Lancaster
Tuesday 11	-	-	-	-	Monmouth	-	-	-
Wednesday 12	Mold	Presteign	Covent. & War.	-	Gloucester and	-	Devizes	-
Saturday 15	Chester	Chester	-	-	[city	-	-	-
Monday 17	-	-	-	-	-	-	-	-
Thursday 20	-	-	-	-	-	-	Bristol	Liverpool

\* There is a very serious case of murder to be tried there, in which a young woman, named Maria Brice, is to be tried for poisoning her husband, and which has stood over from the Spring Assizes, in consequence of the female, who is only twenty-one years of age, being delivered in the goal of an infant on the night before the commencement of the assizes, and being, consequently, prevented from taking her trial.

## SITTINGS AFTER TRINITY TERM, 1840.

## COURT OF CHANCERY.

Saturday, June 27	-	-	-	-	}	Appeals and Causes.
Monday, „ 29	-	-	-	-		
Tuesday „ 30	-	-	-	-		
Wednesday, July 1	-	-	-	-		
Thursday „ 2	-	-	-	-		
Friday „ 3	-	-	-	-	}	Second Seal.—Appeal Motions and ditto.
Saturday „ 4	-	-	-	-		
Monday „ 6	-	-	-	-		
Tuesday „ 7	-	-	-	-		
Wednesday „ 8	-	-	-	-		
Thursday „ 9	-	-	-	-	}	Appeals and Causes.
Friday „ 10	-	-	-	-		
Saturday „ 11	-	-	-	-		
Monday „ 13	-	-	-	-		
Tuesday „ 14	-	-	-	-		
Wednesday „ 15	-	-	-	-	}	Third Seal.—Appeal Motions and ditto.
Thursday „ 16	-	-	-	-		
Friday „ 17	-	-	-	-		
Saturday „ 18	-	-	-	-		
Monday „ 20	-	-	-	-		
Tuesday „ 21	-	-	-	-	}	Appeals and Causes.
Wednesday „ 22	-	-	-	-		
Thursday „ 23	-	-	-	-		
Friday „ 24	-	-	-	-		
Saturday „ 25	-	-	-	-		
Monday „ 27	-	-	-	-	}	Fourth Seal.—Appeal Motions and ditto. Petitions,
Tuesday „ 28	-	-	-	-		
Wednesday „ 29	-	-	-	-		
Thursday „ 30	-	-	-	-		

The Court will not sit after Saturday the 8th August.—Such days as his Lordship is occupied in the House of Lords excepted.

## VICE-CHANCELLOR'S COURT.

Saturday, June, 27	-	-	-	-	}	Pleas, Demurrers, Exceptions, Causes, and further Directions.
Monday, „ 29	-	-	-	-		
Tuesday „ 30	-	-	-	-		
Wednesday, July 1	-	-	-	-		
Thursday „ 2	-	-	-	-		
Friday „ 3	-	-	-	-	}	Second Seal.—Motions.
Saturday „ 4	-	-	-	-		
Monday „ 6	-	-	-	-		
Tuesday „ 7	-	-	-	-		
Wednesday „ 8	-	-	-	-		
Thursday „ 9	-	-	-	-	}	Pleas, Demurrers, Exceptions, Causes, and further Directions.
Friday „ 10	-	-	-	-		
Saturday „ 11	-	-	-	-		
Monday „ 13	-	-	-	-		
Tuesday „ 14	-	-	-	-		
Wednesday „ 15	-	-	-	-	}	Third Seal.—Motions.
Thursday „ 16	-	-	-	-		
Friday „ 17	-	-	-	-		
Saturday „ 18	-	-	-	-		
Monday „ 20	-	-	-	-		
Tuesday „ 21	-	-	-	-	}	Pleas, Demurrers, Exceptions, Causes, and further Directions.
Wednesday „ 22	-	-	-	-		

Thursday, July 23	-	-	-	-	} Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Friday, " 24	-	-	-	-	
Saturday, " 25	-	-	-	-	
Sunday, " 27	-	-	-	-	
Tuesday, " 28	-	-	-	-	} Fourth Seal.—Motions. Petitions.
Wednesday, " 29	-	-	-	-	
Thursday, " 30	-	-	-	-	

The Vice-Chancellor will hear Short Causes and Unopposed Petitions previous to the General Paper every Friday during the sittings.—After Term until the First Seal his Honor will hear Motions and other matters, by order.—The Court will not sit after Saturday the 8th August.

ROLLS' COURT.

Thursday, June 27	-	-	-	-	} Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Friday, " 29	-	-	-	-	
Saturday, " 30	-	-	-	-	
Wednesday, July 1	-	-	-	-	
Thursday, " 2	-	-	-	-	} Motions.
Friday, " 3	-	-	-	-	
Saturday, " 4	-	-	-	-	} Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Sunday, " 6	-	-	-	-	
Monday, " 7	-	-	-	-	
Tuesday, " 8	-	-	-	-	
Wednesday, " 9	-	-	-	-	} Petitions in General Paper.
Thursday, " 10	-	-	-	-	
Friday, " 11	-	-	-	-	} Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday, " 13	-	-	-	-	
Sunday, " 14	-	-	-	-	
Monday, " 15	-	-	-	-	
Tuesday, " 16	-	-	-	-	} Motions.
Wednesday, " 17	-	-	-	-	
Thursday, " 18	-	-	-	-	} Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Friday, " 20	-	-	-	-	
Saturday, " 21	-	-	-	-	
Sunday, " 22	-	-	-	-	
Monday, " 23	-	-	-	-	} Motions Petitions in General Paper.
Tuesday, " 24	-	-	-	-	
Wednesday, " 25	-	-	-	-	
Thursday, " 27	-	-	-	-	
Friday, " 28	-	-	-	-	
Saturday, " 29	-	-	-	-	
Sunday, " 30	-	-	-	-	

Short Causes, Consent Causes, and Consent Petitions every Tuesday, at the sitting of the Court.

COURT OF QUEEN'S BENCH.

MIDDLESEX.

Friday, June 27	-	-	-	-	Common Juries.
Saturday, " 29	-	-	-	-	} Special Juries.
Sunday, " 30	-	-	-	-	
Monday, July 1	-	-	-	-	
Tuesday, " 2	-	-	-	-	

LONDON—Common Juries.

Friday, July 3	-	-	-	-	Adjournment Day.
Monday, " 15	-	-	-	-	[There may be a further postponement to Monday, July 6.] Last day of Sitting.

COURT OF COMMON PLEAS.

LONDON—Common Juries.

Friday, June 30	-	-	-	-	Adjournment Day.
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## COURT OF EXCHEQUER—EQUITY SITTINGS.

Wednesday, July 1	-	-	-	Petitions and Motions.
Thursday, " 2	-	-	-	Further Directions, and Exceptions to Reports. Pleas, Demurrers, and Exceptions.
Friday, " 3	-	-	-	
Saturday, " 4	-	-	-	
Monday, " 6	-	-	-	<i>Knight v. Marquis of Waterford</i> , part heard.
Tuesday, " 7	-	-	-	
Wednesday, " 8	-	-	-	
Thursday, " 9	-	-	-	Causes.
Friday, " 10	-	-	-	
Saturday, " 11	-	-	-	
Monday, " 13	-	-	-	Further Directions and Exceptions to Reports, and Pleas, Demurrers, and Exceptions.
Tuesday, " 14	-	-	-	

## GENTLEMEN CALLED TO THE BAR.

Trinity Term, 1840.

LINCOLN'S INN.—Richard Brome Debary, Richard Henegan Lawrie, Daniel Robertson, John Stodman, jun., Henry Barry, Esqs., and The Hon. Frederick George Brabazon Ponsonby.

GRAY'S INN.—Nathaniel Griffin, Allen Chandler, and Samuel Manning, Esqs.

INNER TEMPLE.—William Dougal Christie and Paitfield Mills, William Rothery, George Atkinson, James Shaw Willea, George Henry Marsh, George Carr Peirson, Charles Spencer March Philipps, Richard Charnock, Edward Christopher Egerton, Florance John Benson, Esqs.

MIDDLE TEMPLE.—James Curtis Somerville, Thomas Leach, Samuel Comyn, Harcourt Mooney, William Henry Spicer, Henry Samuel Chapman, Frederick Philipse Morris, Henry Marsh Lynch, and Joseph Turnley, Esqs.

NEW SERJEANTS-AT-LAW.—William Glover, Esq., of the Middle Temple, and Stephen Gaselee, Esq., of the Inner Temple.

## Law Reports.

## COURT OF CHANCERY.—May 29.

APPEAL FROM THE VICE-CHANCELLOR,  
MAUGHAM v. VINCENT.

ULTIMATE LIMITATION in marriage Articles to such persons as under the Statute of Distributions, would have become entitled to the personal estate of the woman, "IN CASE SHE HAD DIED INTESATE AND UNMARRIED," and she dies leaving children. CONSTRUCTION of the term "UNMARRIED" in such a case—Whether the CHILDREN are NEXT OF KIN to their MOTHER, so as to come within the Limitation.

This was a suit instituted by Caroline

Maugham and others, infants, by George Maugham, their next friend, against James Vincent and others.

By an indenture made previous to the marriage of Richard Maugham and Sally, otherwise Sarah Vincent, dated the 24th March, 1813, between Richard Maugham, of the first part, Ann Vincent, widow, and Sally, otherwise Sarah Vincent, then an infant, of the second part, and Thomas Wilson of the third part, after reciting that a marriage had been agreed upon between the said Richard Maugham and Sally, otherwise Sarah Vincent, and that all the estate to which she was, or at any time during the coverture, should become entitled should be settled and assured to her separate use, independent of her intended husband, the said Richard Maugham, and also the said Sally, otherwise Sarah Vincent, as far as she lawfully might or could, and with the privity and approbation of her mother, the said Ann Vincent, did covenant with Mr. Wilson that as soon as Miss Vincent should obtain the age of 21 years, and become entitled to the real and personal estate therein agreed to be settled they would convey, settle, and assure all and singular the real and personal estate and effects of or to which the said Sarah Vincent, or Richard Maugham, in her right, should or might during the intended coverture, become seized of or entitled to by descent, transmission, devise, bequest, gift, donation, representation, or otherwise, to HOLD the same unto the said Thomas Wilson, or some other person to be nominated as a trustee by and for the said Sarah Vincent, her heirs, executors, administrators, and assigns, respectively, upon trust for such person or persons, and for such estates and interests, and to and for such ends, intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the said Sarah Vincent should, notwithstanding her said intended coverture, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered in the pre-

be of and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, to be signed and published in the presence of and attested by three or more credible witnesses, direct, limit or appoint the same or any part or parts thereof, and in default of, and until such direction, limitation or appointment, and so as no such direction, limitation or appointment should extend, upon trust, during the joint lives of the said Richard Maugham and Sarah Vincent, they, apply and dispose of the rent, issues and profits, interest, dividends and annual produce of the said trust premises, to such person or persons as they, and for such intents and purposes only as the said Sarah Vincent, notwithstanding her said intended coverture, and as if she were sole and unmarried, (a) should from time to time, by any writing or writings signed by her with her own hand, direct or appoint; and in default of such direction or appointment into the proper hands of the said Sarah Vincent, to the end and intent that the said trust premises might be sold, disposed of, settled, given away, devised and bequeathed by the said Sarah Vincent during her said intended coverture, in such and the same manner as if she were sole and unmarried; that, in the mean time, the rents, issues, profits, interest, dividends and annual produce thereof might be for the sole and separate use of the said Sarah Vincent; and that neither the said trust premises, or the rents, issues and profits, interest, dividends, and annual produce thereof might be subject to the debts, contracts, or interference of the said Richard Maugham; and that purpose that the receipts in writing of the said Sarah Vincent, or of her appointees, signed by her or them, should from time to time be sufficient and effectual discharges for the money for which the said trust premises should or might be sold or disposed of, and for the rents, issues, profits, interest, dividends and annual produce thereof. And from and after the decease of either one of them, the said Richard Maugham or the said Sarah Vincent, as should first depart this life, upon trust, if the said Sarah Vincent should happen to survive the said Richard Maugham, for the said Sarah Vincent her heirs, executors, administrators, and assigns, respectively, according to the several natures and qualities of the said several trust premises; but if the said Richard Vincent should happen to die in the lifetime of the said Richard Maugham, then as to that part of the said premises as should consist in feehold or copyhold estate, upon trust, for the said heirs of the said Sarah Vincent; and as to such part thereof as should consist of personal estate, upon trust, for such person or per-

sons as under or by virtue of the statute for the distribution of the effects of intestates, would have become entitled to the personal estate of the said Sarah Vincent, *in case she had died intestate and unmarried*, and such persons, if more than one, to take in the shares to which they would have become entitled to such personal estate. The marriage took place—She died on the 6th of May, 1834, wholly intestate, leaving her husband and eight children (the plaintiffs) her surviving, who, according to the statute of distributions, were her next of kin. She also left a brother, James Vincent, and a sister, Mary Anne Ramsden; also, several nieces and nephews her surviving—but she made no appointment, devise, or testamentary disposition, under the deed of 24th March, 1819. If she had died *unmarried*, then the defendants (her relations) would have been her only next of kin, according to the statute of distributions.

Mr. Wilson, the trustee, died on the 9th of August, 1833, without having acted in or accepted the trusts, and no settlement was ever made in pursuance of the articles.

During the coverture Mrs. Maugham became entitled as one of the next of kin of her brother, Richard George Vincent, to a share of his personal estate, which was administered to by her brother, the defendant, James Vincent, and who had refused in her lifetime to pay her share, because there was no duly constituted trustee of the marriage articles, who, he contended, could only give him a proper discharge; he refused to concur in proper measures to procure the appointment of a new trustee, and alleged that the plaintiffs (*the infant children of Mrs. Maugham*) were not her next of kin, according to the marriage articles, but that the share of Mrs. Maugham in her deceased brother's property devolved upon the defendants, *who would have been her next of kin if she had died unmarried*. The present bill was therefore filed by the children, in which they charged that they were the persons entitled, or must so be presumed to be under the ultimate limitation in the marriage articles, and that such limitation was made by mistake or through inattention, and that they were entitled to have the settlement rectified so as to include them in *terms* in such ultimate limitation. The bill prayed that the marriage articles might be carried into effect, and that a proper settlement might be made in conformity therewith, and that if necessary the trusts might be rectified in the aforesaid particulars, and that the settlement to be made in execution thereof might be so framed as to limit to the plaintiffs, as the children of Mrs. Maugham, the property therein settled, and that her share of her deceased brother's personal estate might be transferred, and paid to the plaintiffs or to the trustee, to be appointed, of the settlement for the

In the settlement the word is "*married*," which is a mistake for the word "*unmarried*."

benefit of the plaintiffs, as the parties beneficially entitled under it, and that the defendant, James Vincent, might be restrained by injunction from otherwise disposing of such share. The defendants, by their answer, admitted all the facts, and denied that the plaintiffs were entitled, but submitted that they (the defendants) were under the limitation in the settlement entitled as answering the description of persons, who, by virtue of the statute of distributions, would have become entitled to Mrs. Maugham's personal estate, in case she had died intestate and unmarried, and that the limitation was inserted purposely, and not by mistake, in order to enable Mrs. Maugham and her husband to defeat the apparent intention of the articles, and to obtain the unrestricted possession of her property, and that a proper trustee thereof might be appointed.

The cause was heard before the VICE-CHANCELLOR, on the 9th of August, 1839, when the plaintiffs abandoned their charge, that the limitations in the settlement were framed by mistake, and the question turned entirely on the construction, to be placed upon the ultimate limitations in the articles. The VICE-CHANCELLOR decreed that the plaintiffs (the children of Mrs. Maugham) were *not* under the limitation in the settlement *her next of kin*, so as to be entitled to the funds; but that they belonged to the person or persons who would have been entitled, under the statute of distribution, to the personal estate of Mrs. Maugham, at the time of her death, in case she had died intestate, and *without having been married*. His Honour considered that the word "unmarried" in the ultimate limitation meant "*never having been married*," so that the children of the marriage could not take, and upon the construction to be placed upon that word the question rested. Against this decision the present appeal was brought, after the Vice-Chancellor had at the request of the plaintiffs *re-considered his judgment*, and declared that he had no power to alter the settlement(b).

Mr. J. Wigram and Mr. Ellis for the plaintiffs.

The LORD CHANCELLOR said, the question was between the children of Mrs. Maugham and her next of kin, supposing that she had left no children. His lordship, after reading the limitation in the settlement, said, the Vice-Chancellor was of opinion that the word "unmarried" should be construed as never having been married, and consequently the children of the marriage would be excluded, and those persons would be their mother's next of kin, and at her death would take the personal property. Nothing short of necessity could compel the court to

adopt such a construction in this case. It was a matter therefore for consideration whether the word "unmarried" was so fixed and inflexible that the court must put that construction on it. If *unmarried* necessarily means *not having been married*—it never could have been intended that the property should go to strangers. The common meaning of the word would appear to be "*not being then married*." The word received a judicial meaning in the case of *Doe, dem. Baldwin and Wife v. Rawding and Wife*, in which it was shown to be a flexible word used according to the circumstances of the case. There are other cases in which the court held that "unmarried" meant "*not being married*;" but they were not authorised in putting that construction on the word in the way it was used in these articles. It is quite competent to this court to adopt the construction put on the word in the case mentioned. There was ample authority to hold this to be a flexible term, and to explain it in the sense in which it was to be used. The articles were executory, and the court had to look to the intention of the parties. In an instrument executed by a court must look to the meaning of the words, but in marriage articles to the intention of the parties. If it had been the intention of the parties to the articles to exclude the children of the marriage they might have been excluded in *terms*. The Vice-Chancellor had two objects in view, one was that the next of kin should take in equal shares, as under the statute; the second was to exclude the husband from all share in the property. He could scarcely have a doubt in the construction to be put on the words, but as the Vice-Chancellor held otherwise he had considered the case, and the conclusion he came to was that, as this was a flexible term he could not adopt that construction of it which would exclude the children. The word was used in other passages of the articles, making provision for the wife as if she were sole and "*unmarried*" and giving her power to sell, dispose of, and give away, devise and bequeath the trust property during the coverture in the same manner as if she were sole and unmarried or *discovert*. The subject being clearly to exclude the husband from his marital rights, the right construction of the word accorded with that intention. I must construe "*unmarried*" to mean "*discovert*."

DECREE of the VICE-CHANCELLOR reversed. DECLARATION of the Court, that the children are the only parties entitled.

Reference to the Master to inquire who the children of Mr. and Mrs. Maugham.

Costs of all parties in the cause to be paid out of the funds.

(b) See *Doran v. Ross*, 1 Ves. J. 57.; *Wingrave v. Pulgrave*, 1 P. Wms. 401.

(c) Barn. and Ald. 441. S.C.—That case was argued at *Sergeants' Inn*. William Wells by his will devised certain lands to his wife for life, and

decease he devised them to his daughter, Mary Wells, and any other children he might have at the time of his decease in fee; but in case his daughter should die before the age of 21 years unmarried, and without lawful issue, then over. The daughter married and died under 21, and without issue, the question in this case turned upon the limitation over. Annot. 1, said, the words are, "in case my said daughter Mary Wells, and such other children as aforesaid, should die under the age of 21 years, unmarried, and without lawful issue, then, in that case, I give and be the entirety of my said lands, &c. unto my daughter mentioned in his will; that daughter died under the age of 21 years, without leaving lawful issue; she did not die unmarried, and I am of opinion the fee remained in her at the time of her death, and passes to her heir at law. According to the plain obvious meaning of the words, "under the age of 21 years, unmarried, and without lawful issue," the testator provides for a single event consisting of three, namely, dying during her minority, dying unmarried, and dying without children: that is the plain obvious meaning of the words. It has been argued, however, that it could not have been the intention of the testator that the fee should remain in her daughter, if she died under 21, and without issue; because, in that case, the estate would confer no benefit on her. An instance, has, however, been put by my brother BAYLEY, in which she would derive a benefit from the fee remaining in her, by enabling her to take the estate upon her husband. It is true, that a writ of privy seal is not frequently resorted to at the present day: but it still is a mode by which the daughter might have been enabled to make a provision for her husband. In order, however, to put the construction upon the will which the defendant has urged for, the word *unmarried* must be wholly rejected. I cannot, however, reject from a will any word, unless I see that the meaning to be given to that word is contrary to some intention plainly expressed in other parts of the will. Now, I cannot collect from anything in this will, that it is contrary to the intention of the testator that the fee should remain in the daughter if she married; and that being so, the word *unmarried*, in my judgment, cannot be rejected. I am, therefore, of opinion, that the event upon which the devise over was to take effect, namely, the death of Mary Wells, unmarried, under the age of 21, has not occurred; and therefore that the fee passes to her at law.

BAYLEY, J. expressed himself to be of the same opinion, and observed: It has been said that the testator could only use the word *unmarried* in one sense, as expressive of the idea of Mary Wells never having been married at all; and that then, as far as the intention of the testator is concerned, that event efficiently provided for by the words "without lawful issue," because she could have no lawful issue without having been married. I apprehend, however, that the word *unmarried* may either mean never having been married at all, or without having at the time of her death a husband or wife. It is used in the latter sense in the legislature, in the statute of 3d and 4th Wm. Mary, c. 11, which enacts, that if any unmarried person, not having a child, shall be lawfully hired into service for one year, such service shall give a settlement. A widower has been held to be an unmarried person within the meaning of this statute. In this case, too, was this word considered by the Court of King's Bench, in the case of *Doe v. Cooke*, (7 East, 403), where the words of the devise over were precisely the same as the present; and I am very desirous to follow that authority here, as it will enable the Court to give effect to every word in the will. That

was indeed the case of a will of personal property, and the husband, under the statute of distribution, would be entitled to the personal property of his wife, and it is said that that makes a material distinction between the two cases, for here the husband could derive no benefit if he survived the wife. That, however, in strictness, is not correct; for the property may have been made beneficial to the husband in the event of his surviving his wife, either by an application to the legislature, or by a writ of privy seal. The latter mode, at the present day, is rarely resorted to, being superseded by the modern practice of applying for an Act of Parliament. See 10 Rep. 43, a Cro. Eliz. 471; 1 Ld. Raym. 113; and *Sir John St. Alban's case*, Salk, 567, and 5 Cruise's Dig. tit. recovery, 431. It is still, however, part of the law of the land; and the course of proceeding was for the crown, upon the petition of the infant and her guardian, to grant letters, under the privy seal, to the Judges of the Court of Common Pleas, directing them to permit the infant to levy a fine or suffer a recovery.

It is, then, in the discretion of the Court to permit the thing to be done or not, according to the circumstances. The husband, therefore, in this case, might have derived a benefit if he had survived his wife; and Mary Wells, the daughter, would be materially benefited by being enabled to make a provision for her husband before marriage. It may, therefore, have been the intention of the testator so to have benefited the daughter by preventing the devise over from taking effect, in the event of her marrying before 21; and it must be recollected that we are bound to construe this will as if it was the will of the ablest lawyer in Westminster Hall. It appears to me, therefore, that this may have been the intention of the testator:—If my daughter dies under 21, but leaves a child, then the estate shall go to the child; if she dies under 21, without a child, but leaves a husband, it shall go in such a way as she may settle it for the benefit of that husband, thus giving her a power which would enable her to advance herself in marriage, and confer upon her a material benefit. But if she died under 21, leaving no issue, and without leaving a husband, for whom it might be the intention of the testator to enable her to provide, in those three events the widow was to take; but she is to take it only subject to these three events. That is the construction put upon words precisely similar to the present, by this Court, in the case of *Doe v. Cooke*; and I think that that construction ought to prevail here. I am, therefore, of opinion that the devise over does not take effect, because the event upon which it was made to depend has not occurred.

See the following cases upon the sense of the word "unmarried":—*Goshawks v. Chiggeel*, Cro. Car. 164; *Framlingham v. Brande*, 3 Atk. 390; *Maberly v. Strode*, 3 Ves. 1. 450; *Bell v. Phyn*, 7 Id. 458; *Brownwood v. Edwards*, 2 Ves. 447; *Doe v. Jessop*, 12 East, 289.—EDITOR.

#### ROLLS' COURT—June 10.

GRAY D. FOOT.

**PRACTICE**—PENALTY upon SOLICITORS for not delivering papers in a Cause down for hearing, to the Judge.

In this case the plaintiff's solicitor had neglected to deliver any papers to his Lordship, in consequence of which he refused to allow it to proceed, and intimated that if none were furnished previous to the rising of the Court, he would, upon an affidavit of service, strike the

cause out of the paper. Just before the rising of the Court.

Mr. Tinney intimated that the order of the Court had been complied with, but at the same time observed, that he did not know whether his Lordship had laid it down as a rule, that where no papers were furnished the cause would be struck out of the paper. It had been laid down in "*Turner's Chancery Practice*," that in such a case the cause would be ordered to stand over, and the solicitor would be ordered to pay the costs of the day. He cited "*Grinstead v. Grinstead*," (*Idem*)

Lord LANGDALE said it was not now necessary to decide. The course he usually adopted was that followed to-day, which was to strike the cause out of the paper, at the same time giving leave to have it restored if application was made in the course of the day, and this had been usually found effective.

June 11.

BROWNE v. KEATINGE.

PRACTICE—EXCEPTIONS to ANSWER—*how far they must correspond with the INTERROGATORIES.*

The hearing of this cause involved a point of practice in the Master's office of considerable importance. The answer of the defendant had been excepted to for insufficiency by the plaintiff, and the Master disallowed the exceptions upon the ground that they differed from the interrogatories put by the plaintiff in his bill. The variation was only by substituting the word "recollection" for the word "remembrance," which latter word the plaintiff had used in the interrogatory in his bill, although he now used the word "recollection" in his exceptions to the defendant's answer to his bill. This the Master, acting according to the uniform practice of all the Master's offices, considered to be fatal, and so reported. To that report the plaintiff excepted.

Lord LANGDALE said, that until corrected by a higher authority, he would never hold that such a variation should be fatal, and allowed the plaintiff's exception to the Master's report.

COURT OF QUEEN'S BENCH—May 5.

*Sittings in Banco.*

FRIEND v. BATTERFIELD.

COAL ACT—PLEADING—ACTION FOR PENALTIES. FORM OF DECLARATION.

This was an action to recover ten penalties for alleged deficiency in certain sacks of coals sold by the defendant to one Teague. The de-

claration was framed on the statute of 1 and 1 William IV., c. 76, s. 57, the statute regulating the sale of coals by weight in the cities of London and Westminster. It alleged that the coals sold to Teague were delivered in Chancery-lane "and within 25 miles of the General Post Office;" that the sacks were weighed and found deficient, by reason of which a penalty of 5s. per sack was incurred. To this declaration the defendant demurred, on the ground that it did not state that the coals were delivered "from any ship, lighter, barge, craft, or warehouse in London or Westminster, or within 25 miles of the General Post Office."

Mr. Martin, for the demurrer, contended that by the statute it was not sufficient, in order to render a party liable to the penalty, that the coals were sold and delivered within the distance mentioned, but it was necessary that they should have come "from" a ship, &c. within that distance.

The COURT were of opinion that the view taken by Mr. Martin was the correct one. Judgment for the defendant.

May 8.

BAYLIS v. LAWRENCE.

*LIBEL.—Whether it is the duty of the JURY to tell the Jury whether the publication is a Libel or no Libel; or whether it is the province of the JURY alone.*

This was an action for libel tried before Lord ABINGER, when the jury found for the defendant. The alleged libel was published in a letter written by the defendant to a Mr. Jones, in which he stated that of late there had been great scarcity of hares in his neighbourhood, as well as on his own premises, and that because he had been in the habit throughout the season of shooting as many as nine or ten hares in the course of a week, whilst now he was not able to meet with even one. The letter then went on to say that a vast number of hares dead had some time been found on the defendant's ground having round their necks wires belonging to the plaintiff. The defendant, in answer to the question, pleaded a justification, that the allegations in his letter were true. A rule to set aside the verdict for the defendant, on the ground of a misdirection on the part of the learned Judge, was subsequently obtained. In leaving the case to the jury, the Judge had said, "Gentlemen, cannot tell whether this is a libel or not, or assist me?" whereupon the jury returned a verdict for the defendant. At the time the verdict was set aside that verdict was obtained, it was contended that the Judge ought to have explained to the jury that the publication was a libel, and then have left it to them to say to what extent

the plaintiff had been injured by the publication, and so to have governed the amount of damages to be awarded to the party.

Lord DENMAN said, that when the rule had been moved for, it had been contended that that Court had said it was the duty of a judge, in cases of the publication of an alleged libel, to tell the jury whether it was a libel or not. Now, with regard to that argument, as to its being the duty of a judge to say whether or not a publication was a libel, he had always taken the same view of the question as Lord Abinger had done in the present case. The jury alone were to say, on all the circumstances of the case, whether the publication complained of was or was not a libel. That was the law as laid down by the 32d of George III. It was very true, however, that that statute was of itself applicable solely to criminal libels, but where there was a rule peremptorily laid down for libels of one class, it afforded a principle for the guidance of the Court with respect to others; so that in fact the rule as to criminal and civil libels was the same. The learned judge, therefore, in this case had been correct in the course he had pursued, in so far as that it was not compulsory on him to tell the jury whether the publication was or was not a libel.

The other judges concurred.—*Rule discharged.*

#### COURT OF COMMON PLEAS.

*Trinity Term, 3 Victoria.*

This Court will, on Tuesday, the 23rd day of June next, hold Sittings, and will proceed in disposing of the business now pending in the Paper of New Trials on the same 23rd, and on the six following days of the same month, (Sunday excepted), commencing with the Country New Trials.

By THE COURT.

#### COURT OF EXCHEQUER—May 6.

*Sittings in Banco.*

PHILLIPS v. MAY.

**BILL OF EXCHANGE.—PLEADING, where the holder of the Bill is a person unknown to the Payee—NEW PLEA—Proper REPLICATION.**

This was an action on a bill of exchange, to which the defendant pleaded that before the commencement of the suit the bill in question was endorsed by the plaintiff to some person unknown to the defendant, who was the holder of the bill at the time the plaintiff sued the defendant.

*Replication* by the plaintiff—that the bill had been endorsed by him to one Robert Knapp-ton, by whom it was presented to the defendant for payment thereof, but that, being dishonoured, it had been returned to the plaintiff, who became again the holder of the same, and as such was entitled to sue upon it, concluding with a special traverse, that a person unknown to the defendant was the holder of the bill, as alleged by the defendant in his plea.

The defendant demurred to this replication, as offering a traverse of an immaterial circumstance.

Mr. *Humfrey*, for the plaintiff, urged that the plea was a new one, framed for the express purpose of delay, and as such would not receive much mercy at the hands of the Court. Though such was its character, it was still very difficult for the pleader to reply to it safely; it was, however, submitted that the traverse of the plaintiff was not a bad one.

The COURT, however, was clearly of opinion that the replication was bad, on the ground alleged by the defendant. It was perfectly immaterial whether the person was unknown to the defendant, who was the holder of the bill at the time the action was brought; and the proper answer to such a plea would have been to reply, that the said person in the said plea mentioned was not the holder of the said bill *modo et forma*, by which a good and sufficient issue would have been raised by the plaintiff. Leave, however, might be had to amend, on payment of costs.

#### COURT OF EXCHEQUER.

*Trinity Term, 3 Victoria.*

The Court will, on Wednesday, the 24th June inst., hold Sittings, and will proceed in disposing of the business now pending in the Paper of New Trials on the said 24th day of the said month, and the following days, viz. the 25th, 26th, 27th, 29th, and 30th June; and, on the 25th day of the same month, and the said following days, will proceed in disposing of the business now pending in the Special Paper, Dated this 16th June, 1840.

By THE COURT.

#### PREROGATIVE COURT—June 13.

WILL OF EDWARD STEPHENS, DECEASED.

**NEW WILL ACT.—CANCELLATION.—Whether a Will shall be considered as REVOKED under the Statute by the Testator drawing a Pen across his name, and also through**

*the attesting clause, which, under the old Law, would have been deemed a CANCELLATION.*

The testator had duly executed a will and codicil, but subsequently drew his pen through his own signature, through those of the two witnesses, and also through the attesting clause. By this paper he had bequeathed property to a large amount, and probate was now prayed for and opposed upon the ground that the testator had *revoked* his will.

Sir H. JENNER said, as "cancelling" is not contained in the new Will Act, though it was in the old law, as well as in the Statute of Frauds, the question was raised whether the will, as propounded, had been revoked by the testator. By the new Will Act it is provided that a will can only be revoked by "burning, tearing, or otherwise destroying;" by another paper executed according to the provisions of the act; or by the fact of marriage. The Court said there could be no doubt that the deceased had drawn his pen through the names on the paper, as it was found immediately after his death in his own repository. The next point was, would this act amount to a revocation. He adverted to the recommendations of the real property commissioners, on which the new Will Act was partly founded, from which it was pretty clear that the word "cancelling" was advisedly left out of the new Will Act by the legislature. The new act abolished all implied or presumptive revocations. Could the Court hold that those papers had been cancelled *animo revocandi*. The intention of the legislature must, in introducing the words "burning, tearing, or otherwise destroying," have meant "or otherwise destroying," to be *de ejusdem generis* with the two modes first set forth for revoking a will. The word "cancelling," by no means an unequivocal word, had been left out of the act; and though under the Roman law many ways existed for revoking wills, the new act had limited the modes of operation. The legislature having advisedly left out the word "cancelling," and it having prescribed the mode by which wills might be revoked, he must hold that the drawing a pen by the testator through his name, did not amount to a revocation. If, therefore, the facts pleaded in the allegation now before the Court were proved, it must hold the will valid.—Allegation ordered to be admitted to proof.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, June 27, 1840.

ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

# The Legal Guide.

VOL. IV.]

SATURDAY, JULY 4, 1840.

[No. 10.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 116.)

WE will now turn attention to the doctrine of NOTICE as applied to CARRIERS, the first recognition of which was made in 15. (a) It was formerly a question of considerable doubt how far common carriers and could by contract limit their responsibility, upon the ground, that exercising a public employment they were bound to carry a reasonable compensation, and had no right to change their common law rights and duties, but these special contracts are now

fully recognised; (b) and in order to put an end to nice questions of liability and lay down a broad rule of dealing between carriers and owners of property which should be suited to the changed circumstances of modern society, the statute, 11 Geo. IV. and 1 W. IV. c. 68, was passed, entitled, "An act for the more effectual protection of mail contractors, stage coach proprietors, and other common carriers for hire against the loss of or injury to parcels or packages delivered to them for conveyance, or custody, the value and contents of which shall not be declared to them by the owners thereof." This is the declared object of the

(b) *Clay v. Willan*, 1 Hen. Black. 298. *Nicholson v. Willan*, 5 East, 507. *Harris v. Packwood*, 3 Taunt. 264. *Lowes v. Kermode*, 8 id. 148. *Evans v. Soule*, 2 Mau. & Selw. 1. *Balsam v. Donovan*, 4 Barn. & Ald. 21. *Riley v. Horne*, 5 Bing. Rep. 217. *Macklin v. Waterhouse*, id. 212.

So stated by BURBROUGH, *J. Smith v. Horne*, 10 Taunt. 146.

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L



statute, and the effect of it is to limit the responsibility of mail contractors, stage coach proprietors, and other common carriers *by land* for hire to £10. in case any of the property specified in sec. 1, should be lost, unless its nature has been declared and a proportionately increased rate of charge paid, or a satisfactory engagement given for payment, and which shall be accepted by the person receiving the package. The statute directs a notice of such increased charges to be affixed in legible character in some public and conspicuous part of the office, warehouse, or other receiving house where the packages are received; and all persons sending parcels containing such valuable articles are made bound by such notice without further proof of the same having come to their knowledge; (c) and when the value has been declared and an increased charge paid or an engagement to pay it accepted, the carriers are to give receipts for the package acknowledging it to have been *insured*, and are to lose the benefit of the act if they do not give such receipt or affix the notice required; (d) but nothing in the act is to be deemed to protect carriers from liability to answer for loss or injury to any articles arising from the *felonious acts* of any *servant* in the employ of a carrier, or to protect such servant from liability for any loss or injury occasioned by his personal neglect or misconduct. (e) This leaves *gross negligence* by the carrier or his servant still open to the *common law*. Carriers cannot by any special notice exempt themselves from all responsibility in cases of gross negligence or fraud; nor can they by demanding an exorbitant price compel the owner of the package to yield to unjust and oppressive limitations of their rights, and they will be made liable for the fraud or negligence of their servants. (f)

Most of the writers upon this class of bailments have directed their attention to

(c) Sec. 2. (d) Sec. 3. (e) Sec. 8.  
(f) *Garrett v. Willan*, 5 Barn. & Ald. 57.

the law as it stood *before* the passing of the statute, with the volume of cases that supported it. At *that time* unless there was strong proof of the limitation by the carrier of his *common law* liability having come to the knowledge of the party sending the parcel or of sufficient efforts having been made by the carrier to bring it to the knowledge of the former, he was liable for the loss or injury of the property sent. The difficulties in that way at *that time* arose in fixing the plain meaning with knowledge of the limitation by the carrier; and what were sufficient efforts to bring it to his knowledge was a question for jury. (g) These difficulties are now at an end if the provisions of sec. 2 of the statute be observed. But "for the loss or injury of any articles and goods in respect whereof they may not be entitled to the benefit of this act," (h) they are declared to be "liable as at the common law, any public notice or declaration by them made and given contrary thereto or in anywise limiting such liability notwithstanding." Carriers by land can now limit their liability in the carriage of any property to a less sum than £10. A case (i) was brought before the Court of Exchequer in 1834, (after the statute,) where a looking-glass of above £10. value, marked on the outside, "plate glass, keep this up," was delivered at the office of a common carrier in London and booked there to go by his waggon to Lymington: the booking was paid for, its value was neither asked nor declared, nor was any increased charge or engagement to pay accepted by the carrier. It was of large size and weighed 5 lbs. The carrier had a notice in his office directed by the statute. When the package arrived at Lymington, the glass was found to be broken. The jury found *negligence*.

(g) *Lesson v. Holt*, 11 Stark. 86. *Kerr v. Macdonald*, 2, Id. 53. *Davis v. Willan*, id. 279. *Butler v. Camp*, 415. *Clayton v. Hunt*, 3 id. 87. *Horne*, 3 Bing. Rep. 2. *Macklin v. Watkin*, Bing. Rep. 212. *Gouger v. Jolly*, Holt's C. N. R. (h) Sec. 4.  
(i) *Owen v. Burnet*, 4 Tyrw. 133.

and gave the plaintiff a verdict for the value of the glass. A point was, however, reserved upon the statute, the value and nature of the package not having been declared by the person delivering it, and no increased charge or engagement to pay having been accepted. The point was argued upon a rule to enter a nonsuit, and BAKER, B., in delivering the judgment of the court said,

We entertain no doubt that this case is within this act. The article carried falls within the words used in the first section, so that unless we see something there restraining its operation to particular descriptions of glass, and excluding it from this particular one, the act applies. Now it has been argued by the plaintiff that the section does not apply to the glass article in question, because it was of considerable size and weight; and it appears from the preamble to section 1. that increased risk had arisen to carriers from the practice of sending by public conveyances by land for hire packages containing money, bills, notes, jewellery, and other articles of great value, in small compass, without such notice to them of their nature and value as would enable them by due diligence to protect themselves against loss by predation. But is the enacting part controlled by those words of the preamble, "articles of great value in small compass?" If it had been the intention of the Legislature to confine the provisions of section 1. to the articles of small size but great value there enumerated, they would have been found not only in the preamble, but in the enacting part of that section. The terms of section 1. are, however, general, and include everything. Among the articles which it enumerates is glass, the value of which increases with its size; but it also mentions plated articles, the value of which at least, as compared with plate, is not in any degree commensurate with the size of the article. The terms of the section are general, and there is no reason why it should not be applied

to any glass article if exceeding £10. in value. The carriage of glass requires particular attention, and imposes peculiar risk on the carrier, from the brittle nature of the commodity; and the term "glass" in the act being unlimited, we should not be justified in saying that it applies to small glasses only, and not to glass of every description. The object of the Legislature was to enable the carrier to provide against the common accidents of a journey, and not merely against theft. Then there is a stipulation applicable to this particular article of glass, that the carrier shall not be liable unless the nature and value of the article be declared, and an increased charge or an engagement to pay it be accepted by the person receiving the package. That had a twofold object, viz. the apprising the carrier of the nature of the article, in order to his giving it the greatest degree of protection on the road, and the giving him increased compensation for his greater risk and liability. But in this case he was only paid according to the rate for an ordinary risk, though notice was fixed in the office of the terms on which glass would be carried. I think that this case is within the act, and that, therefore, the plaintiff cannot recover for the loss sustained; no wrongful conduct or *gross negligence* amounting to a *misfeasance* (k) having been established to take the case out of the protection intended by the statute. *Gross negligence* has in many cases been held to affix a liability on a carrier to which he would not have otherwise been subject. Thus had the defendant dashed the glass on the ground, that wrongful act would have made him liable. In one case where the carrier was held liable, as for gross negligence he delivered the article to a wrong person, (l) in others a mode of conveyance different from that agreed for was substituted.

(k) The absence of that care which a prudent man would take of his own property. See *Bodenham v. Bennett*, 4 Pri. 31. *Duff v. Budd*, 3 Brod. & Ring. 182.

(l) *Birkett v. Willan*, 2 B. & Ald. 358; *Duff v. Budd*, ante.

tuted, (m) and in another the article was carried to a point beyond the right one, or as in *Smith v. Horne* (n) it was left unprotected in a cart in a street in London. In all those cases *misfeasance* had taken place; whereas here there is no *misfeasance* or gross degree of negligence throwing the responsibility on the carrier notwithstanding the act. The supposed negligence here imputed is that of carrying a package containing glass on a truck for a mile, along a hard smooth road. But if that mode of carriage was not the safest, still, had the carrier been informed of the value, he might have used a greater caution, amounting to extraordinary diligence.

VAUGHAN, B., said,—On the plain construction of this act, in order to make the carrier liable, the consignor is bound to make a declaration to him of the nature and value of the goods to be conveyed, when they are of any of the kinds enumerated in sec. 1, and that so doing is a condition precedent to any right to sue the carrier. Had *gross negligence* appeared, *the carrier would have been liable, notwithstanding the act*, and the rule for the nonsuit was made absolute. (o)

(To be continued.)

#### PROBLEM X.—VOL. IV.

##### CRIMINAL LAW.

CONSTRUCT MALICE AFORETHOUGHT to sustain an INDICTMENT FOR MURDER.

To constitute this CRIME these things must concur: that it be committed by a person of sound memory and discretion at the time; it must be an unlawful killing; the person killed must be a reasonable creature, in being, and under the Queen's peace; and lastly, it must be done with *malice aforethought*, which may be implied as well as expressed.—4 Blacks. Com. 195.—See *Western's Com.* 203.

(m) Viz. stage-coach for mail, *Garnett v. Willan*, 5 B. & Ald. 53; *Sleat v. Fagg*, 5 Id. 342; *Wright v. Snell*, 5 Id. 350.

(n) 8 Taunt. 144; Holt's N. P. C. 643, in *Batson v. Donovan*, 4 B. & Ald. 21; the parcel was left in the mail in the street at *Berwick-on-Tweed*.

(o) S. C. 4 Tyrw. 141, 2, 3.

TO THE EDITOR OF THE LEGAL GUIDE.

#### ANSWER TO PROBLEM 7. VOL. 4.

POSSESSIO FRATRIS—Describe it.

*Possessio fratris*, is where a man hath a son and a daughter by one woman, and a son by another woman, and dies; if the first son enter upon the estate of the father and die seised without issue, the daughter shall have the land as heir to the brother, although the son by the second woman is heir to his father; for *possessio fratris de feodo simplici facit sororem esse heredem*; but if the eldest son die without issue, not having made an actual entry and seisin, the younger brother by the second wife, as heir to the father, shall enjoy the land, and not the sister. Sir Edward Coke, in vol. i. p. 15, of his Commentary upon Littleton, says concerning *possessio fratris de feodo simplici facit sororem esse heredem*, four things must be observed:—1stly. That the brother be in actual possession. 2ndly. *De feodo simplici* excludes estates tail. 3rdly. *Facit sororem esse heredem*. So as *soror est hæres facta*, and therefore some act must be done to make her heir; and the younger son is the heir born (or *hæres natus*) if no act be done to the contrary. And although the words be *facit sororem esse heredem*, yet this extends to the issue of the sister, who will consequently inherit before the brother by the second wife. 4thly. Of dignity no possession of the brother will make the sister inherit; but the younger brother being heir to the father will inherit the dignity inherent to the blood, as heir to him that was first created noble. *Possessio fratris* does not take place where land is purchased by the Crown, for there the younger brother will, in preference to the daughter, inherit the lands so purchased; nor is the half blood an impediment to the descent of land belonging to the Crown. (1)

RICARDUS.

TO THE EDITOR OF THE LEGAL GUIDE.

The following investigation of the Prescription Act, and the points in the Act, which doubts have arisen, and cases decided they are offered for insertion in the LEGAL GUIDE.—*Temple, June, 1840.*

A DISCUSSION of the PRESCRIPTION ACT (2 & 3 W. IV. c. 71,) and of the cases decided thereon, with a few preliminary remarks on customs and prescriptions. LORD COKE, in his *Institutes*, gives

(1) See *Cro. Car.* 347. 601.; *Benson, & A. Britton*, c. 119.; *Fleta*, b. 6. c. 1.—Ed.

following definition of these two classes of rights:—

"J. S. seised of the manor of D. in fee prescribeth thus, that J. S. his ancestors, and all those whose estate he hath in the said manor time out of mind of man had and used to have common of pasture in such place, &c. being the land of some other, &c. as pertaining to the said manor; this properly, we call a prescription."

"A custom is in this manner:—a copyholder of the manor of D. doth plead that within the said manor there is and hath been such a custom time out of mind of man used hat all the copyholders of the said manor ave had and used to have common of pasture, &c. in such a waste of the Lord parcel f the manor, &c."

The claim by custom is much larger than hat by prescription; the latter claims the ight as being attached to one particular state, of which the party claiming is the roprietor for the time being: the former claims it as appertaining to a whole manor r district in which the party claiming is a opyholder or inhabitant. Thus in Gateward's case (a) it is said, "Another difference was taken and agreed between a prescription which is always *alleged in the person*, and a custom which always ought o be *alleged in the land*."

It follows from this difference that a prescription can be released, whereas a custom, attached to the land, cannot. A prescription can confer a more extensive privilege an a custom can. See Gateward's case. A custom can only give an *easement in alieno solo*, (1) and not a *profit a prendre*, while a prescription can give either.

Thus in *Blewett v. Treggoning*, (b) PATRICKSON, J. says: "It is clear that there cannot e a custom to take a profit in *alieno solo*." And in *Grimstead v. Marlowe*, (c) it was

held that a custom for the inhabitants of a particular place to claim a profit in *alieno solo* is bad, and a right to take such a profit is claimable by *prescription only*.

This rule appears to be at variance with the definition of a custom quoted above from Coke's Inst., where he clearly states as a custom the privilege of copyholders to common in the Lord's waste, an undoubted case of a *profit a prendre*.

This apparent contradiction is accounted for in Gateward's case, where it was resolved, "that copyholders in fee or for life may by custom of the manor have common in the demesnes of the Lord of the manor, &c. For a copyholder hath a customary interest in the house, &c. and therefore he may have a customary common in the Lord's wastes. And in such case he cannot prescribe in the name of the Lord, for the Lord cannot claim common in his own soil, and therefore of necessity such custom ought to be *alleged*."

And in *Grimstead v. Marlowe*, BULLER, J. says: "Where a profit is to be claimed out of another man's soil, it must be alleged by way of prescription, and not by custom, unless in the case of a copyhold tenant against his Lord, or where the party pleading is a stranger to the title." (2)

It may be useful to give a case in which there has been a question as to what are and what are not *profits a prendre*. In *Blewett v. Treggoning*, (where most of the cases on the point are collected in the arguments of Counsel,) a right to take sand which drifted from the sea-shore on the adjoining lands was held to be a right of this description.

In *Manning v. Wasdale*, (d) the privilege of washing and watering cattle at a pond,

(2) As in *Starr v. Rookesby*, Salk, 335 case, for that he was possessed of a close, adjoining to the defendants, and the tenants and occupiers of the defendant's close had time out of time used to repair the fences, &c. and held good, because it was impossible for the plaintiff, who was a stranger, to set forth the particular estate, interest, and title of the defendant.—EDITOR.

(d) 3 Adol. & Ell. 758.

(a) 6 Rep. 59, b.

(1) As a right of way.—EDITOR.

(b) 3 Adol. & Ell. 554.

(c) 4 Term Rep. 717.

and of taking and using the water for culinary and other domestic purposes was held to be a mere easement.

On this point it seems only necessary to add, that a prescriptive right must originate in a real or supposed grant; but a customary right is gained by the unmolested repetition of the exercise of the right—either class of rights must have existed for a certain number of years; this number has been regulated by the 2d & 3d W. IV. c. 71, and will now be discussed.

The difference in the nature and origin of a custom and a prescription having been briefly touched upon, it is proposed now to discuss the Act of Parliament (2 & 3 W. IV. c. 71,) which regulates the number of years which must have elapsed before such rights can be considered complete and pleadable in bar of any action brought against any person on account of his exercise of them. Section 1, (reciting in the preamble the inconvenience and injustice arising from the former rule, that time immemorial should be considered to denote the whole period of time from the reign of Richard I. inclusive,) enacts, "that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be enjoyed or taken from or upon any land, &c. (except such matters as are herein specially provided for, and except tithes, rents, and services,) shall where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of 30 years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken and enjoyed at any time prior to such period of 30 years; but, nevertheless, *such claim may be defeated in any way in which the same is now liable to be defeated.* And when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of 60 years, the right thereto shall

be deemed absolute and indefeasible *unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made for that purpose by deed or writing.*" (3)

Several sentences in this section require remark.

*First*—"Enjoyed by some person claiming right thereto." These words will be best explained when section 5 is discussed, as they are closely connected in meaning with that section.

*Secondly*—"Such claim may be defeated in any way in which the same is now liable to be defeated."

In *Bright v. Walker*, (c) PARKER, B. explains these words:—"It (the right claimed) may be answered by proof of a grant, or of a license given, or parol for a limited period, comprising the whole or part of the 20 years, or of the absence or ignorance of the parties interested in opposing the claim or their agents during the whole time that it was exercised."

*Thirdly*—"The right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made for that purpose by deed or in writing."

These words have been construed to mean that an enjoyment by a person claiming right thereto without interruption for 60 years becomes absolute, and they depend therefore on the meaning of the words, "enjoyment by a person claiming right thereto," which, as before remarked, will be explained when section 5 is discussed.

Section 2 is expressed in the same terms, and refers to rights of way and other easements, or to any water-course, or the use of any water; but the respective periods are 20 and 40 years.

(3) Evidence of an enjoyment of a right of pasture for 28 years is not sufficient for a jury to presume an enjoyment for 30 years, as stated in a note under the statute, *Appleyard v. Bayley*, 8 Adol. and Ell. 101. — EDITION. (c) 1 Cro. Misc. at B. 319.

The explanations necessary for the clear understanding of section 1, will apply with equal force to section 2. In fact most of the cases have arisen on the latter section.<sup>(4)</sup>

Section 3 differs from the two previous sections,—it relates to the use of light, and enacts that when the access and use of light shall have been actually enjoyed for 20 years it becomes absolute, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

The words, “by any person claiming right hereto,” which are inserted in the first and second sections, are omitted in the third. Hence the actual use of light, although by annual license, &c. for 20 years, makes the right absolute.

Section 4 regulates the time during which the respective periods of years are to be considered to run, and defines what kind of interruption is necessary to stop the right.

“That each of the respective periods of years herein before mentioned, shall be deemed and taken to be the period, next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice hereof, and of the person making or authorising the same to be made.”

“The period next before the commencement of some suit, &c.” A question has been raised as to the form of a plea, drawn

upon this clause. In *Wright v. Williams*,<sup>(f)</sup> the form of the plea was, “for 40 years next before the commencement of this suit.” The plea was demurred to, because the time was not alleged to have run before the act complained of. It was contended, in support of the demurrer, that if the time was to run before the commencement of the suit, this absurdity would follow that the character of the act complained of, whether it be rightful or wrongful cannot be known at the time by the party doing it, but depends upon a subsequent event.

The Court, however, decided that the time runs before the commencement of the suit, and therefore that the plea was rightly expressed.

The same averment was made in the plea in the case of the *Monmouthshire Canal Company v. Harford*.<sup>(g)</sup>

In *Jones v. Price*,<sup>(h)</sup> the averment in the plea was “for 30 years before the commencement of the suit,” the word next being omitted, for which omission there was a special demurrer, which was overruled. TINDAL, C. J., says—“It seems to me that the 4th section of the statute is nothing but an exposition of the proof required to establish the right. It is a mere question of evidence; and if the plaintiff joins in the issue now offered, the defendant will not be able to get out of the proof of enjoyment of the right for thirty years next before the action.”

Lastly, in *Richards v. Fry*,<sup>(i)</sup> the point was again raised, and the Court of Queen's Bench adhered to the decision of *Wright v. Williams*. In their judgment the Court observe:—“We do not feel that the case of *Jones v. Price* at all militates. Against this decision that case merely establishes that the averment ‘of 30 years before the commencement of the suit,’ means ‘30 years next before the commencement of the suit;’ in other words, that the omission of the word ‘next,’ does not alter the sense.”

(4) In order for a person to maintain the benefit of sec. 2, he must prove the enjoyment of the easement as such, and as of right, for a continuous period of 20 years, and therefore unity of possession; for part of that time will destroy the right, see *Onley v. Gardiner*, 1 Mee and Wels. 496. The statute only applies to such rights as would, before the Act, have been acquired by the presumption of a grant from long use. See *Wright v. Gull*, 5 id. 233.—EDITOR.

(f) 1 Mee & W. 97.

(h) 3 Bing. N. C. 52.

(g) 1 Cro. Mee & R.

(i) 7 Adol. & Ell. 696.

From these cases, therefore, it is clear, that the averment in the plea must be either "for — years next before the commencement of the suit," or "for — years before the commencement of the suit," omitting "next," and that the averment, "for years next before the said time in which, &c." is demurrable. The Court, in the case of *Richards v. Fry*, say—"We cannot think, as was suggested at the bar, that both modes of averment are correct, and either may be adopted at the option of the pleader. The periods in the two averments are certainly quite different, and the evidence necessary to support them manifestly not the same. We shall not attempt to obviate the difficulties which have been suggested, but adhering to the express words of the statute and the decision in *Wright v. Williams*, with which we fully agree, we hold that the only correct averment is, 'next before the commencement of this (or possibly some other) suit.'"

The Court, by the words, "or possibly some other suit," seem to suggest that a plea stating that the right has been enjoyed for years before the commencement of some other suit in which the question had been decided in favour of the defendant, would be a good plea in a subsequent action on the same right.

### Law Reports.

#### COURT OF CHANCERY.—June.

##### ATTORNEY GENERAL v. CLEEVE.

PRACTICE.—ISSUES *when they shall be taken pro confesso.*

An issue was directed in this case in 1826 by the Vice-Chancellor, and the order directing it was appealed from and affirmed by the Lord Chancellor in 1831, but by some accident the issue had not been tried. An application was now made for an extension of the time for trial to the next spring assizes, which was resisted.

The Lord CHANCELLOR observed, that it was extraordinary that in 1840 a party was not prepared to go to trial of an issue directed so many years ago. There were yet near three months before the next assizes, and that was quite suf-

ficient time for preparation; and, if the party should not then go to trial, the issue should be taken *pro confesso*. And he wished it to be understood that all issues directed for the future should be taken *pro confesso* against the party who declined to go to trial at the assizes for which it was appointed.

#### ROLLS' COURT.—June 4.

##### ENGLAND v. DOWNS.

HUSBAND and WIFE.—FRAUDULENT SETTLEMENT.—*What shall be considered acquiescence to prevent relief.*

This was a suit instituted by the plaintiff, Sarah, the wife of Alfred England, to carry into execution the trusts of a marriage settlement made by her late mother, previous to her marriage with the defendant, John Thiery Broad.

It appeared that Joan Mason was the widow of William Mason, formerly of the city of Bristol, victualler; and he by his will, dated the 16th of September, 1815, gave the whole of his property, both real and personal, to his wife, whom he made his sole executrix. The testator died on the 9th of December, 1816, leaving his wife, who, on the 3d of January, 1817, proved the will in the Episcopal Court of Bristol, and Sarah, Jane, and Eliza, his three daughters, surviving. The widow continued to carry on the business of her late husband, and by indentures dated the 4th and 5th of August, 1818, she conveyed the property which had been given to her by the will of her late husband to Messrs. Downs and Alexander, as to a freehold piece of arable land, situate near Magdalen Chapel, in the parish of Saint Paul's, upon trust for such persons as she should appoint, and subject thereto for herself for life, with a remainder to her in fee; and as to a freehold house in Bath-street, and certain leasehold premises in Thomas-street, Bristol, and in Tower-lane, in the parish of Christchurch, upon trust for her separate use for life, independent of any husband she might marry; and after her decease, as to the house in Bath-street, for her daughter, the plaintiff, Sarah the wife of Alfred England, for life, with a remainder for her children; and as to the houses in Thomas-street and Tower-lane, as to one moiety thereof for her daughter Jane, the wife of Adam Barton; and as to the other moiety, for Eliza, the wife of Cyrus Davis. The trustees also were to stand possessed of the furniture, stock in trade, brewing utensils, and other effects, for the separate use of Joan Mason for life; and after her death upon trust to sell the same, and divide the purchase-money equally between her daughters. At the time of executing this deed, it was alleged that Mrs. Mason was admitting the addresses of John Thiery Broad: the marriage, however, took place on the 26th

October, 1818, and immediately afterwards Mr. Broad came to reside at the house, and continued to carry on the business of a victualler till 1822, when he sold the business, stock in trade, &c., and out of the proceeds paid various debts. Among them a mortgage upon a part of the real estate for £200, created by the testator in 1807. Mrs. Broad, in pursuance of the power in the deed of settlement, mortgaged the piece of real land to Mr. Strickland, but afterwards sold the same, and kept the purchase-money. On the 14th of March, 1833, Mrs. Broad died, leaving her three daughters by her former husband, and her husband Broad her surviving.

The present bill was filed by Mrs. England in January 1836, praying that the trusts of the settlement might be carried into execution, and for account against the trustees, and charged the defendant Broad that he was fully aware of the settlement before his marriage, and gave his assent to it. Broad by his answer denied this charge, and insisted that the settlement was a fraud upon his marital rights, and void against him; that he knew nothing about it until some time after his marriage, when he first learned that his wife had secretly and without his knowledge, privity, or consent, executed the settlement, and that he had never recognised it.

The Trustees by their answer admitted having executed the settlement, but denied acting in the trusts thereof.

It was proved by Mr. Davies, the solicitor who prepared the settlement, that he did not think it was prepared with the privity of Mr. Broad, nor did he think that its existence was communicated to him before the marriage, and that it was Mrs. Broad's directions that it should be prepared and executed without his knowledge. That after the marriage, Mr. Broad took possession of the business, stock in trade, &c. and carried it on as the absolute owner; that he was made acquainted with the existence of the settlement soon after the marriage, for that in Nov. 1818 himself and his wife laid a case before counsel as to the possibility of revoking it, but he never took any steps for that purpose, and Mrs. Broad afterwards dealt with the settled property uncontrolled by her husband in the manner before stated.

Mr. Cooper stated the case, and asked that the deed of settlement might be established, and that the trustees, and also John Thierry Broad, might account for the personal estate, and also for the rents and profits of the freehold and leasehold premises, and that new trustees might be appointed.

Mr. Kindersley, for Mr. Broad.—It had been said that the simple concealment of facts which took place during the courtship did not constitute fraud, but it was proved that the professional gentleman who prepared the deed was requested

not to communicate the facts; it had also been said that it was a moral duty upon the parent to provide for her children by the first marriage; but the deed which had been executed went much further—it was in effect a settlement upon herself to the exclusion of all interference on the part of any person whom she might marry. The bill charged that Mr. Broad was aware of the settlement at the time of the marriage, but this was inconsistent with his acts, since after the marriage he had dealt with the property as his own, selling and buying stock, and ultimately disposing of the business, stock in trade, &c. and receiving the purchase-money. In this the trustees did not interfere, and the purchaser had actually employed Samuel Alexander to make the valuations. A part of this purchase-money, it was true, had been employed in payment of the mortgage which had been made by the testator in 1807, but the surplus had been retained by him. It was now asked that he should refund this money, that it might be divided among the daughters. But when a man pays his addresses to a woman it must be taken that he knew she had property, and if she was bound by one moral duty she was equally bound by another, and he was entitled to the information that she intended to provide for her daughters, who had no right to receive the benefit which had been derived from his labour in carrying on the business. In 1831, however, when Mrs. Broad sold some part of the real estate, her husband had been made a party; he refused to execute the deed. It had, however, been carried into effect, and she had received the purchase-money. Upon the whole he submitted that the bill must be dismissed with costs. He cited *Weeks v. Maillardet*, 14 East, 568.

Mr. Tinney, for Messrs. Downs and Alexander, denied that they knew anything of the marriage, or the duties imposed upon them by the trusts. Mrs. Broad, however, was a *femme sole* with respect to the property, yet, because there had been a sale, the court was asked to presume that it was made by them. He denied, therefore, that the trustees were answerable.

Mr. Pemberton, in reply, said that in the opening it was supposed that the evidence taken on behalf of J. T. Broad would have been gone into. It had, however, been withheld. At law the settlement was good, and so it was in equity, unless the husband could say it was a fraud. This it rested with him to prove incontestably, and show that there had been a misrepresentation or suppression of the truth, or an allegation of untruth. It was through the marriage only he could become entitled to the property; and he must establish the fact of his having inquired and ascertained his reason for believing that Mrs. Mason had property, and that it was the foundation upon which he contracted the marriage. If



he had been content to take the woman without fortune, he could not afterwards complain of the deed previously executed. That, however, could not apply to the real estate; the only right he could have possessed was for her life, or as tenant by the courtesy. But when the deed was executed there was no evidence to show that Mrs. Mason had any marriage in contemplation; it was not even proved that Mr. Broad knew the woman. Ingenious arguments had been used, confusing the words courtship and contract: but he denied that any acquaintance existed with Mr. Broad; and it must be recollected that the strictest evidence was necessary to set aside a solemn deed, and no equities growing out of the contract could arise until that contract had been established. Indeed, it was not till after the marriage that Mr. Broad had discovered the property of his wife; and it was not till then that he insisted that it was in fraud of his marital rights. The learned gentleman then said that Mr. Broad had become aware of the settlement immediately after the marriage, the provisions of which he had acquiesced in without having taken a single step to set them aside; and with regard to the trustees, he did not think they could be heard to say that the deed was a nullity. They were bound to protect the property. They had accepted the trusts, and were bound to communicate them to Mr. Broad. The decree, therefore, he asked, was to inquire of what the property consisted, and for an account. He cited *Goddard v. Snow*, (1 Russ. 485,) and *St. George v. Wake*, (1 Myl. and K. 623.)

LORD LANGDALE, after observing that it was material to know when Mr. Broad first knew of the settlement, and also in what manner he had dealt with the property, took time to consider his judgment.

#### June 5.

LORD LANGDALE, after observing that there were cases in which settlements made by a woman upon the children of a former marriage, previous to a second intended marriage, had been held not to be a fraud upon the marital right of the intended husband, said, that in the present case the settlement had been made two months before the marriage; and it had been proved by William Davis, that Mrs. Mason told him she was about to be married, and that she did not wish the fact of her having made the settlement to be communicated to her intended husband. It had been said that John Thiery Broad was not the husband alluded to; and it was to be observed, that, though the interrogatory specially mentioned him by name, the answer of the witness was, that she did not wish it to be communicated to her intended husband. However probable, therefore, it might be that Mr. Broad was that person,

still it was not proved. The treaty might have commenced subsequent to the settlement, and though there was proof of a desire to conceal it at the time of the marriage, still there was no proof that such desire continued until the marriage: she might have made the settlement to avoid importunity, or to prevent any yielding on her part; and so that she might have an opportunity when applied to, of saying, you must take me with the settlement. It had been said that J. T. Broad was the owner of the goods, stock in trade, &c., but he (Lord Langdale) did not think that the settlement was executed during the treaty, or that she desired it to be concealed: all these allegations were consistent with the evidence. Mr. Broad had sold the goodwill, stock, furniture, and effects, had applied £200., a part of the purchase money, in payment of a mortgage upon the premises in Bath-street. So far, then, Mr. Broad himself acquiesced in the terms of the settlement, or, at any rate, in right of his wife, and all he said was, that the deeds were given up to him, and that he paid the rent of the leasehold premises. In 1829, his wife, Joan Broad, mortgaged a part of the freehold premises to Mr. Strickland for £160., and in 1831 she sold the same premises, under a power in the deed, for £364., and received the purchase money. Mr. Broad was fully aware of this, and if it was fraudulent, though he did not actually join in the sale, still he acquiesced in what was done. On the 29th of January, 1836, this bill was filed: Mr. Broad, however, had filed no bill, or taken any proceedings to impeach the settlement; and under the circumstances, therefore, and considering that there was no proof of the treaty of marriage when the deed was executed, or of its concealment; or if there was, it appeared that Mr. Broad knew of it shortly after the marriage, and that he had not attempted to set it aside, he considered that he was bound to give the plaintiff relief, and he did so upon the evidence which had been read to the court. The case of *Weeks v. Maillardet* he did not think applied here. It was said there was more evidence; but that he had not read. He thought also there would be no difficulty in ascertaining of what the settled property consisted. The decree, therefore, would be that the settlement must be carried into execution, and an account must be taken of the stock sold, and of the value. There must also be an inquiry if any of the parties had been in possession of the freehold, and who; and if it should be found that any of the parties had been in possession, then there must be an account taken of the rents and profits which they had received. With regard to the plaintiff's costs they must be paid by Mr. Broad up to the hearing; but the costs of the other parties must be reserved. The subsequent costs must be paid by the parties.

June 16.

CANE v. MARTIN.

**SOLICITORS' LIEN UPON PAPERS IN A CAUSE—**  
**RIGHT of a SUITOR whose SOLICITOR with-**  
*draws himself from the conduct of a cause*  
*to have the free use of the papers held by*  
*that Solicitor, so far as they may be re-*  
*quired in the prosecution of the cause, not-*  
*withstanding his LIEN upon them for COSTS,*  
*and that such free use extend to his NEW*  
**SOLICITOR.**

Mr. Renshaw, for the plaintiffs, stated that Mr. Elderton, the former solicitor for the parties, had refused to proceed with the suit unless his bill of costs was paid. The parties were poor, and were unable to discharge the amount, and they were unable to proceed without the papers. Mr. Broughton was ready and willing to undertake the cause on their behalf, and the object of the present petition was, that the papers might be delivered up to Mr. Broughton upon his giving to Mr. Elderton an undertaking either to pay the costs, or to return the papers within a limited time after the hearing. The present application was made on the authority of *Heslop v. Metcalf*, 3 Myl. & Craig, 183, in which the LORD CHANCELLOR had made a similar order to that now asked. (a)

Mr. Elderton said the facts of the case cited did not sufficiently disclose the grounds upon which the order had been made, but they did not appear to agree with the circumstances involved in the present application. The success of this case depended upon the parties being tenants in common. It appeared that they were joint tenants, and upon a demurrer being put in by two of the defendants, it had, upon argument, been allowed. This was a most ungracious application. Inquiries had been made by Mr. Broughton into the facts of the case, and a brief of the readings had been lent to him by Mr. Elderton, who was money out of pocket; but still, if Mr. Broughton would pay £20. he might have the papers. Before, however, the court made any order, he trusted that some better security than a mere undertaking would be given to his client.

LORD LANGDALE said that there was a double inconvenience in this case—the one on behalf of the solicitor, who was money out of pocket, and had a lien upon the papers; and the other on the part of the plaintiffs, who, for want of the papers, were obstructed in proceeding with the suit. Another solicitor, after looking at the pleadings, thought there was a probability of success, and the result was this application. The case which had been cited was an authority, and he thought he must make the order; but it was necessary that the solicitor coming into the suit should undertake to prosecute it with due diligence. If

Mr. Elderton, therefore, would allow Mr. Broughton to have access to the papers, for the purpose of examining them, in order that he might take advice upon the course he ought to pursue, he would not now make any order, but permit this application to stand over. If, however, after examination, Mr. Broughton was willing to give the undertaking, he would make the order.

The application was then ordered to stand over.

(a) Lord COTTENHAM in that case observed, —Since this question was first brought on, I have taken the opportunity of looking at all the cases, and I have now to consider whether I will act on *Colegrave v. Manley* (1 Turn. & Russ. 400), or will undo what Lord ELDON did in that case. The point was there directly raised whether, if the court is of opinion that there should be a production, the order ought to go beyond giving liberty to inspect and take copies. Lord ELDON, in his judgment, first considered the question arising upon the sale of his business by the solicitor, an act which he held to amount to a discharge by the solicitor of himself. His Lordship says, “I look upon Mr. Raphael as having dissolved the connection of solicitor and client; for it is not enough that he was willing to superintend the plaintiff's business. Now, where the solicitor discharges himself, the rule is quite different from what it is where the solicitor is discharged by the client;” and afterwards he adds, “So far as the use of papers is concerned, the suitor, when his solicitor discharges himself, must have his business conducted with as much ease and celerity, and as little expense, as if the connection of solicitor and client had not been dissolved.”

It is true that in several preceding cases, where the solicitor had discharged himself, orders were made, giving to the client the right of inspection only: but it cannot be supposed that Lord ELDON, who, with all his experience, had decided *Colegrave v. Manley*, in the year 1823, was not acquainted with the prior authorities. In *Cresswell v. Byron* (14 Ves. 271), his Lordship intimates, in the form of a doubt, his opinion that a solicitor discharging himself cannot claim a lien; an expression which must be understood as meaning, not that the solicitor loses the lien altogether, but that he cannot set it up so as to prevent the client from proceeding in the cause. And his Lordship's language in *Lord v. Wormleighton* (Jac. 580) is to the same effect.

Undoubtedly that doctrine may expose a solicitor to very great inconvenience and hardship, if, after embarking in a cause, he finds that he cannot get the necessary funds wherewith to carry it on; but, on the other hand, extreme hardship might arise to the client, if—to take

the case which is not uncommon in the smaller practice in the country—a solicitor, who finds a poor man having a good claim, and having but a small sum of money at his command, may go on until that fund is exhausted, and then refusing to proceed further, may hang up the cause by withholding the papers in his hands. That would be a great grievance and means of oppression to a poor client, who with the clearest right in the world might still be without the means of employing another solicitor. The rule of the court must be adapted to every case that may occur, and be calculated to protect suitors against such conduct. Now a solicitor, if he knows that he must trust to the result of the cause for his remuneration, will, of course, be disposed to proceed with it in such a way as while it promotes the interest of his client is most likely to render his lien available. I have no doubt, therefore, that the existence of the lien, while it is a great protection to the solicitor against his client, is also a great benefit to the client; but the benefit would be entirely lost, if the solicitor might stop short in the middle of the suit and insist upon retaining the papers, because then no other solicitor could take up and carry on the cause.

It is admitted that, when the solicitor discharges himself, the client and his new solicitor shall, at all events, have free access to inspect and copy the papers at the office of the former solicitor. The mere giving of access, however, is nine times out of ten of no practical value; for if the papers are to remain, notwithstanding, in the custody of the solicitor who has discharged himself, it is obvious that they cannot be made use of in the further progress of the suit. The result would be, that the client is to be put to the expense of fresh copies; that fresh briefs must be prepared for counsel; in short, that all the costs arising from making copies of the papers and documents to be used in the cause must be incurred over again, and so the client is to be greatly damnified. That is entirely inconsistent with the *dictum* of Lord ELDON, that the suitor must have his business conducted with as much ease and celerity, and as little expense, as if the connection had not been dissolved.

On the other hand, if all that expense be, in fact, incurred by the client, what is the use of the solicitor's lien? There may, indeed, be original papers; but supposing them, as here, to be papers in the cause, the effect of the rule would only be to impose a very great hardship on the client, without any benefit to the solicitor. But if the expense is to operate so as to compel him rather to pay the solicitor's bill than to go to the expense of fresh copies, the admission of access and inspection would be nugatory and of no value. Now that a suitor, whose solicitor withdraws himself from the further conduct of a cause,

shall be permitted to have the free use of the papers held by that solicitor, so far as they may be required in the prosecution of the cause, is quite consistent with the observations of Lord ELDON in *Commerell v. Poynton* (1 Swanst. 1) and *Lord v. Wormleighton*. Those observations, coupled with the express decision to that effect in *Colegrave v. Manley*, leave no doubt in my mind as to what Lord ELDON considered to be the rule in such cases, and I entirely concur in the propriety of that rule.

His Lordship further said, I then take the law as laid down by Lord ELDON, and adopting that law must hold that Mr. *Blunt* is not to be permitted to impose upon the plaintiff the necessity of carrying on his cause in an expensive inconvenient and disadvantageous manner.

I think the principle should be that the solicitor claiming the lien should have every security not inconsistent with the progress of the cause. But it is clear that there will neither be, to use the expression of Lord ELDON, the same ease and celerity, nor as little expense in the conduct of it, if the new solicitor is merely to have access to the papers, as where they are placed in his hands upon his undertaking to restore them after the immediate purposes of the production have been served. S. C. 3 Myl. & Cr. 187.—EDITOR.

#### ROLLS' COURT.—June 27.

*As to the authority to be given to the Notes of Counsel made upon their Briefs.*

A discussion took place as to the degree of authority to be given to the notes of counsel made upon their briefs of the minutes of orders and decrees pronounced by the court.

Mr. *Pemberton* contended, that if the counsel on one side had taken no notes, the notes taken by the counsel on the opposite side upon their briefs must be held to contain the terms of the decrees and orders made by the court.

Mr. *Cooper*, *contra*, referred to the practice of the court and its rules and orders, and submitted that the entry alone of the registrar of the court ought to be consulted. He said that some of the most eminent counsel were known to have been in the habit of not taking any notes at all.

Lord LANGDALE said, that what had been intimated was correct, and that there were orders of court which directed that no attention should be paid to the notes of counsel upon their briefs. Times and practices had, however, changed, and the notes made by counsel upon their briefs had been found by experience to be of so great importance and use, that the orders of the court referred to had in a manner become obsolete, and his Lordship said, he trusted that counsel would continue to give their assistance to the court by continuing their notes in the manner lately practised.

## COURT OF QUEEN'S BENCH.

Sittings at Nisi Prius.—June 29.

SPECIAL JURY.

WELLER v. LEWIS.—*Secretary of the West of England Fire and Life Insurance Company.* (a)MISTATEMENT. — *Whether a mistatement made in a claim for loss by fire that is not a substantial mistake and not fraudulently made shall avoid the policy.*

This was an action brought by the plaintiff, formerly a hatter, residing at No. 1, Vinegar-yard, Drury-lane, against the Secretary (as the proper officer to be sued,) of the WEST OF ENGLAND FIRE AND LIFE ASSURANCE COMPANY.

Mr. Russell Gurney, (with whom was the Attorney-General and Mr. Evans, Q. C.) stated the plaintiff's case. It appeared that the plaintiff, Samuel Weller, was a hat and cap maker, carrying on business at No. 1, Vinegar-yard, Drury-lane, and had on the 1st May, 1839, effected a policy of insurance from fire upon his stock and utensils in trade, including house fixtures in those premises, described brick built and tiled, for £300, and on the fittings up of the shop £20, subject to the usual conditions of that office. On the 1st June, 1839, a fire took place in the premises by which they were burnt down and the plaintiff's stock destroyed. On the following day he gave notice to the fire office, and delivered an account specifying the articles and buildings destroyed, the value of which exceeded the sum which he had insured the whole. Upon his claiming the amount of the policy, the defendant refused to pay, and the present action was brought.

The defendant pleaded, 1st, that the plaintiff was not interested to the amount of £320. or any part thereof.

2ndly—That the stock, &c. were not destroyed by fire, without fraud or evil practice of the plaintiff.

3dly—That the plaintiff did not give notice of the fire to the company as soon as possible, stating the particulars of the loss.

4thly—That in the claim there appeared to be no fraud in stating the amount of plaintiff's loss: and, lastly, *non assumpsit*.

The plaintiff replied by a *similiter* to the three first and last pleas, and denied the fourth.

A great number of witnesses gave evidence that the plaintiff and his wife were very honest and industrious persons, that the plaintiff paid ready money for his goods, and consequently kept few accounts, so that the evidence as to the specific value of all the stock was not so satisfactory as if he had kept books, but evidence of quantity and opinion as to value was given. The fire appeared to have arisen from an escape of gas.

COLERIDGE, J. stated the evidence to the jury

and observed that the only question they had to decide was whether the claim was *fraudulently incorrect*. The defendant's counsel had admitted that his evidence was not sufficient to establish the plea that the fire had been caused by the plaintiff, who had called all the witnesses he could to give evidence as to the state of the shop. The payment of ready money for his goods was a proof that he was a thriving man. His Lordship concluded by directing the jury if they should be satisfied that there was *not* a *substantial* mistake in the claim made by the plaintiff, there was an end of the question; but that if there was, then they had to consider whether that was fraudulent. His Lordship observed, that although the jury might think themselves bound to find for the plaintiff, they were not bound to find the full amount of the claim, and with these observations he left the case in their hands.

The jury returned a verdict for the plaintiff, Damages £150, expressly desiring it to be understood, that in awarding that sum they by no means desired to impute anything like fraud to the plaintiff.

Mr. Evans prayed for speedy execution.

Mr. Hoggins, for the defendant, said that in consequence of the verdict being what it was, the insurance office would at once pay the money.

(a) We have to thank Messrs. Parker and Webster, the plaintiff's attorneys, for the papers in this case.—ED.

LORD DENMAN, in *Stevens v. Harman*, (which was a case on a fire policy, where the defence was an attempt to defraud the office by false statements,) said, the jury would have to decide by the conflicting testimony before them, whether there was an attempt on the part of the plaintiff to cheat the insurance office by a false statement of his losses, and whether he had deprived himself under the conditions of the policy of the insurance money. *It was not unjustifiable in a man to put his claim at the highest point reasonable and proper under such circumstances*; but if the jury were of opinion that the plaintiff has furnished a fraudulent statement of his losses, they would of course find a verdict for the defendant. Q. B. 13, Dec. 1839, M. S. S. And Lord ABINGER, in a similar case that came before him in the Court of Exchequer at *Nisi Prius* on Friday last, observed, that the question the jury had chiefly to consider was, whether the plaintiff had made an *intentional misrepresentation* for the purpose of defrauding the insurance company; if they did *not* believe so, they were bound to find a verdict for the *full amount* of the value of the property proved to have been destroyed by the fire. *Gravenor v. Beaumont*, Secretary of the COUNTY FIRE INSURANCE COMPANY. MSS.—EDITOR.

## COURT OF COMMON PLEAS.—June 27.

*Sittings at Nisi Prius.*

## Special Jury.

## PEACOCK v. TRIMMELL.

*LIABILITY of SHOPKEEPERS to damages for injuries sustained by PASSENGERS in the public streets, occasioned by SHUTTER APERTURES in the foot pavements.*

Mr. Sergeant *Talfourd*, for the plaintiff, stated, that this action was brought to recover compensation for injuries sustained by the plaintiff, through the negligence of the defendant. The defendant kept a trimming shop in Regent-street, the window shutters of which were let down in the morning through a trap-door into the area, through which they were raised in the evening when the shop was closed for the night. On the night of the 9th of March last year, the plaintiff was passing along the street towards the Quadrant at the time when the shutters were being fastened, and just as the bar used for that purpose had been drawn up, he unfortunately fell into the aperture, and was severely injured, his lip being cut in two places, and his shoulder sprained. He was attended by a medical man for a period of five weeks, but he was not altogether prevented from attending to his business during that period. According to the plaintiff's witnesses, the aperture at the time of the accident was left unwatched, the place was dark, and no warning given. On the other side, it was stated that one of the defendant's porters was standing at the aperture at the time, he having just raised the bar, and that the accident was owing to the plaintiff's having the moment before been looking into a hairdresser's shop next door, in which there was a brilliant light, the glare of which must have dazzled the plaintiff's eyes, and so caused him incautiously to step within the bar which the porter was about to place against the shutters.

Mr. *Petersdorff*, for the defendant, contended that there had been no misconduct on the part of Mr. Trimmell. He had been guilty of no neglect, or gross and wilful carelessness, in exercising the right and accommodation to which every shopkeeper was entitled, for the convenience of duly transacting his business and protecting his property. On the contrary, the plaintiff himself was the party to whose charge negligence ought to be laid, he having walked on the area railings, while the path was the proper part for passengers along the street.

ERAKINE, J., left it to the jury upon this conflicting evidence to say whether the accident was attributable to the negligence of the defendant's servant, or to the plaintiff's own want of caution.

Verdict for the plaintiff—Damages, £20.

## COURT OF EXCHEQUER.—June 5.

*Sittings in Banco.*

## PHILLIPS AND OTHERS v. HUTH THE ELDER AND OTHERS.

*PRACTICE.*—COMMISSION to examine witnesses abroad after Rule for New Trial granted.

We so recently reported this case, (a) that the facts of it need not be here repeated. The rule for a new trial was made absolute on the 29th of April last, on the ground that no evidence was given on the trial to show the circumstances under which the tobacco warrants were "entrusted" to Messrs. Warwick and Claggett.

Mr. *Kelly* now applied to the court, on behalf of the defendant, for a commission to examine Mr. Warwick, who resided in or near New York, and who, it was alleged, was the only person who could supply the deficiency in the evidence.

Mr. *Cresswell* opposed the application on the ground that the only object in making it was to delay the plaintiff in his endeavours to recover his just claims. The defendants had really no *bond fide* intention of examining the witness in question. They had already had two commissions for that purpose, on neither of which had anything effectual been done.

Mr. *Kelly* explained that the failure of the two former commissions was owing to the fact that the residence of Mr. Warwick could not be correctly ascertained; and, with regard to the imputation of an intention to delay the plaintiff, he observed that there was no suggestion, by belief or otherwise, of such a motive in any of the affidavits.

Lord ABINGER said the court ought not to be governed in its decision by either the magnitude of the sum or the respectability of the parties, but by the known rules of practice in such cases. The defendants had gone to trial without the former commissions being returned, and without the evidence of this same witness, and they now applied for a third commission upon a suggestion that the residence of the witness had been since, and was now, more correctly ascertained than it was before. There was no suggestion whatever in the affidavits as to what they expected the witness would prove; they had merely stated, as they did before, that he was a material witness. From all the circumstances it appeared to him that the defendant had made out no case for coming to the court for another commission.

Mr. Baron ALDERSON was of the same opinion. It ought to have been stated in the affidavits what the evidence of Mr. Warwick was likely to be, if the nature of it were known, and if not, he could not see how any one could conscientiously swear that to be material of whom he knew nothing.—The other barons concurred. Application refused.

(a) Ante, p. 26.

June 13.—Sittings in Banco.

DOE DEM — v. ROE.

PRACTICE.—AFFIDAVIT to obtain Rule for Judgment against the casual Ejector—Necessity for its strictness in point of form.

Mr. Harlstone moved for a rule for judgment against the casual ejector. It appeared by the affidavit of service, that it had been duly made

in May, without saying "last." The affidavit was sworn in the present month, and perhaps the court would infer that the service must have taken place in the last preceding month of May.

Mr. Baron PARKE.—No. That won't do; we must adhere to the strict rules in this case. You can get the affidavit amended in the course of the term.—Rule refused.

ARTICLED CLERKS WHO PASSED THEIR EXAMINATION AT THE HALL OF THE LAW SOCIETY, TRINITY TERM. 1840.

<i>Clerk's Name.</i>	<i>Name and residence of attorney to whom articled or assigned.</i>
Alderson, Alfred	Robert Williams, Carnarvon.
Alman, Michael	William Bevan, Bristol.
Arundel, James Whitton	John Thomas Miller, 3, Furnival's Inn; assigned to James Taylor, 15, Furnival's Inn; Alfred Bell, 59, Lincoln's Inn Fields.
Ashton, William Henry	Charles Hudson, Vernon-street, Stockport.
Attwood, Richard Henry	Charles Collins, Swansea.
Baker, Thomas	Samuel Duckinfield Darbshire, Manchester; assigned to Thomas Rainford Ensor, 14, South-square, Gray's Inn.
Banner, Edward	Matthew Dobson Lowndes, Liverpool.
Beauniffe, Robert Gray	George Babb, Great Grimaby.
Bellhouse, Thomas Taylor	Thomas Taylor, Wakefield.
Bennett, John William	Charles Constable, 10, Symond's Inn; James Joseph Blake, 24, Essex-street, Strand.
Best, William	James Best, Worcester.
Bolton, Peter John	Richard Jackson, 19, Parliament-street, Kingston-upon-Hull; assigned to William Tredway Clarke, 30, Great James-street, Bedford-row.
Brown, Joseph Thomas	Michael Clayton, Lincoln's Inn; assigned to William Strickland Cookson, Lincoln's Inn.
Burton, William Warwick	Septimus Burton, 12, Serle-street.
Bury, John, the younger	George Humphreys, Manchester.
Carter, Alfred	John Carter, Coventry.
Chambers, Joseph	James Hoskins, Portsmouth.
Chauntler, Thomas	Thomas Hodgson Holdsworth, Gray's Inn.
Clark, Thomas	Jonathan Ward, Stokesley, Yorkshire; Bowyer Mewburn, 9, Great Winchester-street.
Clarke, Edward Salmon	Arthur Clarke, Bishopsgate-church-yard.
Clarke, William	Somers Clarke, Brighton.
Clifton, William Henry	John Parker, Worcester.
Cooper, Charles	George Streater Kempson, 31, Abingdon-street.
Copp, Alfred	Matthew Paramore, Bridgwater, co. Somerset.
Croft, John	Charles Richard Roberts, 35, Seething-lane, London.
Crawell, Thomas, jun..	Henry Beever, Salford, Lancashire; assigned to James Frederick Beever, Salford.
Davies, Henry Daniel	Daniel Davies, 21, Warwick-street, Regent-street.
Davies, Thomas	Oliver Lloyd, Cardigan.
Davies, Edward Martin	Thomas Thomas, Swansea.
Day, John	Edward Amos Chaplin, 3, Gray's Inn-square.
Densham, Richard	George Sharp, 20, Upper Wharion-street, Lloyd-square.
Dolman, Frederick William	Robert Cruickshank, Gosport; assigned to Antonine Dufaur, 25, Lincoln's Inn-fields.
Doughty, Thomas Neale	William Saltwell, Carlton Chambers, Regent-street.
Drew, Henry Richard	Richard Matthews, March.
Edwards, William James	William Edwards, Framlingham, Suffolk.
Edwards, William	William Hazard, Redenhall-with-Harleston.
Ellis, Arthur	George Streater Kempson, 31, Abingdon-street; assigned to John Luke Wetten, 48, Conduit-street.
Fitches, William Macconnell	William Pashley Milner, Sheffield; assigned to Thomas James Parker, Sheffield.

(To be continued.)

## REVIEW OF NEW BOOKS.

A CHART, *showing the Distribution of the Personal Estate of an Intestate, under 22 & 23 Charles II. c. 10, and 29 Charles II. c. 30.* By W. B. D., Gent., One, &c.

We have before us another very useful Chart of intelligence in relation to PERSONAL PROPERTY; Companion to the Chart of Real Property we have already noticed. The Chart is, in fact, a table showing the line of parties entitled to the distribution, to which is attached a KEY that makes it easy of understanding. The CUSTOMS of different places in ENGLAND and WALES are also given, as well as the CANONS or Rules by which the law divides the personal estate of an intestate. These latter the author thus describes:—

"1. THAT in all cases where there is only one person who is next of kin to the intestate, and no other relation in equal degree, that one person takes the whole.

"2. Where representation is allowed, all the children of such deceased person as may be entitled to a share take such, their parent's share, among them.

"3. If a person dies without children, grandchildren, father or mother, and his estate is divided between his brothers and sisters, and their children, the same rule is adopted as in the case of children or grandchildren. (See Rule 2.)

"4. If there be neither children, grandchildren, father, mother, brothers, or sisters, but a grandmother living, she takes the whole of the estate, and his uncles (if he has any) do not share with her; contrary to the case of his own mother, and brothers and sisters.

"5. In case of the intestate leaving only uncles and aunts, and nephews and nieces (being children of a deceased brother or sister), the uncles and aunts take equally with the nephews and nieces, being all next of kin in equal degree.

"6. If the intestate leaves his wife with child, such child when born shall have an equal share with the other children, or such other share as it would have been entitled unto if born and living at the time of his death.

"7. Where distribution is made among the children of the intestate, such children (excepting the heir-at law, 2 P. Wms. 441, 2) must bring into hotchpot any advancement made by the intestate in his lifetime. (Sec. 5. 2 P. Wms. 442.)

"8. The lineal descendants of the intestate, in infinitum, are preferred to all ascendants or collaterals. (Sec. 6, *Keylway v. Keylway*, 2 P. Wms. 346.)

"9. If all the children of the intestate die after his decease, but before distribution is made, their shares vest at the decease of the intestate. (*Edwards v. Freeman*, 2 P. Wms. 442; *Grice v. Grice*, 3 P. Wms. 49, note D.)

## NOTICE TO CORRESPONDENTS.

C. B.—You shall have attention in your turn. The Answers to the Problems have become ESSAYS on their several subjects, and it must be felt by all our Subscribers that there is no work published where the law upon any given subject can be found *wrote up* to the day but this. We must repeat our regrets that we continue in error with very many meritorious Answers, and what to do with them *all* is at present beyond our means of saying. We will, however, do the best for all that our limited space will allow us.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, July 4, 1840.

ADVERTISEMENTS RECEIVED BY BARKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

# The Legal Guide.

[Vol. IV.]

SATURDAY, JULY 11, 1840.

[No. 11.]

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 148.)

It was the practice in former times, by the declaration in an action against common carriers to charge them as common carriers, and make them liable for negligence the custom of the realm, but it was afterwards held to be unnecessary to do so because the custom of the realm is the common law of the land, which the Courts of Law take notice of, and the distinction has, many years prevailed between general and special customs in this respect. Afterwards the practice appears to have been to charge the defendants to be common carriers for the same, totidem verbis. That, however, was

VOL. IV.

departed from in *Brotherton v. Wood* (a), and *Pozzi v. Shepton* (b). The principle laid down in those cases was, that common carriers are made liable, not on contract, but by the custom of the realm; and that, in a declaration charging several defendants as common carriers, it follows, that it is strictly an action on the case for a tort, and that one of several defendants may be found guilty upon it. This was maintained in *Brotherton v. Wood*. The declaration there stated, that the defendants were proprietors of a stage coach for the conveyance of passengers for hire (which the Court construed to mean common carriers), and received the plaintiff to be safely carried for hire from A to B, and by reason thereof ought to have safely carried him; but that they, not regarding their

(a) 3 Brod. & Bing, 54.  
(b) 8 Adol. & Ell. 963.



duty, conducted themselves so carelessly in that behalf, that the plaintiff, by their carelessness, while being so conveyed, was injured. A second count stated that the plaintiff became a passenger at the special instance of the defendants. It was held that a verdict against eight of ten defendants, the other two being found not guilty, was good. In *Ansell v. Waterhouse* (c), the defendant pleaded in abatement to a similar declaration, that there were parties jointly liable who were not sued; and the plea was held bad. BAILEY, J. there adverts to *Govett v. Radnidge* (d), where the declaration stated that three defendants had the loading of a hogshead of treacle of the plaintiff, for reward to be paid by him to them, but so carelessly conducted themselves in the loading, that, by reason thereof, the hogshead was broken; and a verdict against one defendant only was held good. His Lordship said, that if it were necessary to choose between conflicting cases (which necessity, however, he thought did not arise), he should be disposed to adhere to *Govett v. Radnidge*.

The next question to consider is: Who is the proper party to sue?

First. Where the goods are consigned to a particular carrier by order of the consignee, and the goods are lost through the default of the carrier, the *consignor* cannot maintain an action against the carrier for the loss, although he paid for the booking of the goods. The action can only be brought by the consignee. It was *formerly* the doctrine that an action on the case for goods lost might be maintained against a carrier, *either by the consignor or consignee*, and that it might be brought by the *consignor* notwithstanding a private agreement between him and the *consignee* that the carriage should be paid by the latter, the carrier being liable upon his agreement(e). This, however, has

been overruled, and the question now is governed by the consideration in whom the property of the goods is vested. This was settled by Lord KENYON in *Daves v. Peck*(f), which was an action on the case by the *consignor* of goods against the defendant, a common carrier, for not safely carrying according to his undertaking in consideration of certain hire and reward to be therefore paid two casks of gin from London to one *Thomas Odey* at *Hillmorton*, in Warwickshire, within the time limited by two excise permits, in consequence of which the casks of gin became forfeited to the Crown and were seized. The plaintiff proved his case by shewing the delivery of the casks to a person employed by the defendant at the usual place, where they were booked to be sent by the defendant's waggon, and the usual price paid for booking by the plaintiff's servant. The casks were directed to "Mr. Odey, Hillmorton near Rugby, Warwickshire; by Peck's waggon." It appeared that they were afterwards sent by the waggon, and were left at the *Crown Inn* at *West Haddon*, which was the nearest place to *Hillmorton*, in the road which the waggon travelled; and when after laying some time, they were seized in consequence of the time mentioned in the permit for their removal being expired.

Lord KENYON was of opinion that the action by the *consignor* could not be supported for that the legal right to the goods after such delivery was vested in the *consignee*, whom alone the carrier was answerable, at all, and the plaintiff was nonsuited. Upon argument of a rule for a new trial, *Davis v. James*, and *Moor v. Wilson*, were cited in support of it, to shew that the action might be maintained against the carrier either by the *consignor* or *consignee*, and that the reason of the thing was more in favour of the action by the *consignor*, by reason of privity of contract between him and the carrier.

(c) 6 Man & Selw. 385.

(d) 3 East, 62.

(e) *Davis v. James*, 5 Burr. 2680; *Moor v. Wilson*, 1 Term Rep. 659, 3 Camp. 320.

(f) 6 Term Rep. 320. See ante, p. 151.

Lord KENYON, C. J. said, I cannot subscribe to one part of the argument urged on behalf of the plaintiff, namely, that the right of property on which the action is founded is to fluctuate according to the choice of the consignor or consignee; and that, consequently, either of them may, at his pleasure, maintain an action against the carrier for the non-delivery of the goods. The legal rights of the parties must be certain, and depend upon the contract between them, and cannot fluctuate according to the inclination of either. This question must be governed by the consideration in whom the legal right was rested; for he is the person who has sustained the loss, if any, by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured. The facts are these, a man in *Warrimackshire* gave an order for goods from London, which he directed to be sent by a certain carrier, and the dealer in London delivered them accordingly to that carrier to be conveyed to the vendee. Upon this short statement, there can be no doubt, but that, after such a delivery, the vendee must stand to the risk. Then, here, the *damnum et injuria* are to him and not to the vendor, the plaintiff. I do not find that any thing which has been advanced is broken in upon by the two cases which have been relied upon in the argument—the distinction which is there taken I fully adopt. In the one case, the action brought by the consignor against the carrier was sustained, because the consignor was to be answerable for the price of the carriage; he stood, therefore, in the character of an insurer to the consignee for the safe arrival of the goods. And the subsequent case of *Moor v. Wilson*, proceeded on the same ground. It is not disputed but that the consignee might have maintained the action in this case; then, if the consignee had recovered a verdict against the carrier, how could such recovery by a stranger have

been pleaded in bar to this action? And if it could not, and yet this action could be maintained, the consequence would be, that the carrier would be liable to answer in damages to both for the same loss. Therefore, common sense and justice, as well as strict law, are in favour of the objection made against the plaintiff's recovering in this action (g).

(To be continued.)

## PROBLEM XI.—VOL. IV.

### INTERESSE TERMINI. What is it?

TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—I beg to enclose you an answer to the 20th Problem of the 3rd vol. of the Legal Guide. When I first perused the Answer of "ALIIQUIS" (a) to the same Problem, I thought of writing an *Addenda* to his answer, but on reperusing it I found that as there were so many omissions in it it would be less trouble to write an original solution of the same problem than to carry my former intentions into effect. This I have done; and although it is not a complete essay on that part of the Bankrupt Laws on which it treats, yet I am confident it will, in some measure, supply the defects which are to be found in the answer of "ALIIQUIS."

I am, Sir,

Yours obediently,

C. B.

## ANSWER TO PROBLEM 20. VOL. 3. BANKRUPTCY.

What are the different acts of Bankruptcy?

The 6 G. 4, c. 16, s. 3, enacts, That if any such trader (1) (see *ante*, vol. 3, p. 403) shall depart this realm (2), or being out of this realm, shall remain abroad (3) or depart from his dwelling-house (4), or otherwise absent himself (5), or begin to keep his house (6), or suffer himself to be arrested for any debt not due (7), or yield himself to prison (8), or suffer himself to be out-

(g) See also *Snee v. Prescott*, 1 Atk. 248; *Dutton v. Solomonson*, 3 Bos. & Pull. 582; *Jacobs v. Neilson*, 3 Taunt. 428; also, *Duff v. Budd*, 3 Brod. & Bing. 177, where the vendor was induced by the fraud of a swindler, to deliver goods to a carrier for him, and the carrier, by negligence, let him get possession of them. It was held the vendor might sue the carrier in his own name as no property had passed from the vendor.

(a) *Ante*, vol. 3, p. 371; see also *ante*, p. 37.

lawed (9), or procure himself to be arrested, or his goods, money or chattels to be attached, sequestered, or taken in execution (10), or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels (11), or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements (12), or make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels (13); every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made, any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have committed an act of bankruptcy (14).

By section 4 of the same statute it is enacted, that where any such trader shall execute any conveyance or assignment by deed to a trustee or trustees of all his estate and effects, for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader, provided that such deeds shall be executed by every such trustee within 15 days after the execution thereof by the said trader, and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London or within 40 miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within 40 miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor.

Section 5 enacts, that if any such trader shall lie in prison for the space of 21 days after his having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, or having been committed to prison for any other cause, shall lie in prison for 21 days after any detainer for debt lodged against him and not discharged; or if any such trader having been arrested, committed, or detained for debt shall escape out of prison or custody, every such trader shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest. But the escape must be one in fact, and not merely that which might be deemed an escape in contemplation of law. (*Rose v. Green*, 1 Burr. 437.)

A trader may commit an act of bankruptcy by

filing a declaration of insolvency or compounding with the petitioning creditor. (*Vide ante*, p. 4.)

Section 9 enacts, that if any such trader having privilege of Parliament shall commit any of the aforesaid acts of bankruptcy, a commission of bankruptcy may issue against him and be proceeded in in like manner as against any other trader, but with certain exceptions as to arrest. And section 10 provides, that if a trader having privilege of Parliament shall neglect, for the space of one calendar month, after being served with a writ of summons to pay, secure, or compound for such debt to the satisfaction of such creditor, or to enter into a bond with sufficient sureties as therein mentioned, and also to enter an appearance within one month after personal service of such summons, such trader shall be deemed to have committed an act of bankruptcy from the time of service of such summons, and any creditor or creditors whose debt or debts amount to a sufficient sum to support a commission, may sue out a commission against him, and proceed thereon in like manner as against other bankrupts. And section 11 provides, that if any such trader having privilege of Parliament shall disobey any order of any Court of Equity, Bankruptcy, or Lunacy, for the payment of money after service, and peremptory day fixed, he shall be deemed to have committed an act of bankruptcy, on which a commission may issue as in other cases.

By the 7 & 8 G. 4, c. 57, s. 13, the filing of a petition to the Insolvent Debtors' Court, of every person in actual custody who shall be subject to the laws concerning bankrupts, for his or her discharge from custody according to the said act, shall be an act of bankruptcy from the time of filing such petition; and any commission issuing against such person, and under which he or she shall be declared bankrupt before the time appointed by the said courts, and advertised in the London Gazette, for the hearing of such petition, or at any time within two calendar months from the time of filing such petition, shall have effect to avoid any conveyance and assignment of the estate and effects of such person which shall have been made in pursuance of the provisions of the said act; but the filing of such petition shall not be an act of bankruptcy, unless such person shall be so declared bankrupt before the time advertised, or within two calendar months from the filing the petition. The petition is considered as filed when it reaches its place of deposit, and not when it is delivered to an officer of the court, part of whose duty it is to hand it over to another officer for final deposit. (*Garrick v. Sangster*, 9 Bing. 46; 2 M. & Sc. 68.)

The 2 Vic. c. 110, s. 8, enacts, that if as

creditor or creditors in partnership, whose debts amount to £100., or any two creditors whose debts amount to £150., or three or more whose debts amount to £200., of a trader subject to the bankrupt laws, shall file an affidavit in the Court of Bankruptcy, that the debt is due, and that the debtor is such trader, and serve him personally with a copy, and with a written notice requiring payment, and the debtor shall not within 21 days after service pay, or secure, or compound for the debt, or enter into a bond with two sureties to pay the amount to be recovered in any action brought for the recovery of the debt with costs, or to render himself according to the practice of the court, or within such time as the court or a judge shall direct after judgment recovered, he shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of the affidavit and notice, provided a fiat issue against him within two calendar months from the filing of the affidavit.

(1) But the party may commit an act of bankruptcy after he has retired from business, provided it be during the existence of a sufficient petitioning creditor's debt, contracted either before the trading commenced (*Baillie v. Grant*, 1 Bing. 121; 2 M. & Scott. 193), or whilst in trade. (*Ex Bamford*, 15 Ves. 449; *Ex Dewdney*, id. 495; *Ex Bourne*, 16 Ves. 145.)

(2) The word "realm" imports the extent of the courts of this country; and therefore if a trader residing in this country go to Ireland with intent to defeat or delay his creditors, it will be an act of bankruptcy within the meaning of this clause of the act. (*Williams v. Nunn*, 1 Taunt. 70; *Windham v. Paterson*, 1 Stark. 144.) So if a trader residing in Ireland or elsewhere, come to this country upon some temporary business and again quit it to avoid being arrested by a creditor, it is a departing the realm within the meaning of this clause. (*Williams v. Nunn*, *supra*; *Holroyd v. Gwynne*, 2 Taunt. 176. And *vide ante*, p. 3.)

(3) *Vide ante*, p. 3.

(4) *Vide ante*, p. 3. But if a trader depart his house with intent to delay his creditors, though upon a groundless apprehension, it is an act of bankruptcy. (*Ex Bamford*, 15 Ves. 419.) The length of the trader's absence is immaterial, and the act of bankruptcy is complete the moment the trader leaves his house. (*Holroyd v. Gwynne*, *supra*; *Spencer v. Billing*, 3 Camp. 312; *Gaylin v. Eylooe*, 2 Stra. 809.)

(5) The decisions which have taken place upon the meaning of those words and which are now contained in the 13 Eliz. c. 7, s. 1, and Jac. 1, c. 15, s. 2, are as follows; that whenever a trader absents himself from his house merely to avoid a particular creditor (*Bigg v.*

*Spooner*, 2 Esp. 651), or for the purpose of avoiding an arrest (*Chenoweth v. Hay*, 1 M. & S. 676), he will have committed an act of bankruptcy. Or if a trader have no settled place of dwelling, absent himself from his usual place of abode, it will be an act of bankruptcy. Thus where a vender of newspapers, in the habit of attending the Royal Exchange to collect news, retired from 'change upon the approach of a creditor, and desired a friend to tell him he was not there, it was holden an absenting himself within the statute, and an act of bankruptcy. (*Gimingham v. Laing*, 6 Taunt. 532.) So a trader absenting himself from any place with intent to delay a creditor, commits an act of bankruptcy. (*Hall v. Homer*, 1 Car. & P. 108; *Curteis v. Willes*, ib. 211.) The absenting must be voluntary, and not by means of an arrest. (*Phillips v. Peake*, Greene 52.)

(6) The statute 13 Eliz. c. 7, s. 1, and 1 Jac. 1, c. 15, s. 2, also made it an act of bankruptcy for a trader to keep house in order to delay his creditors. If a trader retire from that part of his house where his business is carried on, and where he usually attended, to a more retired part, to avoid personal applications for money, he will be guilty of a beginning to keep house within this clause of the statute. (*Dudley v. Vaughan*, 1 Camp. 271; *Key v. Shaw*, 8 Bing. 320; 1 M. & Scott, 462.) So if a person do not attend his counting-house or office in his usual way, or if he send for his papers to his house, or do not go out as usual, they are circumstances from which a beginning to keep house may be inferred. (See 16 Ves. 149; and see *Curteis v. Willes*, 4 D. & R. 224; *Hawkins v. Howard*, 1 R. & M. 64.) The closing the doors and shutters of a bank is a beginning to keep house, though it is not the domicile of the banker. (*Cumming v. Bailey*, 4 M. & P. 36; 6 Bing. 363; *sed vide Ex Mavor*, 19 Ves. 543.) Several cases have decided that where a trader orders himself to be denied to a particular creditor, or to creditors generally, it is sufficient evidence to raise a presumption of the trader's beginning to keep house within the meaning of this clause of the statute. But a denial to a trader on a Sunday is not an act of bankruptcy, although the creditor calls by appointment with the bankrupt for payment of his debt. (*Ex Preston*, 2 V. & B. 311; 2 Rose, 21.)

(7) *Vide ante*, p. 3.

(8) Where a trader was arrested for a debt which he had sufficient money to discharge, but he chose to go to prison, in order, as he said, to compel his creditors to come to a composition, it was holden to be an act of bankruptcy. (*Ex Burton*, 7 Vin. Abr. 62.)

(9) *Vide ante*, p. 3.

(10) *Vide ante*, p. 3. The word "attached"

means that species of attachment by which suits are commenced; such as the foreign attachment by the custom of London or Bristol, and the like. (*Per Lord Mansfield in Clavey v. Hayley*, Cowp. 428; and see Cullen, 41, 42.)

(11) A clause something similar to this was contained in the stat. 1 Jac. 1, c. 15, s. 2, but there the words were, "or make or cause to be made any fraudulent conveyance of his, her, or their lands, tenements, goods, or chattels." The words "either within this realm or elsewhere," were introduced in the present statute to prevent any fraud being practised by executing the deeds out of *England*, as it was decided that the stat. 1 Jac. 1, c. 15, s. 2, did not extend to such conveyances. (*Inglis v. Grant*, 5 T. R. 530; *Norden v. James*, Dick. 530.)

The conveyances which have been considered fraudulent within that part of the stat. 1 Jac. 1, which I have just quoted are the following, namely, voluntary conveyances without a valuable consideration which are rendered void as against creditors by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4 (*Hassell v. Simpson*, 1 Dougl. 88); and all deeds and conveyances which a court of equity would declare fraudulent (*Jacobs v. Sheppard*, 1 Burr. 471; *Unwin v. Oliver*, ib. 481); as well as all cases which either appear from the facts themselves to be, or from the conclusion of law arising from these facts, would be deemed to be fraudulent as against third persons, however fair they might be as between the parties themselves. (*Worsley v. Demattos*, 1 Burr. 467.) And it was also decided that the conveyance must have been by deed, properly stamped, and duly executed by all parties, but as in the present statute the words are "any grant or conveyance of lands, goods," &c., and in a subsequent part of the same section there is a provision that if any trader "make or cause to be made any fraudulent gift, delivery, or transfer, of any of his goods or chattels," he shall be guilty of an act of bankruptcy, it is plain that the transfer may be made without deed, and it would therefore be waste of time to enumerate the various cases and decisions which have taken place upon the words contained in the 1 Jac. 1, and upon which it was so decided that a deed was necessary.

(12) *Vide ante*, p. 4.

(13) This includes mere manual delivery or transfer as well as conveyances by deed or otherwise. A bill of exchange is within the meaning of this section, and the fraudulent delivery or transfer of which will constitute an act of bankruptcy. (*Cumming v. Bailey*, 6 Bing. 363.)

(14) Every act of bankruptcy must consist of two parts, namely, first, of the act itself, which has already been treated of; and, secondly, of the intention with which it was committed. This

must be done with intent to defeat or delay creditors; for if done to avoid performing a mere duty, as to avoid an arrest upon an *exco. cap.*, or the service of process to enforce a decree in Chancery (unless a decree for the payment of money), (*Com. Dig. Bankrupt, C.*; 1 Coke, 89), or to avoid an attachment upon an award for not delivering goods pursuant thereto (*Per Willes, C. J. in Linwood v. Eade*, 1 Atk. 196), it will not of itself constitute an act of bankruptcy, unless accompanied by circumstances from which also an intent to defeat or delay creditors may fairly be presumed, but if the intention to defeat or delay the creditors actually existed at the time the act was committed, it is little matter whether a creditor was thereby defeated or delayed or not. This point has been so long settled, that it is thought useless to cite any cases in support of the proposition.

May 7, 1840.

C. B.

## Imperial Parliament.

### HOUSE OF LORDS—July 2. APPEALS.

THE QUEEN OF PORTUGAL v. SIR R. C. GLYNN, BART., AND OTHERS.

DON MIGUEL'S LOAN—BILL OF DISCOVERY—*Whether it can be supported against persons interested in the subject matter of the action, but not parties to the record.*

APPEAL from the JUDGMENT of the LORD CHIEF BARON, overruling a demurrer put in by the QUEEN OF PORTUGAL to the bill filed by the respondents.

The following are briefly the facts of this case. In the year 1829, Don Miguel, who was at the *de facto* at the head of the Portuguese Government, negotiated a loan with two persons, subjects of France. Bonds were given to those individuals for the repayment of the loan, which was to be raised by bills drawn upon certain parties of England and France. The bills upon this country were transmitted to the respondents who are eminent bankers in London, and who accepted them. Upon Don Miguel being de-throned and declared an usurper, the present Queen of Portugal repudiated the loan, and ultimately a bill of discovery was filed, to which that Queen was made a party. The defendants put in a demurrer on the ground that the bill ought to have been for relief instead of discovery. Upon the demurrer being argued before the LORD CHIEF BARON, it was overruled, and against that decision the present appeal was brought.

The LORD CHANCELLOR stated that it was much to be regretted that so long a time had

elapsed since the case was argued. It did not, however, arise from any doubt that he entertained upon the case, but from a desire to examine and look into the cases cited. The principal question in the cause was, whether a bill of discovery could be supported against persons interested in the subject matter of the action, but not parties to the record. The LORD CHIEF BARON was of opinion that they could, and upon that ground directed the demurrer to be overruled. The LORD CHANCELLOR could not agree with that proposition, and in that opinion he was fortified by the decisions of Lord ELDON in the cases of "*Fenton v. Hughes*" (a), and "*The Mayor and Corporation of London v. Levi*." (b). He was, therefore, clearly of opinion that the judgment of the Lord Chief Baron must be reversed.

Lord LYNCHBURST fully concurred in the opinion expressed by his noble and learned friend. He considered the case of "*Fenton v. Hughes*" directly in point, and the judgment in that case had been affirmed in the case of "*Powell and Yates*."

Lord BROUGHAM expressed his entire concurrence in the view taken of the case by his two noble and learned friends.

Lord WYNFORD felt great diffidence in placing his opinion in opposition to the opinions of two noble and learned friends; but if their opinions were adopted by the House, as he feared they would, the Queen of Portugal would obtain a sum of money to which she had no title upon earth, and one of the foulest frauds that he could conceive would be committed. His own opinion clearly was that the decision to which the Lord Chief Baron had come, was correct, and ought not to be disturbed.

Judgment ordered to be reversed.

### Law Reports.

#### VICE-CHANCELLOR'S COURT—June 20.

TOMLINSON v. THE MANCHESTER AND BIRMINGHAM RAILWAY COMPANY

**VENDOR AND PURCHASER—MISTAKE—Whether a purchaser taking possession under mistake is bound to bring his purchase money into Court—Ordinary RULE of the COURT.**

Mr. Knight Bruce and Mr. G. L. Russell appeared for the plaintiff.

This was a motion on behalf of the plaintiff, the Rev. J. W. Tomlinson, rector of Stoke-upon-Trent, that the Manchester and Birmingham Railway Company might be ordered to pay into court the sum of £15,098. under a contract entered into

for the purchase of a portion of the glebe lands of the rectory before the incorporation of the company. Under the powers of a private act of Parliament passed in the 7th and 8th of George IV. the plaintiff was enabled, with the consent of the patron and ordinary, to alienate certain glebe lands belonging to the rectory, and in 1837 two projects were set on foot for constructing different lines of railway from Manchester to Birmingham, one called the Manchester, Cheshire, and Staffordshire Railway, and the other the Manchester South Union. The plaintiff made his contract with the latter by an agreement with the provisional committee, in March, 1837. When the rival projects were carried before Parliament, it was found expedient to adopt some portions of each line, and an amalgamation of the two infant companies took place, out of which the present one grew, on the understanding that, in every case where either company should have entered into any contracts with landowners whose property might be affected by whichever of the two projected lines might be adopted, though in a somewhat different mode, and the company projecting the accepted line should not have made contracts with the individual landowners, the contracts so entered into by the company proposing the rejected line should be adopted by the united company. In the beginning of 1838 the present company intimated some intention of varying their line, and having expressed a doubt whether they should require the plaintiff's land, the present bill was filed by the plaintiff against the defendants for a specific performance of the contract, and by the answers of the company it was found the company denied their liability to perform the contract. A supplemental bill was then filed by the plaintiff, setting forth an alleged adoption of the contract of the company, and alleging acts of ownership on their part, such as the agent of the company having entered into possession of the land, and having let a portion of it to two persons, and with having received the sum of £5. 10s. by way of rent. The answer of the defendants to the supplemental bill set forth that such acts of ownership proceeded from a mistake on the part of their agent, Mr. Barlow, who, as soon as he discovered the mistake, took every step in his power to rectify the error, by returning the money received as rent to the plaintiff, and re-delivering possession of the land. The company denied that they now were, or ever had been in possession, but that, even if the Court decided otherwise, they were at liberty to elect whether they would give up possession or pay the purchase-money into court, as the plaintiff was not entitled to both.

Mr. Knight Bruce, for the plaintiff, submitted that a purchaser taking possession of land

(a) 7 Ves. 287.

(b) 8 Ves. 397.

comprised in an agreement was invariably compelled by the court to pay the amount of his purchase-money into court until all matters in dispute should be settled.

Mr. Wigram, Mr. Koe, Mr. L. Lowndes, and Mr. S. Sharpe, appeared for the defendants.

Mr. Wigram opposed the motion, and submitted that the company never had actual *bond fide* possession of the land; that the short possession which had been had, was had through a *mistake* on the part of the company's agent, he not being authorised by the company to take possession; and that as that mistake had been promptly rectified, and the land re-delivered into the possession of the plaintiff, the rule of the court alluded to by the other side was not applicable to the case.

The VICE-CHANCELLOR said that cases of this kind depended very much upon the peculiar circumstances of each case. He admitted that if a purchaser did deliberately take possession of land without consent, that might be in some instances a reason why the court would order the purchase money to be paid into court, and that might be, even though the purchaser might be willing to give up possession. But the ordinary rule of the court seemed to be, that where a party took possession, and was in possession of the land, he should not be at liberty to retain possession of the land, and at the same time keep back the payment of the purchase-money. The present case appeared to his Honour to differ totally in its circumstances from any other case of the kind he ever recollected. The mere question here was, whether there had not been a possession, by the company, of the land. It did appear to his Honour that the acts which had in this case been done by the agent of the company, Mr. Barlow, were acts done under a mistake, and he did not think that the affidavits showed that there was any deliberate intention on the part of the company to take possession of the land in the ordinary way. His Honour then went into a detail of the facts of the case relating to Mr. Barlow, the company's agent, taking possession of the land by mistake, and observed, that it appeared to him that what Mr. Barlow had done was done under a mistake, and that he had immediately taken such steps as he could to rectify it. His Honour did not understand the company ever to have been in actual possession of the land, nor even, under all the circumstances of the case, to have been constructively in possession. It did, therefore, appear to him that there was nothing in the case to justify the court in ordering the purchase-money into court. There was this remarkable circumstance in this case, that the company, by their act, had power to carry their railway through the parish of Stoke-upon-Trent, or not to carry it through the parish

of Stoke-upon-Trent, as they pleased. If, then, the company should not carry the railway through the parish of Stoke-upon-Trent, it was not clear to him that the company would have any power to purchase land in Stoke-upon-Trent; and, if they should elect not to carry their railway through Stoke-upon-Trent, then this was a contract with reference to which he conceived the court could grant no relief, because the company would then have no authority to purchase any land in Stoke-upon-Trent for that purpose. Upon the whole of the case, his Honour thought it would now be too much, upon the hearing of a motion to bring the purchase-money into court, to conclude that the land was purchased land, and therefore to be thrust upon the company. He would not, therefore, make any order for the payment of the money into court; and, as what had taken place appeared upon the showing of the company's agent to be a mistake, he thought, therefore, it would be too much to refuse the motion with costs. Refused, but without costs.

#### ROLLS' COURT.—July 3.

GRAHAM v. OLIVER.\*

VENDOR and PURCHASER.—*Specific performance of Contract.*—Where a Vendor has only a limited interest in the estate contracted to be sold, and is thereby incapable of performing the whole Contract.—FRAUD.—Jurisdiction of the Court.

This suit was instituted by Mr. Wm. Graham, a solicitor of respectability and property at Abingdon, Berks, against John Oliver, Esq. nephew of Sir Charles Saxton, late of the same place, for a specific performance of the following contract:—

"Memorandum between John Oliver, of Abingdon, Esq., of the one part, and Wm. Graham, of the same place, solicitor, of the other part. The said John Oliver, for himself, his heirs, executors, and administrators, agrees to sell, and the said Wm. Graham, for himself, his heirs, executors, and administrators, agrees to purchase at the sum of £5,500., the leasehold messuage, garden close, cottages, (a) yards, buildings, and appurtenances situate at Abingdon, aforesaid, late in the occupation of Sir Charles Saxton, deceased, the leasehold tithes late of Sir Charles Saxton, all which premises are held under the Corporation of Abingdon: and also about 9 acres of land called Haythorns, also held under the Corporation of Abingdon: and also certain freehold lands lying in the com-

\* We have been favoured by Mr. Thomas Graham the plaintiff's solicitor, with the papers in this case.—EDITOR.

(a) The word "cottages" was erased.

fields or parish of Abingdon aforesaid, containing 93 a. 1 r. and 7 p. And all the crops now, grain, hay, and other crops now growing on the said farms and lands, and the profits of, and of the said tithes, from Lady-day except that the said John Oliver shall and reside in the dwelling-house now occupied in until Lady-day 1839, without paying any for the same. The said John Oliver agrees to make out a good title to the said premises, the said Wm. Graham agrees to pay the said purchase-money on the 24th day of June next, to pay the expence of his conveyance; and agreed that the said John Oliver shall have use of the front yard and the close with the same until Lady-day 1839. And the said Wm. Graham agrees to give him the cuttings of 3 acres &c.

This contract was left by the plaintiff in the possession of the defendant without the plaintiff giving any copy of it. Before the contract was made, some discussion took place as to including the cottages standing upon the homestead, the defendant observing he was not quite sure whether they belonged to his father or himself; but as the plaintiff would not make the purchase without them, it was ultimately agreed that the cottages should be included in the purchase. On the day following the signing the agreement, the defendant wrote the plaintiff, that he could not consent to sell the cottages, and that he required to be paid the expences of the crops, to which the plaintiff replied reminding the defendant of a previous discussion, and that he would not make the purchase without them, and that as to the crops, it was expressly agreed that the plaintiff should not be subject to any expences whatever.

The plaintiff then wrote the defendant for a copy of the agreement which was replied to by the plaintiff by the plaintiff that he had made any agreement, and therefore he was unable to furnish it. The plaintiff then sent his brother, Mr. Wm. Graham to demand an explanation, to which the defendant admitted the execution of the agreement, and that it was in his possession, but refused to produce it or to permit Mr. Wm. Graham to see it, alleging that it was only a memorandum and no agreement, and that he might if he pleased throw it behind the fire at any time. The present bill was therefore filed, charging the defendant with fraud in having made the contract by striking out the word "cottages," and prayed a specific performance of the contract, the plaintiff offering specifically to perform his part of the contract upon the defendant making a good and marketable title and executing a proper conveyance and agreement; and that if he was unable to make a title to the whole, then that he might be

decreed to convey to the plaintiff such parts as he was entitled to, and in that case that a reasonable abatement might be made from the purchase-money; also an injunction restraining the defendant from destroying or in any manner defacing or injuring the contract, and that it might be brought into court for safe custody.

The defendant by his answer set out a settlement made by the late Sir Chas. Saxton previous to the marriage of defendant with Miss Emma Matilda Morgan, dated 3 Nov. 1837, in which the freehold lands in the common fields or parish of Abingdon, called "Murses land," (part of the lands contracted to be sold to the defendant,) were conveyed to trustees to the use (after the marriage) of the defendant and his assigns sans waste for life, or which should first happen, until he should be found and declared a bankrupt or take the benefit of any Act or Acts of Parliament passed or to be passed for the relief of insolvent debtors, in either of which events the use or estate theretofore limited to the defendant of and in the said hereditaments and premises should cease and determine, with divers remainders over. The settlement contained a power of sale to the trustees at the request and by the direction of the defendant during his life, and also a power of revocation of the uses of the settlement for effecting such sale, and for the trustees to give legal discharges for the purchase-money without the purchaser being obliged to see to its application.

The defendant also set out a deed of covenant executed by Sir Charles Saxton in contemplation of the defendant's marriage, by which Sir Chas. Saxton did covenant to assign all his interest in the leasehold tithes and all other the premises then held by Sir Chas. Saxton by lease under the Municipal Corporation of Abingdon, (being part of the leasehold property contracted to be sold to the plaintiff,) unto the defendant, his executors, administrators, and assigns, for his and their own benefit absolutely. That the marriage took place. That the plaintiff and defendant met upon the subject of the purchase and sale, and that defendant told the plaintiff that as to the freeholds it was necessary he should have the consent of his trustees to sell it, but that there would be no difficulty in obtaining it. That as to the crops, the plaintiff agreed to pay the expence of cropping, and all the expences from Lady-day, and that as to the agreement the defendant before he signed it struck the word "cottages" out, stating at the time he struck out the same that the cottages did not belong to him. That he had a pen in his hand when he was reading the memorandum and that he so struck out the word "cottages" as he read it, and that after the memorandum had been so altered it was signed by both parties. The defendant then set out the contract, and admitted what



took place at his interview with Mr. Thomas Graham. That if the court should be of opinion that the memorandum was a final and binding agreement, he was unable to make a title to or convey the freeholds, as he was only tenant for life, and that he had no power to compel the trustees of the settlement to exercise the power of sale, or to compel them to sell or convey, and that the complainant knew such to be the case, and that with respect to the cottages the defendant had no title whatever to them, and was wholly unable to make a title or to convey or assign them to the plaintiff, and that with respect to a house in Bear-street (other part of the property contracted to be sold), he had no other title except that his mother had promised to give the same to him.

By the evidence it appeared that the full, fair, and just value of the freehold and leasehold lands, tithes, and premises in April 1838, was £4974. 15s. 3d.; that all the leaseholds, except the cottages, were held under the Corporation of Abingdon for the residue of two terms of 21 years, from Michaelmas 1823, at annual rents amounting to £52. 10s., and the cottages were held under the same Corporation for the residue of a term of 21 years from Michaelmas 1837, at an annual rent of 2s. 6d., and that £184. 4s. 2d. would be the full, fair, and just value to be given in April 1838, for the expence of putting in the crops. It also appeared that the defendant had produced the contract to one of the witnesses who read it, and who deposed that the word "cottages" was in, and formed part of the said agreement not struck out or erased, and that the defendant had requested the witness to interfere with the plaintiff to give up the cottages, and that the defendant had written the witness stating that he had quite decided upon selling all at Abingdon, as well freehold as leasehold. Evidence was also given of other parties with whom the defendant had treated with for sale of the property as the absolute owner.

Mr. Pemberton, Mr. Turner, and Mr. G. L. Russell, for the plaintiff.

Mr. Kindersley and Mr. Sutton Sharpe for the defendant.

Mr. Kindersley said, that the plaintiff was a solicitor at Abingdon, and a man of great experience, and the defendant was a young and inexperienced man; he explained the situation of the defendant by his answer, and contended that the agreement afforded internal evidence that it was not a concluded contract.

Lord LANGDALE said, I have heard no evidence of the defendant's inexperience; he had no adviser, but there is no evidence of want of knowledge. He is 37 years of age, and appears by the evidence to be perfectly competent to look to his own interest.

Mr. Kindersley continued, and observed that it was the case of a professional man dealing for his own benefit, and that there was no one to advise the defendant. He cited *Thomas v. Dering*, (b) and contended that all the observations in the judgment in that case applied almost verbally to this case.

Mr. Turner replied, and cited *Clark v. Seymour*. (c)

Lord LANGDALE said, I think this agreement is binding upon the defendant, and I have no difficulty upon the question whether there be an agreement, and the plaintiff is entitled either to a decree for a specific performance, or to damages for a breach of the contract. It does not appear whether as to the freeholds it can be performed specifically—as to them I have a great difficulty. I think, however, if the trustees are of opinion that this is a beneficial contract, and wish to secure the benefit of it for those in remainder, in that case the defendant can perfect the contract specifically as to the freeholds, and I shall feel no difficulty in declaring that it ought to be carried into effect, but it required further information to know whether that would be done with reference to both the freehold and leasehold parts of the estate, and if it could not then if the purchaser chose to accept less than the amount of his contract, the vendor must perfect his title to the smaller quantity. I have no doubt as to the leaseholds, and the evidence proves that the word "cottages" was in the agreement at the time of signature by both parties. Refer it to the Master to enquire whether the defendant can procure to be made a good title to all the premises comprised in the agreement, including the cottages therein mentioned, or any and what part of such premises; and if the Master should find that the defendant cannot or by application to the trustees cannot make a good title as to any part of the premises, then let the Master state what reasons he cannot make a good title to that part, and liberty to the Master to state special circumstances; reserve further directions as to costs. (1)

(1) In *Mortlock v. Buller*, (10 Ves. 315.) Lord ELDON thus expresses himself:—"I agree."

(b) 1 Keen, 729. In that case it was held, on application for specific performance, first, that there was a binding contract between the vendor and purchaser, and that the vendor was bound to perform it if he was able; secondly, that the vendor ought not to be decreed to request or direct the trustees to execute a contract, unless the trustees had a discretion, under the power of sale, which the court had no power or jurisdiction to control; and lastly, that the purchaser was not entitled, in such a case, to have the contract performed to the extent of the vendor's interest, by a conveyance of his life estate and his ultimate reversion.—Ed.

(c) 7 Blm. 67.

in, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell it as his own. It is not competent to him afterwards to say, though he has valuable interests in it, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by his assertion in his contract; and, if the vendor chooses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole." In the case *Dale v. Lister*, (cited 16 Ves. 7.) a bill was filed against the vendor for the specific performance of an agreement for the sale of leaseholds held under the Dean and Chapter of *Norwich*, which the defendant represented himself to be absolutely entitled, as to 24 acres, part of the leaseholds, he was not absolutely entitled, the lease were in effect limited to him for life, with remainder to his sons and daughter in tail. To a part the vendor could not make a good title beyond his own life; he admitted that the plaintiff might put an end to the contract, but insisted that he, the vendor, ought not to be compelled to sell for less than the stipulated price. A specific performance with a reduction of the purchase-money was decreed; but from the observations made upon the case by Lord Eldon in *Milligan v. Cooke*, (16 Ves. 1,) there appear to have been circumstances which make the decision questionable.

Again, the case of *Milligan v. Cooke*, was a bill for a specific performance filed against the vendor, who had represented his interest in certain leasehold estates to be greater than it really was. Lord Eldon decreed that the contract ought to be specifically performed and carried into execution so far as the defendant was able to perform the same; and after clearly defining what, in his view, was the interest which the vendor had offered for sale, and the interest which he really had, he directed an enquiry what was the difference between the value of the interest represented, as proposed for sale, and the actual interest of the vendor in the lease. The decree provided for the case of the Master being unable to ascertain such difference in value, and the purchaser being willing to take such interest as could be given to him with an indemnity. Lord Rossdale seems to have considered that the jurisdiction was confined within narrower limits than stated by Lord Eldon in *Mortlock v. Buller*. See *Lawrenson v. Butler*, (1 Scho. & Lef. 13,) and *Harnett v. Fielding*, (2 id. 553.)—Ed.

QUEEN'S BENCH.—May 4.  
*Sittings in Banco.*

COLLS v. COOKE.

SHERIFF'S POUNDAGE.—*Right of the Sheriff to Poundage, where the Defendant tenders the amount of the debt and costs to the Officer on presenting his warrant.*

The plaintiff in this cause had sued out execution against the defendant, who, when the sheriff's officer came to his house, tendered the amount of the debt and costs, but refused to pay the sheriff's poundage. The officer refused to accept payment without the poundage, and made a levy for the whole amount of debt, costs, and poundage.

Mr. *Wightman* had obtained a rule *Nisi*, calling upon the sheriff to show cause why he should not pay over to the defendant the amount of the poundage he had levied.

Mr. *Crompton* now showed cause against the rule, and contended that the sheriff was clearly entitled to his poundage, whether he levied under the writ or not, inasmuch as he acquired his right to the payment of poundage the instant the writ had come into his possession.

Mr. *Wightman*, in support of the rule, submitted that the sheriff did not derive the right of poundage in the event of the amount of the debt being tendered prior to the levy having been made.

The Court were of opinion that the rule must be made absolute.—Rule absolute.

COURT OF COMMON PLEAS.—July 1.

*Sittings at Nisi Prius.*

SHEPHERD v. PYBUS.

WARRANTY, breach of—*Damages for.*

This was an action brought against the defendant, a barge builder, for damages for a breach of warranty.

Mr. Sergeant *Talfourd* stated the plaintiff's case to be that in 1838 he ordered the defendant to build him a barge, which was accordingly done. It was named "The New Dispatch," and delivered to the plaintiff as being fit for use. The plaintiff accordingly sent the barge on a voyage between London and Faversham, but her leakage was so great as to destroy a part of the cargo (cement) to the value of £60. and she had to be extensively repaired which cost upwards of £28. all of which charges the defendant refused to pay when demanded, and to recover which the present action was brought.

Mr. Sergeant *Channell*, for the defendant, contended, that every new barge leaked considerably when first put on the water; and that usually proper precautions were taken by the owner to prevent any injury resulting from that leakage. The barge in question was of good materials and

good workmanship; and it was contended that all the damage that had occurred was the fault of the plaintiff in not taking due care. It was also pleaded that there was no stipulation in the contract that the barge should be fitted for the plaintiff's purposes.

TINDAL, C. J. said, that this was an action for a breach of warranty which the defendant was alleged to have made on the purchase by the plaintiff of a barge built by Mr. Pybus. That warranty was that the barge should be reasonably fit for use. It would be for the jury now to say whether the warranty had been broken or not. They had to decide whether the barge was, when delivered, fit for use, considering its nature and condition, or whether it was unfit, from want of care, on the part of the defendant, in building her.

Verdict for the plaintiff—damages £90.

July 2.

Sittings at Nisi Prius.

KEYS v. DANIELLS.

**FALSE IMPRISONMENT.**—*Necessity for an observation from the Judge occasioned by the frequency of innocent parties being given into custody on charges of felony without any cause.*

This was an action to recover damages for false imprisonment.

Mr. Serjeant *Bompas*, for the plaintiff stated, that the plaintiff and defendant are both dealers in soap; and it appeared that the former, accompanied by a friend, went to the defendant, and offered to sell him a quantity. The defendant, having looked at the soap, fancied that it was his own property, and asked the plaintiff where he had procured it. The latter replied that he bought it from a Mr. Fenimore, but his companion corrected him, and said that the person who had sold him the soap was named Ball, and the defendant thereupon gave both the plaintiff and his friend into custody, and they were taken to the station-house, where they were confined for some time on a charge of felony. It subsequently appeared, however, that the plaintiff had purchased the soap from a person named Harding, upon which the plaintiff and his friend were discharged from custody.

Mr. Serjeant *Talfourd*, for the defendant, contended that at the time he gave the parties into custody he had reasonable and probable cause to suspect that the soap was his own property, although it subsequently appeared that he was mistaken.

TINDAL, C. J.—Told the jury that the plaintiff having proved his case, the only question for their consideration was the amount of damages.

Verdict for the plaintiff, damages £20.

TINDALL, C. J. said that the jury had come to a very proper decision, and he hoped that a

few such verdicts would put an end to actions of this description, which were too common. Persons were too much in the habit of giving innocent parties into custody on charges of felony without any cause whatever.

July 4.

CUMMING AND ANOTHER v. GRIFFITHS.

**SHIPPING.**—**COLLISION.**—*Whether the proprietors of a TOWING VESSEL or STEAM TUG are answerable for damages done to the ship in tow by COLLISION.*

This was an action brought to recover compensation for injury done to the plaintiffs' vessel, the *Agnes*, and to two others, while the former was under charge of the defendant's steam-tug. The *Agnes*, on the day of the accident, left the London Docks, and, when clear of them, was taken in tug by the steamer, which was a "sea-going" one of 600 or 700 tons. When they had proceeded some way, the pilot on board the *Agnes*, perceiving some vessels coming in an opposite direction, called to the steam-tug to ease her rate. Those in command eased her a little but immediately commenced again her former speed of progress. The pilot then called out for the rope to be cast off, or, in case that could not be done, for it to be cut away from the tug. If that had been done, no accident would, according to plaintiffs' witnesses, have occurred; but the speed of the tug was neither decreased, nor was the rope slackened or cut off. The consequence was, that the steam-tug dragged the *Agnes* against the *Speculation*, and rebounding from that vessel came in contact and caused the damage for which the present action was brought.

Mr. Serjeant *Bompas* for the plaintiffs contended that Messrs. Cumming had the right of action in this case, as it was the duty of the owner of the steam-tug safely to conduct the vessel for the distance contracted. The plaintiffs had been obliged to compensate the owners of the *Speculation* and *Commerce* for the injuries done.

The witnesses for the defendant went to prove that the accident had occurred through the want of sufficient precaution by those on board the plaintiffs' ship. In such cases it was understood that the tug and the vessel that was attached to her were so far independent that each was to look to her own safety. The towing-steamers were to be answerable both for its own security and for that of the vessel attached.

Mr. *Thesiger*, for the defendant, argued that it was the absolute duty of the vessel in the course of being towed to take all proper means and precautions for her own safety and preservation. She ought to be provided in such a manner that, in order to avoid immediate danger, the towing vessel took a particular course which was liable to lead the ship towed into hazard, the master

should be within the command of that ship, so towed, to escape the peril. If she had the warp in such a way that it could not be cut or slackened, it was contended that it would be very hard to make the master of the tug answerable.

Witnesses were called who stated that, in the case of one vessel being towed by a steamer, it was the practice for each to take care of itself; and, in difficulties, to act independently of each other. The usual course was for the ship towed, if danger arose, to cast off the towing-rope, or at least to slacken it.

TINDAL, C. J. said, this was an action brought by the owners of the Agnes vessel against the owners of a tug steamer, in which the former complained that, through the carelessness and negligence of the defendant's servants, they had so managed and conducted that steam-tug that it dragged the plaintiffs' vessel against the Speculation, and afterwards against another ship, the Commerce. The owners of the Agnes had, therefore, been compelled to make compensation to the masters of those vessels for the injuries inflicted. The question for the jury would be whether the case had been made out against the defendant. The contest now was whether the loss, which the plaintiffs assigned as solely attributable to the want of proper care on the part of the defendant's servants was really to be put down to that cause, or whether the plaintiffs' servants were not bound to take certain steps, by the adoption of which this accident would have been avoided. The injury now complained of shaped itself into two particulars: the first by the vessel belonging to the Messrs. Cummings having been first dragged against the Speculation, and then against the Commerce. It would also for the jury to consider whether the notice had been given to the defendant's servants, as had been alleged. His lordship said he thought resolved itself very much into the question whether those on board the ship belonging to the plaintiffs had a *bond fide* belief that those in the steam-tug would obey the order of the pilot. They would, therefore, have to ask themselves whether the captain of the steamer was going at a rapid rate in the pool, contrary to the directions of the pilot of the Agnes; whether he had acted as a prudent and careful man; and whether, that being the case, the plaintiffs' captain could have done any course in the emergency to any steps by which the occurrence of the accident would have been avoided. If the jury thought that the plaintiffs had been contributory to their own loss in this instance by not following a prudent and careful course, their case would not have been made out. Their decision must then be for the defendant. There would be no question as to the amount of damages to be awarded, as that would be decided by the court.

Verdict for the plaintiffs.

## COURT OF EXCHEQUER.—July 4.

### Sittings at Nisi Prius.

BURNETT v BAUCH AND OTHERS.

SHIP BROKERS.—FREIGHT.—*Whether the Owners of a Ship are obliged to pay more than one Broker, that party being the one through whose introduction the Merchant is found, who ultimately freights the Ship, or executes the charter-party.*

This was an action to recover the sum of £39, and was brought by the plaintiff, a ship-broker, against the defendants, the owners of the ship Wilton, for commission due to him by reason of his having found a freight for that ship.

It appeared that the plaintiff was the broker who had introduced the merchant to the captain of the vessel, but in reality the charter-party was ultimately executed at the office of another broker. That the Wilton, as wanting a freight, had been entered upon the books of the plaintiff, and that the captain had subsequently called and requested the plaintiff to let him know of the first application he might have for a vessel of his tonnage (about 130 tons). In March, a merchant of the name of Ballard called at the plaintiff's office, and having stated that he wanted a ship of about 130 tons to go out for a cargo at St. Domingo, he was shown the book in which the names and descriptions of the various vessels were entered. After looking through the list, Mr. Ballard selected the Wilton as that which was likely to suit him. He then requested that the captain might be appointed to meet him at the counting-house of the plaintiff at a given hour. The appointment was in pursuance of this instruction made, and in due time the two parties were brought into each other's presence. In the course of the interview the captain demanded a freight of £4. 10s. whilst the merchant declined to give more than £4. 5s. To this an offer was eventually made to split the difference; but that proposition not exactly meeting the views of the one party, they separated with a distinct understanding that they were to meet on 'Change in the afternoon. Accordingly the plaintiff kept his engagement, and was on 'Change at the hour which had been fixed, when neither the captain nor the merchant made their appearance. On the succeeding morning the plaintiff's clerk went down to the captain, and asked him how it was that he had not kept his appointment, as had been arranged, for the preceding afternoon; whereupon he stated, that after he had quitted the plaintiff's counting-house, he and the merchant had gone to the office of another broker, where, in consequence of the latter having agreed to give him some little advantage in an outward freight, he had consented to split the difference, and to take £4. 7s. 6d. as proposed at the plaintiff's office.

The question between the parties was as to which of two brokers, or whether both, was entitled to the payment of commission on the freight.

Several witnesses were called to show that the usage was to pay the commission to the broker who introduced the merchant, or the party who ultimately executed the charter-party, to the ship, whether it so happened that such execution took

place at the office of the particular broker, or that of some other.

The defence was, that the proper broker to be paid was the broker through whose instrumentality the charter-party or contract had been ultimately executed: and, therefore, inasmuch as that the plaintiff had not been such party, he was not entitled to set up the claim.

Verdict for the plaintiff, £39.

**ARTICLED CLERKS WHO PASSED THEIR EXAMINATION AT THE HALL OF THE LAW SOCIETY, TRINITY TERM. 1840.**—[Continued from p. 159.]

<i>Clerk's Name.</i>	<i>Name and residence of attorney to whom articulated or assigned.</i>
Eyre, William Vardy	Samuel Field, Deddington.
Eyre, Frederick Edwin	Walpole Eyre, 22, Bryanstone-square; assigned to John Pinniger, 1, Gray's Inn-square.
Fell, Robert	John Burren, Durham.
Finlow, Richard Whiteley	Richard Finlow, Liverpool.
Fooks, Thomas, the younger	Henry Charles Goodden, Sherborne, Dorset.
Foster, Thomas	Joseph Foster, Wolverhampton; assigned to Edward Henry Rickards, 29, Lincoln's Inn-fields.
Futvoye, Edward	James Fairbank, Staple Inn; assigned to Henry Coode, 4 Guildford-street, Russell-square.
Gadsby, John	Daniel Welch, Derby; assigned to William Stevens, 6, Queen's-street, Cheapside.
Gall, James Charles	William Brooke, Kenninghall, co. Norfolk; assigned to William Ransom, Stowmarket; and to Dan. Calver, Kenninghall.
Geldard, Christopher John	William Robinson, Settle.
Gell, Alfred	Francis Harding Gell, Lewes.
Good, John Wiltshire	George Austie, Devizes; assigned to Edward Francis Fensholt, 32, Bedford-row.
Goodman, Hiller	Henry Gilbert, Southampton; assigned to John Bamey, Southampton.
Gordon, William	Alexander Gordon, 57, Old Broad-street.
Grant, Charles William	John Hartley, Settle.
Griffith, Griffith	David Griffith, Carmarthen.
Grigson, Edward Robert	Edward Harvey Grigson, Walton, co. Norfolk; assigned to Charles Goodwin, King's Lynn, Norfolk.
Gutteres, George	Thomas Webb Gilbert, 1, Brabant-court, Philpot-lane.
Gwynne, John	Thomas Binns, Elvetham, and 17, Essex-street.
Harbin, Peter Tait	William Waller, 12, Clements' Inn.
Hawkyard, George	James Mellor, Ashton-under-Lyne.
Hazel, Edward Wells	George Parsons Hester, Oxford.
Henning, Thomas Parr	William Price Pinchard, Taunton.
Hill, Richard	William Graham, Abingdon.
Hinton, Frederick	James Pullin Hinton, Bristol.
Hodgson, John	Matthew Gaunt, Leeds; Thomas Lechmere Marriott, Manchester.
Hook, St. Pierre Butler	Sir George Stephen, Knt., 17, King's-arms-yard.
Hulton, Fred. Blethyn Copley	Charles Buck, Preston.
Ilderton, Henry Decimus	George Leeke Baker, 52, Lincoln's Inn-fields.
Inglis, James	William Mason, Colchester.
Jenkins, George Thomas	Thomas William Budd, Bedford-row.
Johnson, William Henry	William Braikewridge, 16, Bartlett's-buildings.
Johnston, George	Joseph Heapy Watson, 19, King's-arms-yard.
Jones, John William	Benjamin Worteman, Evesham, county Worcester.
Jones, Daniel Price	Daniel Price, Talby, county Carmarthen.
Kemp, George Baring	Joseph Maynard, 3, Mansion-house-place; assigned to Frederick Lewis Austen, 6, Ely-place, Holborn.
Law, James Charles	Daniel Godfrey, Abingdon, Berks.
Lavers, William, the younger	Thomas Phillips, Plymouth.

<i>Clerk's Name.</i>	<i>Name and residence of Attorney to whom articled or assigned.</i>
Lewis, Edward	James Blackledge, Brackanbury, Manchester.
Long, John	Thomas Jones, the younger, Millman-place, Bedford-row.
Maister, John	James Russell, York.
Mathews, Richard Gardner	Alexander Mitchell, 4, New London-street; assigned to Henry Hill, New London-street.
Matterson, John Key	John Blanchard, York.
Matthews, Richard	Edward Twopeny, Rochester, Kent.
Michell, Charles Clement	Edward Michell, Shepton Mallett.
Mitford, Edward Reveley	John Adams Tilleard, 34, Old Jewry.
Morgan, Thomas Henry	Richard Helps, Gloucester.
Niblett, Charles William	Charles Niblett, Farnham; assigned to John Rand, Guildford, and Farnham.
Nicholl, Frederick Iltid (B.A.)	Robert Wheatley Lumley, Carey-street.
Norris, Jas. Edw. the younger	James Edward Norris, Halifax.
Norton, William Hebelert	William James Norton, New-street, Bishopsgate.
Pallet, James	John Wilkes Unett, and John Unett, Birmingham.
Paterson, Robert	George Marshall, Berwick-upon-Tweed.
Perkins, Thomas	John Lampray, Warwick.
Poole, Francis	Richard Barnes, Barnard Castle.
Protheroe, Thomas	John Hill, 56, Welbeck-street, Cavendish-square.
Pullen, James Thomas	Robert Byron Chambers, Austin Friars, Old Broad-street.
Reed, Thomas Lancelot	Sturley Nunn, Ixworth; assigned to Henry Manisty, 3, King's-road, Bedford row.
Rodgers, Charles	William Foster, New Sleaford.
Rowley, Thomas Butler Weloh	Thomas Lamb, Lancaster.
Rush, John Brook	John Roger Rush, 18, Austin Friars.
Scaine, John the younger	George Tallentire Gibson, Newcastle-upon-Tyne.
Scobell, Edward Henry	Henry Arthur Harvie, Bideford.
Serjeant, Robert	Richard Symons and Edward Luxmoore, Wadebridge.
Shelton, George Lane	William Deveroux, Bromyard.
Shepherd, William Luke	John Uppley, Scarborough.
Shipman, Robert Milligan	Joseph Munn, Tenterden.
Sloper, John William	Joseph Maynard, 3, Mansion-house-place.
Smith, Joseph Crowther	Samuel Smith, Walsall.
Smith, Arthur	John Smith, Crediton, Devon; assigned to John Cleave, Bridge-street, Hereford.
Smith, George	Peter Tuxford, Boston; assigned to Buxton Kenrick, and Henry Harwood, Boston.
Staley, Alfred	William Aldridge, Stroud.
Stamp, George	George Marris, Caistor.
Standbridge, Thomas	John Richards, Birmingham; assigned to James Motteram, Birmingham; re-articled to James Motteram.
Stokes, Charles	Thomas Andrew, Great Coggleshall, Chester; assigned to Samuel Waylen, Great Coggleshall.
Stone, George	William Bartley, 9, Temple-court, Liverpool; assigned to John Hawkinson Kenyon, 16, Castle-street, Liverpool.
Stykes, William	James Wadsworth, Eddercliffe, township of Liversedge.
Symons, William	Edward Hoblyn Pedler, Liskeard.
Sweet, Henry	Northmore Herlé Pierce Lawrence, Launceston.
Tepper, Jabez	Josiah Isles Wathen, 3 Bedford-row.
Thompson, William	Joseph Thompson, Workington; assigned to Edw. Scott, Wigan.
Thorne, John Chorley	John Michell, the younger, Redruth, Cornwall.
Torr, John Smale	John Smale, Exeter.
Torre, John Alexander	Edward Klocker, Dover; assigned to George Washington Abbott, 9, Saint James's-street.
Traviss, John	William Shepherd, Barnsley, Yorkshire.
Veal, Charles Marfield Barron	Questor Veal, Great Grimsby.
Terrell, Henry	John Tribe, Steyning, Sussex; assigned to Robert Upperton, Brighton.
Teysey, Arthur	Robert Upperton, Brighton.

*Clerk's Name.*

Wace, George  
Wade, Charles Joseph  
  
Walker, Willoughby Newton  
Wasbrough, Henry Sidney

Watson, Jacob  
Watts, John King  
Webb, Edward John  
Welch, William Lister  
Weyman, Thomas  
Wheelwright, Charles  
Whittenbury, John Llewellyn  
Wilby, John

Wilson, John (B. A.)  
Wintle, James

Wormald, William

Wright, Robert

Wright, Charles  
Yarrington, William Samuel

Yates, William

*Name and residence of Attorney to whom articulated or assigned.*

Richard Wace, Shrewsbury.  
Thomas Wood, formerly of Wolverhampton, but now of London; assigned to Thos. Holme Bower, 46, Chancery-lane.  
Edward Harrison, 14, Southampton-buildings.  
John Bligh Stanley, 11, Corn-street, Bristol; assigned to John Aubrey Whitcombe, Gloucester; re-assigned to John Bligh Stanley.  
Edmund Kent, the younger, Fakenham.  
Thomas Escoline Fisher, St. Ives.  
Joseph Allen Higgins, Ledbury.  
Richard Claye, Manchester.  
William Downes, Ludlow; assigned to James Cross, 9, Staple-inn.  
Arthur Ryland, Birmingham.  
Sir John Bickerston Williams, Knt., Shrewsbury.  
George Robinson, Wakefield; assigned to Thomas Taylor, Wakefield.  
Charles Harrison Clarke, and Henry Wells, Nottingham.  
Richard Helps, Gloucester; assigned to Charles Meredith, Lincoln's-inn.  
Timothy Beaver, Wakefield; assigned to Joseph Phillips, Chippenham.  
Robert Fenton, Newcastle-under-Lyme (deceased); assigned to Robert Fenton, Newcastle-under-Lyme.  
Edward Sewell, Swaffham.  
Samuel Sadler, North Walsham, Norfolk; assigned to William Yarrington, Swaffham.  
John Atkinson, Liverpool; assigned to Richard Finlow, Liverpool; re-assigned to John Johnson Brown, Liverpool.

The above were examined at *Common Law*; the following in *Chancery*.  
Cooper, Charles Henry      William Jeary Cannon, Cambridge.

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29, Maiden Lane, in the Parish of St. Paul, Cove-  
Garden, in the County of Middlesex; and Published  
by **JOHN RICHARDS**, Law Bookseller, 194, Fleet  
Street, in the Parish of St. Dunstan-in-the-West,  
in the City of London.—Saturday, July 11, 1868.

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# The Legal Guide.

VOL. IV.]

SATURDAY, JULY 18, 1840.

[No. 12.

Price Sixpence.

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## JOINT STOCK BANKING COMPANIES.

WE are enabled to give a very full report of the important appeal case in the case of Lords (*The London Joint Stock Bank v. the Bank of England*), embracing rights and privileges of all the Joint Stock Banks in the Kingdom, and it is of great importance to all the COUNTRY BANKS. By the statute 3 & 4 W. IV. c. 98. the right of carrying on the business of banking is extended upon certain conditions to partnerships, consisting of more than six persons in *London*, or within any distance in *London*.

The exclusive privileges of the Bank of England have been continued in Acts of

Parliament from the 6th Anne to 7th George IV. c. 46. which was the first statute that enabled banks to be established by more than six persons. But that Act did not extend to *London*, or to places within sixty-five miles of *London*.

The question between the Bank of England and the London Joint Stock Bank, when reduced, is of great simplicity. It is whether the circumstance of a Canadian bank, drawing bills of exchange upon the manager of a London Joint Stock Bank in his individual capacity, which he accepts payable at such Joint Stock Bank, and the due payment of which bills is protected in Canada by the guarantee of that bank, is or is not a violation of the Bank of England



Acts of Parliament, and in particular that of the 4th and 5th W. IV. c. 93. This is the sole and simple question, however broad it may appear in the detail. *Sir Wm. Follett* in his argument before the *Master of the Rolls* against the injunction, observed,

The *London Joint Stock Banks* cannot sue and be sued in the name of one of their officers, for that, it is said, would be an infringement of the privileges of the Bank. It has been decided that they cannot accept a bill of exchange, drawn for a less time than six months, for that would be an infringement of the privileges of the Bank; but those privileges ought not to be stretched to an extent which the language of the Acts of Parliament does not warrant. Whether a *foreign bill* of exchange is within the prohibition is still a question. It is clear that a *foreign bill* of exchange, drawn by a *foreign bank* upon a *London bank* (which has money of the foreign bank in its hands); for the purpose of enabling it to negotiate its paper in this country, can never come into competition with the circulating paper of the *Bank of England*, and the fair inference, therefore, is that it does not fall within the meaning of the prohibiting clause in the Acts of Parliament.

The Bank has the power, and, if the power, it has shewn that it has the will and the inclination to throw every obstacle in the way of joint-stock banks, and to prevent them, if possible, from carrying on their business. There is no mode in which, so long as the privileges of the Bank continue, they can conduct their business upon an equality with that corporation; but *if they can find a mode* by which they may avoid some of the inconveniences to which they are exposed, without violating the acts of Parliament, they have a clear right to avail themselves of it. It is not denied, but avowed, that their object is to get out of the provisions of the act of Parliament, if they can; and they have a right to do so. It could not be the intention of the legislature, when it

enabled joint-stock banks to be established in *London*, that the privileges of the Bank should be so constructed as to render it impossible for such joint-stock banks to carry on their business. It cannot be disputed that the *London Joint Stock Bank* had a right to act as agents of the *Canada Bank* to make advances for that bank, and to pay its paper to any amount which they thought fit to answer. Suppose the *Canada Bank* had made their promissory notes payable to the *London Joint Stock Bank*, that might be done without any infringement of the act of Parliament, and it is, in fact, the course which has been adopted by the *country banks*. Suppose the bills of the *Canada Bank*, instead of being drawn on Mr. *Pearl*, as manager of the *London Joint Stock Bank*, had been drawn upon a merchant resident in the *city of London*, who thought fit to accept them upon a guarantee from the *London Joint Stock Bank*, would that have been an infringement of the act of Parliament? A fraudulent evasion of an act of Parliament is an infringement of the act, and will be dealt with accordingly by the Court of Law or Equity. But a contrivance to avoid the inconveniences to which a class of men are exposed by the penal provisions of an act of Parliament, is not unlawful, and cannot be restrained by a Court of Equity, because a Court of Equity cannot extend the provisions of an act of Parliament. (a)

#### PROBLEM 12. VOL. IV.

##### DEVASTAVIT.

What shall *not* amount to a Devastavit?

#### ANSWER TO PROBLEM 24. VOL.

##### DEVASTAVIT.

What shall amount to a Devastavit?

A Devastavit is the mismanagement of the estate and effects of a deceased person, in neglecting and misapplying the assets, contrary to the duty imposed on executors or administrators for which they shall answer out of their own pockets so far as they had, or might have had.

(a) *Bank of England v. Booth*, 3 *Keen*, 479, 3.

sets of the deceased. (1) Executors and administrators may be guilty of a *devastavit*, not only by a direct abuse by them, as by spending, consuming, or converting to their own use the effects of the deceased, but also by such acts of negligence and wrong administration as will disappoint the claimants on the assets.

The application of the assets to the satisfaction of the executor's own debt to a third party, or the collusive sale of the testator's goods at an under value, are *devastavits* by direct acts of abuse. The misapplication of the assets in unnecessary expences for the funeral, (2) in the payment of debts out of their legal order to the prejudice of the creditors, are examples of *devastavit* by bad administration; (3) but the payment of a debt of an inferior degree before one of higher, which he had no notice, will not amount to a *devastavit*. *Hawkins v. Day*, 1 Dickens, 155. If an executor surrenders the residue of a term years where the land is of more value than the rent, or assigns a term to attend the inheritance, he is liable for *devastavit*.

By releasing or compounding debts due to the testator, unless it appears to have been for the benefit of the trust estate, he will be liable for a *devastavit*. (4) So also, if he applies the assets to the payment of a claim which he is not bound to satisfy, or pays a bond *ex turpi causa*, or one founded on an usurious contract. (5)

Such acts of negligence or careless administration as defeat the rights of creditors or legatees, or parties entitled in distribution, amount to a *devastavit*. So if an executor delays the payment on which interest is payable, while he has sufficient funds in hand, he can be charged with the interest. *Hall v. Hallet*, 1 Cox, 134. (6) If an executor, by his delay in bringing an action, enables the debtor to make a defence under the Statute of Limitations, he is liable for a *devastavit*. (7)

At law an executor or administrator is liable in respect of assets come fully into his possession or hands, and afterwards lost to the estate. (8) but Courts of Equity are very liberal in making every possible allowance, and are cautious not to hold executors or administrators liable except in very clear cases. (9) Thus in Courts of Equity an executor is not held liable for the loss of the goods of the testator by theft, casualty, or for the loss of money invested on a real security, though without the indemnity of a decree, where, at the time of the investment, there was no reason to suspect the security, but afterwards such security proves bad. (10) With respect to loans upon personal security, the doctrine of the Courts of Equity is, that an executor or administrator lending money upon

bond, promissory note, or other personal security, is guilty of a breach of trust, and shall be personally answerable if the security prove defective. *Vigrass v. Binfield*, 3 Madd. 62; *Walker v. Symonds*, 3 Swanst. 63. (11) An executor is not liable for any loss by the fall of stocks. (12)

Executors should not allow the money of the testator, at the time of his death, invested on personal security, to remain so, longer than is absolutely necessary, as they will generally be held liable for any loss that may happen, unless they appear to have acted with diligence and good faith. *Powell v. Evans*, 5 Vesey, 839; *Buxton v. Buxton*, 1 Mylne and Cr. 80. With respect to losses sustained by the failure of bankers or other persons in whose hands the money of the testator has been deposited by the executor, the rule in equity appears to be, that where the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible for the loss. *Bacon's Abridg.* tit. Executors; *Comyn's Digest.* tit. Admon.; 2 *Williams' Law of Executors*, 2nd edit. 1278 et seq. J. S.

EDITOR'S NOTES.

- (1) See Off. Ex. 157; 3 Bac. Ab. 77; Com. Dig. tit. Admon.
- (2) See *Bissett v. Antrobus*, 4 Sim. 512.
- (3) See *Spade v. Smith*, 3 Russ. 511. Or by disbursements in the schooling, feeding, or clothing of an intestate's children subsequently to his decease; see *Giles v. Dyson*, 1 Stark, 32.
- (4) See 1 Nels. Ab. 262.
- (5) See *Winchcombe v. Bishop of Winchester*, Hob. 167; Noy. 129.
- (6) See *Seaman v. Everard*, 9 Lev. 40.
- (7) See *Hayneard v. Kinsey*, 12 Mod. 573.
- (8) See *Goodfellows v. Burohett*, 2 Vern. 290.
- (9) *Id.*
- (10) *Brown v. Litton*, 1 P. Wms. 141.
- (11) See *Wilkes v. Steward*, Coop. Rep. 6. and 2 Cox's Rep. 1; but see *Harden v. Parsons*, 1 Eden. 145.
- (12) See *Hutchinson v. Hammond*, 3 Bro. Ch. Rep. 147; *Franklin v. Firth*, id. 433; *Cooper v. Douglas*, 2. id. 231.

FRIVOLOUS SUITS ACT.

Vic. 3 & 4, cap. 24.

*An Act to repeal part of an Act of the forty-third year of the reign of Queen Elizabeth, intituled "An Act to avoid trifling and frivolous suits in law in her Majesty's Courts in Westminster," and of an Act of the twenty-second and twenty-third year of the reign of King Charles the Second, intituled "An Act for laying impositions on proceedings at law;" and to make further provisions in lieu thereof.*

3d July, 1840.

WHEREAS an Act passed in the forty-third

year of the reign of Queen Elizabeth, intituled, "An Act to avoid trifling and frivolous suits in law in her Majesty's Courts in Westminster," and another Act in the twenty-second and twenty-third years of the reign of King Charles the second, intituled "An Act for laying impositions on proceedings at law," which recites that many good subjects of this realm have been and daily are undone by such suits, contrary to the intention of the said statute of Queen Elizabeth; but the same evil, notwithstanding, doth still prevail and increase, and it is expedient to make further provisions for the prevention thereof: Now be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said recited Act of the forty-third of Elizabeth, so far as it relates to costs in actions of trespass, or trespass on the case, and so much of the twenty-second and the twenty-third of Charles the Second as relates to costs in personal actions, be and they are hereby repealed.

II. And be it further enacted, That if the plaintiff in any action of trespass, or of trespass on the case, brought in any of her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any cost whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or on the writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious.

III. Provided always, and be it further enacted, That nothing herein contained shall extend to or be construed to extend to deprive any plaintiffs of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or enclosures, or for entering into any dwellings, outbuildings, or premises in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions.

## SMALL TENEMENTS ACT.

1 & 2 Vict. c. 74.—Passed 10th Aug. 1838.

### *An Act to facilitate the Recovery of Possession of Tenements after due Determination of the Tenancy.*

This beneficial Statute to Landlords of Tenements at a rent under £20. a-year, saving them the expense and delay of proceedings by Ejectment to recover possession, where a tenant refuses to quit at the determination of his tenancy, is now getting into full work throughout the country. It becomes necessary, therefore, that our readers should have its contents.

Sec. I. enacts, That from and after the passing of this Act, when and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent or at a rent not exceeding the rate of £20. a-year, and upon which no fine shall have been reserved or made payable, shall have ended or shall have been duly determined by a legal notice to quit or otherwise, and such tenant or (if such tenant do not actually occupy the premises, and only occupy a part thereof,) any person by whom the same or any part thereof shall be then actually occupied shall neglect or refuse to quit and deliver up possession of the premises or of such part thereof respectively, it shall be lawful for the landlord of the said premises or his agent to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to this Act, signed by the said landlord or his agent of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this Act, and shall still neglect or refuse to deliver up possession of the premises or of such part thereof of which he is then in possession to the said landlord or his agent, it shall be lawful for such landlord or agent to go to such justices proof of the holding and of the end or other determination of the tenancy, and of the time or manner thereof, and where the rent of the landlord has accrued since the letting of the premises, the right by which he claims the possession, and upon proof of service of the

ice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within which the said premises or any part thereof shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district, division, or place within which the said premises or any part thereof shall be situate, commanding them, within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession thereof to the same to such landlord or agent: Provided always, that entry upon such warrant shall not be made on a *Sunday, Good Friday, or Christmas day*, or at any time except between the hours of nine in the morning and four in the afternoon: Provided also, that nothing herein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not at the time of granting the same lawful right to the possession of the premises: Provided also, that nothing herein contained shall affect any rights to which any person may be entitled as out-going tenant or the custom of the country or otherwise.

Sec. II. enacts, That such notice of application intended to be made under this Act may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the person so holding over as aforesaid, and that the person serving the same shall read over the same to the person served or with whom the same shall be left as aforesaid, and explain the purport and intent thereof: Provided that if the person so holding over cannot be found, and the place of abode of the person shall either not be known or admission thereto cannot be obtained for serving such summons, the posting up of the said summons in some conspicuous part of the premises so held over shall be deemed to be good service upon the person.

Sec. III. enacts, That in every case in which a person to whom any such warrant shall be granted had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant; and in case such tenant or occupier will become bound in two sureties as hereinafter provided, to be approved of by the said justices, in such sum as the justices shall seem reasonable, regard being had

to the value of the premises and to the probable costs of an action, to sue the person to whom such warrant was granted with effect and without delay, and to pay all the costs of the proceeding in such action in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action or become nonsuited therein, execution of the warrant shall be delayed until judgment shall have been given in such action of trespass; and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs in the said action of trespass.

Sec. IV. enacts, That every such bond as hereinbefore mentioned shall be made to the said landlord or his agent, at the costs of such landlord or agent, and shall be approved of and signed by the said justices: and if the bond so taken be forfeited, or if upon the said trial of the action for securing the trial of which such bond was given the judge by whom it shall be tried shall not indorse upon the record in court that the condition of the bond hath been fulfilled, the party to whom the bond shall have been so made may bring an action, and recover thereon: Provided always, that the court where such action as last aforesaid shall be brought may, by a rule of court, give such relief to the parties upon such bond as may be agreeable to justice, and such rule shall have the nature and effect of a defeasance to such bond.

Sec. V. enacts, That it shall not be lawful to bring any action or prosecution against the said justices by whom such warrant as aforesaid shall have been issued, or against any constable or peace officer by whom such warrant may be executed, for issuing such warrant or executing the same respectively, by reason that the person on whose application the same shall be granted had not lawful right to the possession of the premises.

Sec. VI. enacts, That where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this Act, but the party aggrieved may, if he think fit, bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit: Provided that if the special damage so laid be not proved, the defendant shall be entitled to a ver-

dict, and that if proved, but assessed by the jury at any sum not exceeding 5s., the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been held shall certify upon the back of the record that in his opinion full costs ought to be allowed.

Sec. VII. enacts, That in construing this Act the word "premises" shall be taken to signify lands, houses, or other corporeal hereditaments; and that the word "person" shall be taken to comprehend a body politic, corporate or collegiate, as well as an individual; and that every word importing the singular number shall, where necessary to give full effect to the enactments herein contained, be deemed to extend and be applied to several persons or things as well as one person or thing; and that every word importing the masculine gender shall where necessary extend and be applied to a female as well as a male; and that the term "landlord" shall be understood as signifying the person entitled to the immediate reversion of the premises, or if the property be held in joint-tenancy, coparcenary, or tenancy in common, shall be understood as signifying any one of the persons entitled to such reversion; and that the word "agent" shall be taken to signify any person usually employed by the landlord in letting of the premises or in the collection of the rents thereof, or especially authorized to act in the particular matter by writing under the hand of such landlord.

Sec. VIII. The Act shall not extend to Scotland or Ireland.

#### SCHEDULE to which this Act refers.

##### FORM, No. 1.

#### NOTICE OF OWNER'S INTENTION to apply to JUSTICES to recover POSSESSION.

I [owner, or agent to the owner, as the case may be,] do hereby give you notice, that unless peaceable possession of the tenement [shortly describing it] situate which was held of me, or of the said [as the case may be] under a tenancy from year to year, or [as the case may be], which expired [or was determined] by notice to quit from the said or otherwise [as the case may be] on the day of , and which tenement is now held over and detained from the said be given to [the owner or agent] on or before the expiration of seven clear days from the service of this notice, I shall on next the day of at of the clock of the same day, at , apply to Her Majesty's justices of the peace acting for the district of [being the district, division, or place in which the said tenement, or any part thereof, is situate], in petty sessions assembled, to issue their warrant direct-

ing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

Dated this

(Signed)

To Mr.

[Owner or agent]

##### FORM, No. 2.

#### COMPLAINT before TWO JUSTICES.

The complaint of [owner or agent, &c. as the case may be,] made before us, two of Her Majesty's justices of the peace acting for the district of , in petty session assembled, who saith that the said did let to a tenement, consisting of , for under the rent of , and that the said tenancy expired [or was determined by notice to quit, given by the said , as the case may be,] on the day of and that on the day of the said did serve on [the tenant over-holding] a notice in writing of his intention to apply to recover possession of the said tenement (a duplicate of which notice is hereto annexed) by giving, &c. [describing the mode in which the service was effected]; and that notwithstanding the said notice the said refused [or neglected] to deliver up possession of the said tenement, and still detains the same.

(Signed)

Taken the day of before us

(Signed)

A duplicate of the notice of intention to apply is to be annexed to this complaint

##### FORM, No. 3.

#### WARRANT to PEACE OFFICERS to take and give POSSESSION.

Whereas [set forth the complaint], we, two of Her Majesty's Justices of the peace, in petty sessions assembled, acting for the district of , do authorize and command you, on any day within days from the date hereof (except on Sundays, Christmas-day, and Good Friday: to be added if necessary), between the hours of in the forenoon and four in the afternoon, to enter (by force, if needful,) and with or without the aid of the owner or agent, as the case may be, or any other person or persons whom you may think requisite to call to your assistance, into and upon the said tenement, and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said [the owner or agent].

Given under our hands and seals this day of

To and all other constables and peace officers acting for the district of

## Imperial Parliament.

## HOUSE OF LORDS, July 10.

## ADMINISTRATION OF JUSTICE BILL.

The LORD CHANCELLOR moved that the House resolve itself into a Committee on this Bill. His Lordship said, that the Committee which had sat upon the Bill had suggested an alteration which he was anxious to state:—The Bill left the appointment of successors to the two Vice-Chancellors in the hands of the Crown, and the alteration proposed was, that the Crown should only have the power of appointing a successor to one, and that the other should, in the first instance, be only appointed for life, thus rendering it necessary, upon his death, to apply to Parliament to appoint a successor.

Lord LYNTHURST said, that the Committee had examined the whole of the subject with the greatest minuteness, and had been perfectly unanimous upon every point suggested.

The Bill then passed with the proposed alterations.

July 16.

Read a third time and passed.

July 14.

## COPYHOLD ENFRANCHISEMENT BILL.

Lord BROUGHAM withdrew this Bill. His Lordship observed, that when he first brought in his Bill he had wished it to be referred to a Select Committee, and after some delay that had been done. The Committee had sat for some time, and a period of the session had now arrived which made him feel that he could hardly hope to get the Bill passed this session. If he were to proceed with the Bill, it could not be sent down to the other House of Parliament before the end of this month, and that was a sufficient reason for his withdrawing it. He would add, that this circumstance presented the only reason for withdrawing it, because, with the exception of the compulsory clauses, he was confident that he should have obtained the consent of the Select Committee. He would withdraw the Bill now, but he had no doubt whatever that this important Bill would receive the sanction of the Legislature early next session.

Lord LYNTHURST said, that in his opinion his noble friend was perfectly right in withdrawing the measure, upon a pledge that he would bring it forward early in the next session of Parliament. Their lordships had been so much occupied with the Chancery Committee from day to day, and in fact as often as his noble and learned friend on the woolsack could attend, that it was impossible to consider the details of his noble friend's bill.

Lord REDESDALE stated, that, under existing circumstances, he should withdraw the Bill which

he had himself introduced on the same subject, and bring it forward early next session, in order that their lordships might have an opportunity of comparing the merits of the two measures.

## Law Reports.

## HOUSE OF LORDS, July 9.

## APPEALS.

BOOTH AND OTHERS, DIRECTORS OF THE LONDON JOINT STOCK COMPANY V. THE GOVERNORS AND COMPANY OF THE BANK OF ENGLAND.

*The exclusive PRIVILEGE claimed by the BANK OF ENGLAND over other BANKING COMPANIES for accepting Bills of Exchange having less than six months to run.—Whether it is lawful for a Joint Stock Banking Company (consisting of more than six persons) to contract with a foreign Bank, by which the latter may draw Bills of Exchange upon the Manager of the Joint Stock Bank in his individual capacity, and not as Manager, payable at the Joint Stock Bank, and having less than six months to run.—The due payment of such Bills being guaranteed by the Trustees of the Joint Stock Bank making its funds responsible.*

This was an Appeal from an Order of the Master of the Rolls made in June, 1837, of the very first importance to Joint Stock Banking Companies and to the commercial world at large.

Sir W. Follett and Mr. Kindersley appeared for the Appellants, and Sir F. Pollock and Mr. Pemberton for the Respondents.

The facts as shewn by the Bill, are these—

The following Prospectus was issued for the purpose of establishing a Bank in London, to be called THE LONDON JOINT STOCK BANK. "The London Joint Stock Bank, Princes Street, Mansion House. Capital 3 Millions, in 6000 shares of £50. each. Directors Sir Felix Booth, Bart., Wm. Miller Christy, (and 16 others) George Pollard, Esq. Manager. The business of the Bank is conducted on the following principles. Accounts of parties properly introduced, are received agreeably to the present custom of London bankers, with this advantage, that interest is allowed on correct accounts, and on deposits, on the first day of every month, at the rate of £2. per cent. on the smallest balance, which may appear to the credit of each account at the close of any days during the preceding month. Sums of money received on deposit, at such rate of interest, and for such periods as may be agreed upon, reference being had to the state of the money market, and if required, bills or promissory notes at not less than six months' date, will be delivered to the depositors in lieu of receipts for sums not less than £100. interest at the rate of £2. 10s. per cent. allowed on sums not ex-

ceeding £2000., deposited without special agreement, which may be withdrawn at any time on giving ten days' notice. The agency of joint stock, and other country and foreign banks, undertaken on such terms as may be agreed upon. Investment in, and sales of all descriptions of, *British* and foreign securities, bullion, specie, &c. effected; dividends received, and every other description of banking business, and money agency transacted. A bill committee of the directors sit daily, from 12 to 2 o'clock, to receive applications for discounts, which are considered confidential, and promptly decided upon. The board of directors meet weekly when a full statement of the affairs of the bank is laid before them." That the bank was established in Oct 1836, the defendants were the directors and manager, and were all partners or shareholders except the manager.

That the plaintiffs had discovered that the object and design of the said company was not only to carry on the business of a Bank of deposit, but to borrow, owe, and take up money on their bills or notes, at a shorter date than six months, from the issuing thereof, in violation of the privileges of the plaintiffs.

That a bank at KINGSTON, UPPER CANADA, in NORTH AMERICA, called "THE COMMERCIAL BANK, MIDLAND DISTRICT," had previously to May, 1837, commenced drawing, and had in fact drawn divers bills of exchange, payable at *less than six months from the time of the acceptance*, upon the LONDON JOINT STOCK BANK, and that such bills of exchange had been accepted by that Bank, and that such bills had been drawn and negotiated with a view to maintain a circulation of paper-money for the benefit of the LONDON JOINT STOCK BANK.

That on the 26th of April, 1837, the Secretary of the LONDON JOINT STOCK BANK addressed the following letter to the plaintiffs:—

"Gentlemen,—Having received from a transatlantic bank the offer of their agency, which would involve the necessity of the bank accepting their drafts, payable at a *shorter date than six months*, the Directors of this Bank are desirous of knowing whether the Directors of the BANK OF ENGLAND would interpose any difficulty in the way of the Bank accepting such drafts.—I have the honour to be," &c.

To this the following reply was given—

"Bank of England, 27th April, 1837.

"Sir,—I am desirous to acknowledge the receipt of your letter of the 26th inst. addressed to the Governor and Court of Directors of the Bank of England, in which you asked whether the Directors of the Bank of England would interpose any difficulty in the way of the London Joint Stock Bank accepting drafts payable at a shorter date than six months, and

in reply I have to state, that such acceptances would be an infringement of the privileges of the Bank of England, and as respects the public would be illegal and void, and, consequently, could not be permitted by this corporation."

That notwithstanding such reply, at the end of Sept. 1837, the plaintiffs received, among various bills of exchange which formed part of remittances sent to them from Canada, a bill of exchange drawn by the President of the Commercial Bank, Midland District, upon the London Joint Stock Bank, as follows:—

"£1000. Sterling. Kingston, Upper Canada, 25th of July, 1837, Sixty days after sight, pay this my 1st of exchange, 2nd and 3rd unpaid, to the order of F. A. Harper, Cashier, the sum of £1000. sterling value received, which place to the account of the Commercial Bank, Midland District, with or without further advice John S. Cartwright, President. To George Pollard, Esq. Manager, London Joint Stock Bank, London."

That the plaintiffs presented this bill for acceptance at the London Joint Stock Bank, which was accepted by George Pollard as manager of the said bank as follows.—"Accepted 2d October, 1837, at the London Joint Stock bank, George Pollard."

That the word "at" was fraudulently introduced for the purpose of defrauding the plaintiffs and the public; and that the bill was really accepted by the London Joint Stock Bank, and that such company held themselves and their assets liable to pay the same; that the plaintiffs caused the bill again to be taken to the office of the London Joint Stock Bank, and required an acceptance in words according to the tenor of the bill; but that one of the clerks stated that such acceptance was sufficient, and that the bank were ready to discount the bill.

That on the 26th of October, 1837, the plaintiffs caused their solicitors to write the following letter to the defendants:—"Gentlemen,—The attention of the Governor and Directors of the Bank of England has been drawn to bills of exchange which have recently appeared, drawn by a bank in Upper Canada, for which, it appears you act as London agents, upon your manager, and accepted at your office. The Bank are advised, that the acceptance of such bills, having less than six months to run is a violation of their exclusive privilege; and we are therefore requested to know whether it is intended to persist in the practice, as in that case we are instructed to take immediate proceedings to obtain an injunction from a court of equity. We are, &c. FRESHFIELD and SOY."

To which was given the following answer:—"London Joint Stock Bank, 2nd November.

1837. Gentlemen,—Your letter of the 26th ult., addressed to the directors of this bank, was read before the board yesterday, and in reply hereto, I am instructed to state, that the directors deny that any practice has been adopted by the *London Joint Stock Bank*, which is a violation of the exclusive privilege of the *Bank of England*, the *London Joint Stock Bank* never having accepted, nor directed, nor authorized their manager, or any other person, to accept any bills of exchange having less than six months to run. I am, &c., MICHAEL BOGLE."

The bill charged that the directors had authorized *George Pollard* to accept bills of exchange drawn upon the company in the manner and form in which the bill of exchange, dated the 25th of *July*, 1837, had been accepted by him; that such form of acceptance had been resorted to in consequence of the acts of parliament giving such privilege, to the plaintiffs, with intent and for the purpose of evading or eluding the provisions of the said acts or some of them, or of avoiding the operation thereof: that the defendant *George Pollard* had no connection with the *Commercial Bank of Upper Canada*, except as agent, manager, or servant of the *London Joint Stock Bank*; that the bills of exchange so accepted by *George Pollard* were entered in the bill books belonging to the company, and paid out of the money belonging to the bank. And prayed that an account might be taken of all bills accepted by the defendants on behalf of the Company having less than six months to run from the date of acceptance, and particularly on all bills drawn upon the Company accepted by the defendant, *George Pollard*, or any agent of the company, in the form in which the bill of the 25th of *July*, 1837, was accepted, and of the gains and profits of the company made by such acceptances; and that it might be declared that the accepting such bill of the 25th of *July*, was a fraud upon the plaintiffs, and that the defendants might be restrained from accepting on behalf of the *London Joint Stock Bank* company any bills payable at less than six months from acceptance; and from accepting any bills in the form in which the bill of the 25th of *July*, 1837, was accepted; and that the defendant, *George Pollard*, and every agent or servant of the company might in like manner be restrained, and that all the defendants might in like manner be restrained, from in any other manner borrowing, owing, or taking up in *England* and on behalf of the said company, any sums of money on the bills or notes of the said company, payable on demand, or at any less time than six months from the borrowing thereof.

All the defendants except Mr. Pollard filed a joint and several answer; and Mr. Pollard, the manager, who was not a partner or shareholder, filed

a separate answer. It appeared from the answers that 30,000 shares had been subscribed for by the 22nd of October 1837, and that on the 31st of October 1837, a deed was executed by which it was provided that the concerns of the Company should be under the control of nineteen directors, who should have the entire management of the business of the Company, and the sole power of appointing and removing the manager and every other officer or servant of the Company; that such person or persons as the directors should by any resolution or minute authorise, should exclusively have power to sign, draw, indorse, and accept all bills of exchange and other negotiable securities, which alone should be binding upon the Company; and each of the directors and shareholders disclaimed all right so to do, unless he should be expressly authorised by the directors, who were to have the entire control and disposition of the capital and effects of the Company; and the manager and other officers of the Company were placed under the directors. The directors were authorised to execute any power of attorney to enable any other person or persons to act on behalf of the Company, in any transaction, business, or thing, which should be stated in such power.

On the 19th of November, 1836, the defendant, *George Pollard*, was authorised by the directors exclusively to indorse all bills of exchange and promissory notes, and to draw such cheques in the name and on account of the Company as might be necessary in the usual course of business. On the 14th of March 1837, the *London Joint Stock Bank* received a letter from Mr. Harper, the secretary of the *Kingston Commercial Bank*, in *Upper Canada*, proposing that the *London Bank* should become their agents, receiving drafts from the *Canada Bank* payable at sixty days, and giving the *Canada Bank* a credit for that time to the amount of from £40,000. to £60,000. On the 6th of May 1837, the directors of the *London Joint Stock Bank* resolved that a communication should be made to the *Kingston Commercial Bank*, stating their readiness to act as the agents of the *Kingston Commercial Bank*, upon condition that all drafts should be drawn upon and accepted by the manager of the *London Bank*, in his individual capacity. On the same day, Mr. Pollard wrote a letter to Mr. Harper, stating that by the construction put upon the charter of the *Bank of England* by the Court of Common Pleas and the Master of the Rolls, (a) no joint-stock bank could accept bills of exchange in *London*, or within sixty-five miles of *London*, at a less date than six months; and suggesting that the difficulty might be got over either by the *Kingston Com-*

(a) See the *Bank of England v. Anderson*, 2 Keen, 328.



mercial Bank issuing their own promissory notes to the extent of £40,000, payable at sixty days at the London Joint Stock Bank; or by drawing, at sixty days' sight, bills upon Mr. George Pollard, the manager of the London Joint Stock Bank—the due payment of the bills accepted by the manager to be guaranteed by the London Joint Stock Bank. Mr. Harper replied on the 21st of June 1837, that the board of the Kingston Commercial Bank had taken into consideration the two modes proposed, so as not to come within the power of the acts in favour of the Bank of England, and preferred that of drawing on the manager at sixty days; and requesting that the guarantee of the London Joint Stock Bank might be sent to protect the drafts of the president of the Kingston Commercial Bank. The directors, on the 26th of July 1837, resolved to accept the agency on these terms; and on the 29th July 1837, the trustees wrote a letter, undertaking that, in consideration of the Kingston Commercial Bank keeping a banking account with the London Joint Stock Bank, the latter would provide the necessary funds to pay at maturity all such bills as might be drawn by the Kingston Bank upon, and accepted by, Mr. George Pollard, manager of the London Bank, such bills being accepted by him in his *individual capacity*. With this guarantee was sent a counter-under-taking, to be executed by the Kingston Bank, that they would pay the balances due to the London Bank, which was returned, signed in due form, to the London Bank. The president of the Kingston Commercial Bank drew the bill of exchange dated the 5th of July 1837, in anticipation of the guarantee being sent out. This bill was protested by the Bank of England for non-acceptance, but was ultimately paid. On the 6th of Oct. 1837, Mr. Pollard suggested an alteration in the form of the bills of exchange, to the Canadian Bank, by leaving out the word “manager,” and directing them “to George Pollard, Esq. at the London Joint Stock Bank.”

The defendants (the directors) denied that the bill was accepted by Mr. Pollard, as manager of the company on their behalf, and for their benefit, but said that it was accepted on behalf of himself, and for the benefit of the Kingston Commercial Bank; they denied that the word “at” was fraudulently inserted; and also denied that they held themselves or the assets of the company responsible or liable to pay the bill; but they stated the arrangement made between the London Joint Stock Bank and the Kingston Commercial Bank; and that, in conformity therewith, they had out of monies belonging to the Kingston Commercial Bank in their possession, or out of their own monies, paid all the bills of exchange of the Kingston Commercial Bank, drawn upon and accepted by the defendant, George Pollard, which bills were sometimes ad-

ressed “to G. Pollard, Esq. manager, London Joint Stock Bank, London; and at other times, “to G. Pollard, Esq. manager of the London Joint Stock Bank, London;” and at first “accepted at the London Joint Stock Bank, Geo. Pollard;” and afterwards, “accepted payable at the London Joint Stock Bank, Geo. Pollard.”

Defendant, George Pollard, admitted that he was manager of the London Joint Stock Bank; and that the only connection which he had with the Kingston Commercial Bank in his individual character was, in accepting their bills of exchange; and that the bills accepted by him were *paid out of the assets of the company*, but he said that he had authority to indorse bills and draw cheques, but no authority to accept bills of exchange on behalf of the company; that the bills of exchange accepted by him were entered in a private account kept by himself, and when paid, were entered in the books of the company.

The MASTER of the ROLLS granted an injunction, restraining the London Joint Stock Bank and every partner therein, and the defendant, George Pollard, and every clerk, servant, or agent of the same, from accepting, or causing to be accepted, in the name of the said partnership, or in the name of the said George Pollard, or any other name on behalf of the said bank, in the course of their banking transactions, any bill or bills of exchange payable on demand, or at any less time than six months from the acceptance thereof. (b)

This appeal now came on for argument on the part of the *Bank of England*. The case of the *Bank of England v. Anderson* (c) was relied upon.

On the part of the *London Joint Stock Bank* the following cases were cited: *Thomas v. Bishop*; (d) *Emly v. Lye*; (e) *Jackson v. Hudson*; (f) *Leadbitter v. Farrow*; (g) *Denton v. Rodie*; (h) *South Carolina Bank v. Case*; (i) *Wilson v. Barthrop*; (k) *Dunbar v. Gill*; (l) *Bramah v. Roberts*. (m)

THE LORD CHANCELLOR said, if the case of the *Bank of England v. Anderson* was to be taken by their lordships to be the law, then the question to be considered would be, how the circumstances of that case created any distinction, so as to make a different rule of law applicable to the facts of this case as opposed to the case of the *Bank of England v. Anderson*. In proposing questions for the consideration of the judges, the object of their lordships would be so to put them as to draw from the

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| (b) See 2 Keen, 496.    | <i>Booth v. The Bank of England</i> |
| (c) 2 Keen, 328.        | (h) 3 Camp. 463.                    |
| (d) 2 Str. 955.         | (i) 8 Barn. & Cres. 47.             |
| (e) 15 East. 7.         | (k) 2 Man. & Wels. 40.              |
| (f) 2 Camp. 447.        | (l) Moo. & N. 450.                  |
| (g) 5 Mau. & Selw. 845. | (m) 3 Bing. N. C. 283.              |

earned judges an opinion how far the circumstances which varied the two cases would affect that decision in point of law. Now here were three circumstances relied on as distinguishing that case to which he had referred from the present. First, it was said that the bill which was here accepted was an inland bill of exchange, and that, in the present case, it was a foreign bill of exchange. Secondly, it was insisted, and it was the most important circumstance, no doubt, as regarded the mode in which the acceptance was made, not being made by the company, or in the name of the company, but by Mr. George Pollard, under the circumstances which appeared upon the facts of the case. Then it was said, thirdly, that in the case of the *Bank of England v. Anderson*, it was a fact stated, that at the time the company accepted the bill, they had funds in hand equal to the amount of the bill so accepted. In the present case the contract was that the company in London should accept bills—looking to the company in Canada remitting money in time to meet the acceptances as they became due. He did not, he confessed, see any distinction between the two cases, as respected the bills of exchange, being in one case an inland bill, and in the other a foreign bill of exchange, because the object of the Act was to protect the Bank of England. His lordship then submitted the four following questions for the decision of the judges:—

“First.—The London Joint-stock Bank under the circumstances which have made it illegal in them as a company, and a violation of the rights and privileges of the Bank of England, to have accepted and issued bills herein-aftermentioned, if drawn upon them under an arrangement with a bank in Canada to pay bills drawn by such bank upon George Pollard, the manager of the London Joint-stock Bank to be accepted by the said George Pollard, and to provide funds for the due payment by the said George Pollard, the money transactions arising therefrom being on the account between the two banks, and to be treated in all respects as transactions between the said two banks. Is the acceptance of such bills by the said George Pollard, in execution of that arrangement, lawful, regard being had to the Act in force respecting the Bank of England?”

“Secondly.—Would the acceptance of such bills be lawful, assuming that the London Joint-stock Bank, at the time of such acceptance, had funds in their hands on account of the Bank in Canada equal to the amount of bills so accepted?”

“Thirdly.—Would the acceptance of such bills be lawful, assuming that the London Joint-stock bank had not, at the time of such acceptances, any funds in hand belonging to the bank in Canada, but that such bills were accepted upon the credit of the contract by such bank to remit sufficient funds to the London Joint-stock Bank

to meet such acceptances before the time at which they would become payable?”

“Fourthly.—Could the Bank of England maintain any action against the London Joint-stock Bank under either of the circumstances above supposed?”

Lord Chief Justice TINDAL, on behalf of the judges, asked for time to consider the questions.

#### PRIVY COUNCIL JUDICIAL COMMITTEE.

This Court is adjourned.

#### COURT OF CHANCERY, July 1.

##### IN RE PACKWOOD.

**ANNUITANTS FOR LIVES.**—*Power of the Lord Chancellor to order the holder of a Rent-charge upon real Estates for lives to produce the lives at the next parish church to the residence of the cestuis que vie.*

*Mr. Whatley* applied under the statute 6 Ann, c. 18. with an affidavit made by the owner of certain lands, upon whose real estate a rent-charge had been granted for four lives, who resided at Camden-town and in Tottenham Court-road, and who deposed as to his belief that the *cestuis que vie* were dead, and that the holder of the rent-charge concealed that fact from him, which brought the present application within the statute. The *cestuis que vie* all resided within the parish of St. Pancras, which parish having several parish churches, a difficulty arose as to which church they should be produced in.

The LORD CHANCELLOR ordered all the *cestuis que vie* to be produced at the parish church of St. Pancras within a month.

July 11.

##### IN RE HARPER.

**BANKRUPTCY.**—**PRACTICE.**—*ORDER for annulling a FIAT in BANKRUPTCY—the effect of such an ORDER by the COURT of REVIEW.*

*Mr. W. R. Ellis* moved in this case to alter the date of an order annulling a fiat. The order had been pronounced by the Court of Review on the 30th of May, but it could not be obtained from the office in order to procure the signature of his Lordship until the 1st of June. By the statute the power to annul a fiat was vested solely in the Lord Chancellor; but in practice the great seal was applied on the credit of the order by the Court of Review. He said it was important to the petitioner, because he had commenced an action against a debtor, who had left the country for New South Wales, and if new process were necessary, his remedy would be lost. Under these circumstances he prayed the Court to antedate the fiat, or strike out the date altogether.

The LORD CHANCELLOR said, the order of the Court of Review was of no force until the great seal was affixed, and therefore he could not alter

the date. It did not reach his Lordship until the 1st of June, otherwise the petitioner should not have been injured by the inability to obtain his signature on the day it was brought. If it had been brought on the 30th of May, the date might have been of that day; but not being so, the Court could not remedy the particular inconvenience by a general rule which would affect others.

#### QUEEN'S BENCH, July 11.

##### THE SHERIFF AND THE JURY FINED.

LORD DENMAN said, there had been several persons who had not attended at all during the present sittings. They had been resummoned, and had been fined 5*l*. They were now fined 40*s*. more, and it was right the public should know that there was no limit to the fines which might be imposed on jurymen for non-attendance; if they still absented themselves, a very heavy fine would be imposed. His Lordship then asked for the summoning officers, but they were not to be found; he then called for the sheriff, but no person was present to represent him.

LORD DENMAN then said, that he should like the public to see the heavy bills of costs parties had to pay for bringing their cases here; indeed, it often happened that it was their utter ruin; and then, when things were fully prepared, the sheriff, who was bound to have a jury, was not in attendance; the sheriff should, therefore, be fined 20*l*.

#### BAIL COURT, May 13.

##### GRIFFIN v. SMITH.

**PRACTICE.**—AFFIDAVITS sworn before a Commissioner for taking Affidavits in IRELAND. —Whether it will be read as evidence in ENGLAND.

In this case a judgment had been obtained in Dublin, and an affidavit was put in to support a rule upon such judgment in the Court of Queen's Bench in England, which appeared to be sworn before a Commissioner for taking affidavits in the Courts in Dublin.—An objection was made to this affidavit, on the ground that an Irish Commissioner had no authority to take affidavits in causes pending in the English Courts of Law.

WILLIAMS, J., held that such an affidavit could not be read in the English Courts.

#### COURT OF EXCHEQUER, May 8.

##### Sittings in Banco.

##### BALL v. STANLEY.

**JUDGE'S ORDER for payment of a debt by a given time or Judgment—Whether the Plaintiff can before that time has expired when the Defendant is about to leave the**

**kingdom, apply to a Judge for a Capias. —Suggestion of the Court in such cases.**

In this case a writ of summons had been served upon the defendant, for a debt due to plaintiff, and an order had been made by consent of plaintiff and defendant, that on payment of costs by the defendant, and of the debt within six months from the date of the order, all proceedings should be stayed, but that in default of such payment the plaintiff was to have final judgment. The defendant did pay the costs according to the order, and the time had not arrived for payment of the debt, but the plaintiff having learnt that the defendant was about to leave the kingdom, he made an affidavit to that effect as required by the Act for abolishing Arrest for Debt, and obtained an order from PARKER, B., for a Capias, upon which the defendant was arrested, and put in bail in the usual manner.

MR. E. V. WILLIAMS, for the defendant, now moved to set aside the Judge's order and the writ of Capias as contrary to the agreement between the parties, by which all proceedings in the cause were stayed, until the defendant should commit a breach by not paying the debt at the time specified; that time had not arrived, and the defendant had in all other respects performed his part of the order, by which the proceedings were stayed—therefore the Judge's order was irregular and the arresting him was unjustifiable.

PARKER, B., expressed himself to have had considerable doubt upon the meaning of the word "proceedings," when he granted the order for the Capias, and had consulted his Brother ROLPH before he did so, but he felt now that he ought not to have granted the order. He thought the word "proceedings" meant any proceeding tending to final judgment, and he considered that a Capias was only such a proceeding, and under that impression he had made the order. His Lordship said, where a creditor grants his debtor time for payment of a debt, the hands of the creditor are absolutely tied up for that time, he cannot during that time take any proceedings against the debtor. So in this case the order staying proceedings is an agreement on the part of the plaintiff, granting six months for the defendant to pay the debt, he can take no proceeding against him while that time is running. "I was therefore wrong in making the order for the Capias. When a plaintiff feels there is any danger of a defendant quitting the kingdom, in cases of this nature he should, by the order for stay of proceedings, reserve to himself a power of applying to a judge in such an event for a Capias."

The rest of the Court concurred.

Judge's order for the Capias and the Writ set aside. Plaintiff to pay the costs. The defendant undertaking not to bring any action.

May 9.—Sittings in Banco.

— V. MARTIN.

PRACTICE—NEW WRITS—*Whether the forms adopted by the Judges may be varied as circumstances shall require.*

In this case a *capias satisfaciendum* had been issued against the defendant, by which the sheriff had been commanded to arrest the defendant, to satisfy the plaintiff not only for a debt due to him, but also interest thereon, which writ did not follow the form prescribed by the judges.

Mr. Watson now moved for a rule to set aside the writ for irregularity.

PARKE, B. said the Court were of opinion that the plaintiff was at liberty to adopt the form complained of, which suited the altered circumstances of the law with reference to the right to recover the interest. By the general rules the judges had given forms of writs which were to be followed, subject to certain variations required by circumstances. When a party was allowed to try interest as well as principal, the form of the writ might be altered, even if the judges had not themselves made any rule; but the fact was that the rule was so general as to allow the writs to be altered to the extent now complained of.

Rule refused.

INSOLVENT DEBTORS' COURT, July 9.

JOHN GIBLETT'S CASE.

VERSEERS committed to NEWGATE for De-falcation. *Whether upon a Petition for Relief under the Insolvent Act, by such a person, he can be admitted to BAIL.*

This was the first case of the nature that has come before the Court since the passing of the statute.

The Insolvent had presented his petition to be discharged under the statute. He had been verseer of the parish of North-holt, near Harrow, Middlesex, and having been found a defaulter in the parish accounts was by the magistrates committed to Newgate, under the 50th Geo. III. c. 49. s. 1. He was now brought up from that prison by order of the Court, upon his petition to be discharged upon bail.

Mr. Woodroffe appeared for the parish, and contended that the insolvent could not be admitted to bail, that the warrant against him gave him no *locus standi* to make the present application. There was, he said, at this time an assignee in Newgate for appropriating a considerable sum to his uses, and if the Court entertained the case now before it, that party would have a right to make a similar application. The Court said, in cases of criminal conversation, &c. refused to liberate parties on bail, and if he had supposed the insolvent to be serious in his intention to appear, he would have been better prepared. He was committed by two justices on a

warrant under the 50th Geo. III. c. 49. s. 1. there to remain without bail or mainprize.

Commissioner BOWEN, on reference to the copy of causes, said there was nothing about bail or mainprize in the document. It seemed a distress had been levied, but as no money was realized he was then committed to the common gaol of Middlesex.

Mr. Woodroffe said he was told the warrant stated the commitment was without bail or mainprize.

Commissioner BOWEN thought it could not be so. The warrant had clearly been copied.

Mr. Cooke, for the insolvent, said the question before the Court rested simply on the act of Parliament under which the insolvent now applied to the Court. The insolvent had a clear right, under the 35th section of the act for abolishing arrest for debt, to petition: he was in custody for the non-payment of a sum of money, and it mattered not in what prison he was confined. Being so entitled, he could exercise the privileges which the act gave him, and one of the most important was, the privilege of bail, which was now extended to persons confined for debt. The Court had said, in cases where it was obvious a demand would take place on the mere production of the record, that the parties should not be liberated on bail, but there was no analogy in the instances mentioned. This man was in custody for the non-payment of money, and it did not follow as a matter of course that he would be remanded. The legislature had said, a man should have the privilege of bail, and this was not a case in which so important a privilege should be denied.

Commissioner BOWEN said, the warrant on which the insolvent was in prison had been granted by magistrates, and it did not set forth various matters, as it was supposed, and which, if it had been done, it would, perhaps, have been bad in law. This was clearly a criminal commitment to Newgate, though the Court had authority under the act to discharge the insolvent. The Court had a discretionary power as to bail, and he did not think the present insolvent was a proper person to admit to bail; his application would, therefore, be rejected. It would be, added the learned Commissioner, making the warrant of the magistrates "quite ridiculous" if this man was to give bail.

The insolvent was remanded to Newgate.

July 11.

BUSINESS OF THE COURT—OPERATION OF THE NEW INSOLVENT ACT—SITTINGS during the VACATION.

The Court did not sit to-day, but in a bail case heard on the previous day, the hearing was appointed for the 22nd September, when the Court will resume its sittings after the vacation.

The present sittings will continue to Saturday the 15th August, at which time the vacation will commence. It is, however, understood that the Court will sit during the recess one day in each week to hear bail cases, as it did last year, with the view of carrying out the intention of the legislature in framing that salutary provision. The Commissioners could order an adjournment of six weeks, as the clause regulating the sittings in the present act existed in the former, when bail was not allowed; but they do not mean to avail themselves of the power, as many would be detained in prison, and it would give parties an opportunity of gratifying their feelings against debtors, by delaying executions until the adjournment took place. There has been a good deal of business before the Court for some time. No visible diminution of business has occurred since the operation of the new act, and in cases where parties cannot procure bail the imprisonment is longer than formerly, from the fact that the orders for hearing extend over a more lengthened period than they did some time ago. Those persons who have just commenced their cases cannot now (if without bail) be discharged until the latter end of September. Nearly two-thirds of the applicants to the Court in London have, since the passing of the new act, been liberated on sureties.

#### COURT OF THE CORONER FOR MIDDLESEX, June 10.

CARTER v. EVANS AND ANOTHER, SHERIFFS.

This was an action for false imprisonment. The Defendants suffered judgment by default. A writ had been issued directed to the Coroner for Middlesex to assess the amount of damage.

Mr. Wordsworth stated that the plaintiff, Major Carter, had reason to complain of a gross violation of the rights of an Englishman—namely, the deprivation of his personal liberty, by an arrest which was not justifiable in law, and an imprisonment which was most unjust, and, if tolerated, would go far to endanger the liberty of the subject. The defendants had not ventured to justify their proceedings; and he should, therefore, merely call witnesses to prove the fact of the arrest, and the consequent injury sustained by the plaintiff, which would entitle him to a verdict. He should prove that Major Carter was walking on the evening of the 3d of March last, through the Quadrant, when he was seized very unceremoniously by a sheriff's officer, named Willis, at the instance of a man named Clarke, who pointed out the plaintiff as being one Samuel Chifney, against whom Clarke had brought an action. Major Carter in vain asserted that the officer was mistaken, and the latter left him in custody of an assistant, who took the plaintiff to a sponging-house in Chancery-lane. On their way: ~~that~~ Major Carter called upon

a tradesman who knew him, and who assured the officer that he had taken the wrong party into custody, and stated that the plaintiff was Major Carter and not Samuel Chifney. The bailiff, however, refused to release him from custody, asserting that he was only doing his duty, as the plaintiff had been pointed out as Chifney. The plaintiff was, consequently, compelled against his will to go to the lock-up house, where, after being detained for an hour and a half, Clarke entered, and, holding a candle towards the plaintiff, said that he had made a mistake, and the major was then permitted to go at large. He called several witnesses, who fully proved the fact of the arrest and detention of the plaintiff.

Mr. Jones (for the defendant) contended that although the sheriffs were the nominal defendants, the jury had in fact to decide on the conduct of the officer. The sheriffs were bound by law to execute the writs directed to them, and their officer was bound to arrest the party whom the plaintiff pointed out to him as being the defendant, or he and the sheriffs would be liable to an action. In the present instance there could be no doubt the officer had acted *bonâ fide*, and Clarke, who was anxious to make reparation for his error, had offered, first 5*l*, and then 10*l* and the costs, to settle the affair. The plaintiff had, however, rejected the offer, and demanded 20*l* and costs, which Mr. Clarke refused to pay.

Witnesses were then called to prove this offer, and that the plaintiff had been treated with all the civility possible.

Mr. Wordsworth replied, and contended that the liberty of an individual ought not to be outraged with impunity. Sheriff's officers were performing a voluntary act for their own profit, and therefore were not entitled to sympathy if they committed any error. They ought to be very cautious that they arrested the right party, and if they did not they must bear the responsibility. The learned counsel urged that no offer, made by Mr. Clarke, had anything to do with the case, the sheriffs being the parties against whom the plaintiff had a right to proceed. He considered this a case of palpable indiscretion and gross blunder, and one calling for exemplary damages.

Mr. WAKLEY (Coroner) recapitulated the evidence; and observed, that in his opinion, the great mistake was the officer not attending to what was told him by the plaintiff and the witness, viz., that he was mistaken in the person. Clarke no doubt led the officer into error; but the jury would not have to decide on that fact but give such calm and moderate damages as would be some recompense to the plaintiff for the anxiety he must have felt, and the inconvenience he experienced, in consequence of his detention.

Verdict for the plaintiff—damages 30*l*.

**ROBINSON v. EVANS AND ANOTHER, SHERIFFS.**

This was an action brought for a trespass committed by the defendants' officers, by illegally taking possession of the goods and chattels of the plaintiffs.

Mr. James said the plaintiff was a young man just set up in the wine and spirit trade, in King William-street, Strand, and the action arose from his goods having been illegally taken, under an execution, by the same officer as in the last case, which proved him to be an inexperienced and rash man, notwithstanding he was a sheriff's officer. The execution had been taken at the suit of Messrs. Nicholson, the distillers, against a person named Myers, who formerly kept the house, now held by the plaintiff, to whom the stock and business had been transferred, 15 months ago. The case was very different from the last, for in an execution against the goods, the sheriffs stood in a much better position than with any one against the body, inasmuch as if the sheriffs in the latter case refused to arrest an individual that was pointed out to them, they were liable to an action; but when it was against the goods, and two parties claimed them, then the law protected the sheriffs, and they could retire, or compel the plaintiff in the suit to give them an indemnity. In the present instance the defendants could have compelled Messrs. Nicholson to have proved the goods belonged to Myers, but they had failed to do so, and the officer had obstinately gone on, although he was shown the deeds, and also invoices made out by Messrs. Nicholson in the plaintiff's name, for goods supplied to the house. Willis had left a man in possession for 24 hours, when he was withdrawn. For the first three or four hours the man remained in the plaintiff's counting-house in the sight of all his customers, and hereby did a grievous and unquestionable injury to the plaintiff's reputation.

J. Cole, the plaintiff's cellarman, proved the act of a man being left in possession, and said that the latter told witness that Willis had seen the deeds, and no doubt he (the bailiff's man) could be called away in half an hour.

Cross-examined—Myers' name was in one place on the front of the shop, and also on a blind in the window.

Mr. Bell, a shoemaker, said he lived next door to the plaintiff, and it was well known in the neighbourhood that he had bought the trade, &c. of Myers. Witness heard the man in possession say that the plaintiff had offered to show Willis the rate-books, and had referred him to the Directory; but Willis said he had nothing to do with the Directory. Witness is a member of the paving-board, and knows it for a fact that the plaintiff was the rated possessor of the house.

Mr. Jones, for the defendants, said no doubt Willis was acting conscientiously, and that, from

the fact of Myers's name being conspicuously over the door, he considered him the proprietor, and that he was bound to execute the warrant. The officer was, in such a case, in a most awkward situation, for if he retired on being told an assignment had been made, or had seen the deeds, if it subsequently turned out to be a collusive and fraudulent agreement, the sheriffs would be subject to an action for not executing the writ, while, on the other hand, if they made the seizure, they ran a risk of action, as in the present instance. He thought it was one of those cases that did not deserve more than trifling damages.

The CORONER left it to the jury to say whether due caution had been used by the officer; they would bear in mind that the name of Myers was to a certain extent put forward as the landlord, but at the same time if the officer refused to listen to explanations, or avail himself of information offered, he must bear the brunt of it. He, the learned coroner, said that it should also be taken into consideration, that although no special damage was proved, yet there could be no doubt that the fact of a bailiff being in possession, and the fact becoming known in the neighbourhood, must do a certain injury.

Verdict for the plaintiff—damages £25.

No case of the above description has been tried before either of the Coroners for Middlesex for more than six years.

EDITOR.

## CIRCUITS OF THE COMMISSIONERS FOR RELIEF OF INSOLVENT DEBTORS.

AUTUMN CIRCUITS.—1840.

MIDLAND CIRCUIT.—R. B. Reynolds, Esq., Chief Commissioner.

*Essex*.—At Chelmsford, Tuesday, Nov. 10; at Colchester, Wednesday, Nov. 11.

*Suffolk*.—At Ipswich, Thursday, Nov. 12; at Bury St. Edmunds, Thursday, Nov. 19.

*Norfolk*.—At Yarmouth, Saturday, Nov. 14; at Norwich and City, Monday, Nov. 16; at Lynn, Wednesday, Nov. 18.

*Cambridgeshire*.—At Cambridge, Friday, Nov. 20.

*Huntingdonshire*.—At Huntingdon, Monday, Nov. 23.

*Northamptonshire*.—At Peterborough, Tuesday, Nov. 24; at Northampton, Thursday, Dec. 17.

*Lincolnshire*.—At Lincoln and City, Wednesday, Nov. 25.

*Nottinghamshire*.—At Nottingham & Town, Friday, Nov. 27.

*Derbyshire*.—At Derby, Monday, Nov. 28.

*At the City of Lichfield*.—Tuesday, Dec. 1.

*Staffordshire*.—At Stafford, Wed. Dec. 2.  
*Shropshire*.—At Shrewsbury, Saturday, Dec. 5; at Oldbury, Thursday, Dec. 10.  
*Warwickshire*.—At Birmingham, Tuesday, Dec. 8; at the City of Coventry, Friday, Dec. 11; at Warwick, Saturday, Dec. 12.  
*Leicestershire*.—At Leicester, Tues. Dec. 15.  
*Bedfordshire*.—At Bedford, Friday, Dec. 18.  
*Buckinghamsh.*—At Aylesbury, Sat. Dec. 19.

HOME CIRCUIT.—J. G. Harris, Esq.  
 Commissioner.

*Sussex*.—At Horsham, Friday, Nov. 6.  
*Kent*.—At Dover, Friday, Nov. 13; at the City of Canterbury, Saturday, Nov. 14; at Maidstone, Tuesday, Nov. 17.  
*Hertfordshire*.—At Hertford, Friday, Dec. 4.

NORTHERN CIRCUIT.—T. B. Bowen, Esq.  
 Commissioner.

*Rutlandshire*.—At Oakham, Sat. Oct. 10.  
*Yorkshire*.—At Sheffield, Monday, Oct. 12; at Wakefield, Wednesday, Oct. 14; at York and City, Tuesday, Oct. 20; at the town of Kingston-upon-Hull, Thursday, Oct. 22; at Richmond, Saturday, Oct. 24.

*Durham*.—At Durham, Monday, Oct. 26.  
*Northumberland*.—At Newcastle-upon-Tyne and Town, Wednesday, Oct. 28.  
*Cumberland*.—At Carlisle, Friday, Oct. 30.  
*Westmorland*.—At Appleby, Monday, Nov. 2; at Kendal, Tuesday, Nov. 3.  
*Lancashire*.—At Preston, Wednesday, Nov. 4; at Liverpool, Friday, Nov. 20; at Lancaster, Tuesday, Nov. 24.

*Cheshire*.—At Chester and City, Friday, Nov. 6.  
*Flintshire*.—At Mold, Monday, Nov. 9.  
*Denbighshire*.—At Ruthin, Tues. Nov. 10.  
*Anglesea*.—At Beaumaris, Thursday, Nov. 12.  
*Carnarvonshire*.—At Carnarvon, Friday, Nov. 13.  
*Merionethshire*.—At Dolgelly, Monday, Nov. 16.  
*Montgomeryshire*.—At Welchpool, Wednesday, Nov. 18.

SOUTHERN CIRCUIT.—W. J. Law, Esq.,  
 Commissioner.

*Berkshire*.—At Reading, Thursday, Oct. 22.  
*Oxfordshire*.—At Oxford, Saturday, Oct. 24.  
*Worcestershire*.—At Worcester and City, Tuesday, Oct. 27.  
*Herefordshire*.—At Hereford, Thursday, Oct. 29.  
*Radnorshire*.—At Presteigne, Fri. Oct. 30.  
*Brecknockshire*.—At Brecon, Monday, Nov. 2.  
*Carmarthenshire*.—At Carmarthen and Borough, Wednesday Nov. 4.  
*Cardiganshire*.—At Cardigan, Friday, Nov. 6.  
*Pembrokeshire*.—At Haverfordwest & Town, Saturday, Nov. 7.

*Glamorganshire*.—At Swansea, Tuesday, Nov. 10; at Cardiff, Thursday, Nov. 12.

*Monmouthshire*.—At Monmouth, Saturday, Nov. 14.

*Gloucestershire*.—At Gloucester and City, Tuesday, Nov. 17.

*At the City of Bristol*.—Friday, Nov. 20.

*Somersetshire*.—At Bath, Monday, Nov. 21; at Wells, Tuesday, Nov. 24.

*Devonshire*.—At Plymouth, Friday, Nov. 27; at Exeter and City, Wednesday, Dec. 2.

*Cornwall*.—At Bodmin, Saturday, Nov. 22.

*Dorsetshire*.—At Dorchester, Saturday, Dec. 5.

*Wiltshire*.—At Salisbury, Tuesday, Dec. 8.

*At the Town of Southampton*.—Wednesday, Dec. 9.

*Hampshire*.—At Winchester, Thursday, Dec. 10.

#### NOTICE TO CORRESPONDENTS.

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ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 83, FLEET STREET.

# The Legal Guide.

VOL. IV.]

SATURDAY, JULY 25, 1840.

[No. 18.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

#### CARRIERS BY WATER.

(Continued from page 163.)

CARRIERS by WATER usually make special contracts by charter parties and bills of lading. Of this class are the owners and masters of ships and vessels, lightermen, keel-owners, hoymen, ferry-men, canal boatmen, and others who by water engage to convey or transport goods from place to place for hire. Carriers by water generally stipulate against all liability for losses occasioned by the act of God, the king's enemies, pirates, and all and every other dangers and

accidents of the seas, rivers, and navigation of what nature or kind soever." The common law gives them the benefit of the two first stipulations, and the statute 26 Geo. 3. c. 86. s. 2. relieves them not only from loss by fire, but also from making good loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones, sustained by any robbery, embezzlement, making away, or secreting thereof, unless the owner or shipper has at the time of shipping declared the nature and value thereof in writing. The statute 53 Geo. 3. c. 159. relieves them from liability in all cases of loss occasioned without their default or privity; but this act does not extend to vessels used solely in rivers or inland navigations, nor to any ship not duly registered according to



law; nor do any of the acts extend to *lighters* and *gabbets*.(a) The relief afforded by the acts extends to *owners only, not to masters*; the latter statute contains an express clause against relieving the *master*, though he may happen also to be a part owner. Mr. Justice BAYLEY, in *Wilson v. Dickson* (b), gave a very elaborate judgment upon the construction to be placed on this statute. That was a special action on the case brought by the plaintiff against the defendants as joint owners of the ship *Hope*, on account of the loss of certain goods therein laden belonging to the plaintiff: the nature of the loss was, the improper sale (by the *captain and part owner*) of those goods in the course of the voyage. The cause was referred, and the arbitrator by his award submitted for the consideration of the court three questions which arose upon the last-mentioned statute. 1st. Whether, inasmuch as there was fault of negligence on the part of *one* of the three owners, that takes away the protection given by the statute to the other part owners? and supposing his fault does not take away from the others (who are sued jointly with him) the protection of this statute, the second question is, whether the value of the ship in this Act of Parliament is the value at the time of the loss, or at the time when the ship commenced her voyage? 3rdly. Whether under the words "freight due or to grow due," that part of the freight which was paid by anticipation is to be taken into the account? Mr. Justice BAYLEY said, upon the first point the arbitrator was of opinion that upon the true construction of this act, the defendants being sued jointly, and no fault being imputable to more than one of them, in the form in which this action was brought the defendants were entitled to the benefit of the act, and were not responsible beyond the value of the ship and freight. And in this respect it seems to me the arbitrator came to

the proper conclusion. The object of the Act of Parliament is to limit the responsibility of ship-owners, and the words of the section are, "that no person or persons who is, are, or shall be owner or owners, or part owner or owners, of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter or thing done, omitted or occasioned, without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandise, or other things, laden or put on board the same ship or vessel, or which may happen to any other ship or vessel, or to any goods, wares, merchandise, or other things being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage." The act therefore contemplated two descriptions of losses—one a loss or damage to the cargo laden on board the ship, the other a loss or damage to an unconnected ship or her cargo. This is not the first Act of Parliament which limited the responsibility of shipowners for the 7 Geo. 2. c. 15. was an act passed for the same purpose, but the words "owner or owners," were certainly not used in that statute, and I rather think they were for the first time introduced into this act. Without, however, considering whether those words were previously introduced in any intermediate statute or not, it is clear that the use of them in this act shews anxiety on the part of the Legislature to explain the words "owner or owners," used in the 7 Geo. 2. c. 15, and to give a protection to *part* owners, which might not have been given under the general words *owner or owners*. Indeed, it seems as if those words were introduced as a legislative explanation of the words "owner or owners," as used

(a) *Hunter v. McQueen*, 1 High, 622.

(b) 2 Barn. & Ald. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

the former statute. It is admitted that the words in the first section are sufficiently large to give the protection of the statute to these defendants, but it is said that the object of the statute was to protect the owners against the acts of their servants, and not against their own acts; that this is a loss occasioned by the act of one of several part-owners, and that therefore the whole are liable.

But part owners, though jointly liable to the persons with whom they contract on account of the ship, yet in many respects stand in a very different situation from that of part-owners; and for this, amongst other reasons, that in the case of a partnership, every man knows who his partner is, but when one part-owner sells his share, the remaining part-owners not being privy to the instrument by which the new part-owners are created, may be entirely ignorant of the fact who the person is who has become a part-owner with them. And it is to be observed, also, that the words of the statute are, "that they shall not be liable for any act, &c. without the fault or privity of such owner or owners," without saying "or any of them." So that it seems that the true construction of the clause is this, that if you sue a sole owner, and the fault or privity were in him, he will be excluded from the protection of the statute; but if you sue several owners, then the words applicable to that case are, "without the fault or privity of such owners;" the fair and true construction of which is, that there must be the fault or privity of each. The fourth section of the act seems to shew that that is the right construction; for that section provides that "nothing shall lessen or take away any responsibility to which any master or mariner of any ship may now by law be liable, notwithstanding such master or mariner may be an owner or part owner, &c." It seems to me, that the meaning of that clause is, that if the master be a part-owner, his responsibility, if you sue him in his character of master, and not as one of

several part-owners, will not be affected by the first section of the act; but that, if you sue him as one of the part-owners, with the other part-owners, the circumstance of the loss being occasioned by his fault, and with his privity, will not take away from the other part-owners the protection which the first section of the statute intended to give to them.

The second question is, at what period of time you are to estimate the value of the ship: the words of the act as to that point are, "further than the value of his or their ship or vessel, or the freight due or to grow due during the voyage which may be in prosecution, or contracted for at the time of such loss or damage." It has been argued, that the words "at the time of such loss or damage," not only refer to the freight due or to grow due, but also to the words, "their ship or vessel." It seems to me, however, that they do not apply to either, but are connected with the words "the voyage;" for these words are substituted for others, which are found in the 7th Geo. II. c. 15. s. 1. which are, "the full amount of the freight due, or to grow due, for and during the voyage, wherein such embezzlement shall be made, permitted, or done." Then substituting for these latter words, in the 7th G. II. the words, "at the time of the said loss." In the Act in question, it clearly appears that these latter words apply to "the voyage," and not to any other part of the sentence. The question, therefore, must be considered as if those words were not in the Act. In speaking of value generally, we must be understood to speak of existing value, and in this instance the Legislature is speaking of a thing existing at a particular period of time, for they use the terms freight due, that is due at the time of loss, for the words "to grow due," apply to the freight that may become due upon that voyage, after the loss. With respect therefore to freight, the Legislature contemplated two periods of time.

viz. freight due at the time of the loss, and freight due at the conclusion of the voyage; and if they had intended that the value of the ship was to be taken at two periods also, or at a period different from that of the loss, they would have used words to express their intention in that respect. It has been argued, that the owners of the cargo trusted the owners of the ship to the amount of the value of the ship before she sailed, and that therefore they ought to continue liable to that extent; but it must be recollected, that their responsibility is limited also in like manner in the case of damage done to any other ship by collision, &c.; and it being obvious that this argument could only apply to the one class of cases, and not to the other, both being included in the same clause, it follows that the argument is not entitled to any weight. Upon the whole, therefore, it seems to me that the words "the value of his or their ship or vessel," must, unless there are some other words to control them, mean the existing value at the time when the loss takes place. The mode of ascertaining that value is a matter of evidence, and may possibly be attended with some degree of difficulty. If the ship ultimately arrive, by ascertaining her then value, you may easily find the value at the time of the loss; in other cases, when the exact time of the happening of the injury is uncertain, the plaintiff may launch a *prima facie* case by shewing the value at the time of sailing, leaving it to the opposite party to shew what deterioration had taken place. That, however, is mere matter of evidence, and no positive rule can be laid down upon the subject; and possibly (I only say possibly) the Legislature, from motives of policy, might think that persons who had embarked their property in shipping, should, on giving up all they had ventured in a particular voyage, be relieved from any further responsibility.

The third and last question is, what is the true construction to be put upon the words

"freight due or to grow due?" And it seems to me that those words mean all the freight for that voyage, whether paid in advance or not. If the whole freight had been paid in advance, according to the argument, the defendants would be liable to the value only of the ship, and not of the freight. It is clear, on the other hand, that it would come within the very words of the Act, if the whole freight were due at the time of the loss; and it seems to me, that it ought not to make any difference with respect to the owner's responsibility, whether the freight be in his own pocket, or in that of the person who would have to pay it. I therefore think that the words "freight due or to grow due," were meant to comprehend all the freight for the voyage, and that it makes no difference whether that freight was paid in advance or not."

(To be continued.)

#### PROBLEM XIII. VOL. 4.

##### TITLE DEEDS.

Where several Estates are held under the same Title.

In what cases will Equity compel the owner of Title Deeds to produce them to other persons, and in what cases will their production be compelled in adverse suits and actions?

#### TO THE EDITOR OF THE LEGAL GUIDE. ANSWER TO PROBLEM 3.—VOL. 4.

##### BANKRUPTCY.

##### JOINT AND SEPARATE FIATS.

In what case may a joint fiat be sued out against all or some of the members of a firm, or a separate fiat against one or each of them, and what debts may be admitted to proof under each of such fiats?

SIR,—I shall divide this answer into two parts, the first of which I shall confine to joint fiats, and the second to separate fiats.

First, of joint fiats.—Joint fiats may be sued out against all or some of the members of a firm where all the partners, or such portion of them have committed acts of bankruptcy, which fiat can be sued out by any creditor of such partners committing such acts of bankruptcy.

As to the proof of debts under joint fiats,

an order of Lord Loughborough made in 1794, it is ordered, that the commissioners in a joint commission against two or more bankrupts shall be at liberty at any meeting or meetings for the proof of debts under such commission, to admit the proof of any separate debt or debts of any one or more of such bankrupts under such joint commission, and such separate creditors shall be at liberty to assent to, or dissent from, the allowance of the certificate of the bankrupt or bankrupts of whom they shall be separate creditors.

Under this order it has been decided that the creditors of a firm of three partners may prove their debts under a commission against another firm consisting of these three partners and others. (*Ex parte Worthington*, 3 Mad. 26; *Fyffe*, 2 Rose 393).

Joint debts are debts for which an action, if brought, must be brought against all the partners constituting a firm. Where parties are indebted jointly, and enter into a covenant on demand jointly and severally to pay, no demand is necessary to entitle the creditor to proceed severally against the parties, but if it be expressly stipulated by three partners, that until a demand is made, an existing debt should remain a joint debt, and no demand is made previous to the bankruptcy, the debt is proveable against the joint estate only. (*Ex parte Fairlie*, Mont. 17). Where one of three partners, who also carried on a separate trade, being indebted to J. S. in £100., sent him a bill for £300. indorsed by the firm, and not by that partner individually, and received from him the balance in cash, upon the bankruptcy of the firm, this was holden to be a joint debt. (*Ex parte Kirby*, Buck, 511). But if an executor, assignee of a bankrupt, or trustee, be a partner in a firm, and apply the trust-money to the purposes of the partnership, with the knowledge of his partners, the *cestui que trust* may treat it as a joint or separate debt, at its option. Where one of the partners of a banking-house, by means of a power of attorney, granted by him, sold bank stock belonging to a customer, paid the proceeds into another banking-house to the account of the firm, and subsequently appropriated the proceeds to his own use, and the partner who so acted was executed for other forgeries, it was holden that the value of the bank stock was proveable under a commission afterwards issued against the other partners. (*Ex parte Bolland*, 1 Mon. & A. 570). Where one of two partners, after his co-partner has committed an act of bankruptcy, accepts bills in the name of the firm for a previous partnership liability, the bills in the hands of a *bona fide* holder are proveable under a fiat against both. (*Ex parte Robinson*, 1 Mon. & A. 18; 3 Dea. & B. 376;) on appeal from *ex parte Ellis*, Mon. B. 249. If a joint security is given for the

separate debt of one partner, it is upon the creditor to prove the authority of the partners to the giving the security of the firm. (*Ex parte Thorpe*, 1 Ves. 394). Where two partners agreed to borrow money for the purposes of the partnership, but one only gave a bond for the payment of it, the other being a witness, and the money was entered in the cash book of the partnership, it was holden that the lender might treat this as a joint debt. (*Ex parte Brown*, 1 Atk. 255). If a man deal with a trader without knowing that he has a dormant partner, he may afterwards treat the debt as a joint debt. (*Ex parte Hodgkinson*, 19 Ves. 291). Where one partner dies, and the remaining partners continue the partnership and become bankrupt, those who were the creditors before the death may prove equally with those who became creditors after. Where different firms are engaged in a joint adventure, the creditors of the adventure may prove against the joint estates of the partnerships. Although joint creditors are prevented from claiming a dividend under a separate fiat, yet it was deemed only right that they should have a control or influence over the certificate and the choice of assignees, and they were therefore allowed to prove for those particular purposes—(vide 6 Geo. 4. c. 16. s. 62.) which applies only to a partnership subsisting at the time of bankruptcy. The petitioning creditor is however made a statuteable exception to this rule, and although a joint creditor, he may prove and receive dividends under any separate fiat sued out by him. (*Ex parte Ackerman*, 14 Ves. 604). But if a joint creditor sue out a joint fiat, he binds himself by so doing to resort to the joint property only, and when a fiat is sued out against a trader as a "surviving partner," this is considered a joint fiat, and the petitioning creditor will not be allowed to claim on separate property. (*Ex parte Barned*, 1 Gly. & J. 309). Where two partners became indebted on bond, and one of the partners conveyed real estates, his separate property, for securing the debt, it was held that the creditor could prove against the joint estate without giving up the real security, the joint estate being primarily liable, and the separate estate being only a security for the joint estate. (*Ex parte Peacock*, 3 Gly. & J. 27). Where partners purchased an estate out of partnership funds, but took the conveyance as tenants in common, and afterwards jointly mortgaged it for a joint debt, it was held to be a joint security, and that the debt could not be proved under a commission against the firm without giving up the security. (*Ex parte Freese*, 2 Gly. & J. 250). If a creditor has a joint and several bond, and as a collateral security a joint warrant of attorney upon which judgment is signed, the liability on the bond is merged, and the creditor

is not entitled to prove upon the separate estate. (*Exparte Christie*, Mon. & B. 352).

If a creditor have two distinct debts due to him, one from a partner individually, the other from the firm, he may prove them accordingly on the separate and joint estates respectively. Where one of three partners in a bank advanced money to the business upon the security of the other partners, and afterwards retired from the business, and by the deed of dissolution the remaining partners covenanted to repay the same by four instalments, and to indemnify against the partnership debts, the continuing partners, after paying one instalment, became bankrupt when two other instalments were due, and the retiring partner paid some partnership debts, it was held that the remaining instalments and debts were provable under the commission. (*Parker v. Ramsbottom*, 5 D. and R. 138). Where some of the partners of a firm carry on a distinct trade, and in the course of dealing in the distinct trade one of the firms becomes indebted to the other, such debt can be proved under a fiat against the debtor firm. (*Exparte Castell*, 9 Gly. & J. 124). And if one partner of a firm is also a partner of a distinct firm, the two firms may prove against each other.

Secondly—Of separate fiats.—A separate fiat is a fiat sued out against one or each of the members of a firm who has committed an act of bankruptcy, independent of the other partners, as where one of three partners in a bank, who resided thereat, (the others residing at a distance from it) shut up, and absented himself from the bank, which stopped payment, this was held to be an act of bankruptcy in the resident partner only. (*Mills v. Bennett*, 2 Mau. & S. 556). For what shall be deemed acts of bankruptcy whereon a fiat may issue, see *ante*, pp. 3 & 37.

A joint creditor may sue out a separate fiat against any one of the partners of the firm indebted to him, who has committed an act of bankruptcy, and even one of the partners of a firm may sue out a fiat against his co-partner, if his debt have not arisen out of the partnership, otherwise not unless upon an account settled. (*Crispe v. Perritt*, Willes 467; *Wyndham v. Paterson*, 1 Stark. 144; see *Antram v. Chase*, 15 East, 209; *exparte Noakes*, 1 Mon. B. L. 423). As two fiats against the same person cannot be in operation at the same time, the Court of Review will, upon application, impound one of them, leaving that in operation which is most beneficial and advantageous to the creditors; and where a separate fiat issues against one partner, and a joint fiat is subsequently sued out against him and others of the firm, as the latter is generally advantageous to creditors, the separate fiat is usually impounded or annulled at the costs of the joint estate, unless

there may be special reasons to the contrary. (*Exparte Smith*, 1 Gly. & J. 256; see *exparte Rowlandson*, 1 Rose, 89).

As to the proof of debts under a separate fiat, the rule of law, as now generally laid down, I find to be that "separate debts are those for which the creditor can have his remedy at law, not against the whole firm, but against that partner only who contracted them." Where a dormant partner drew bills, which were accepted by the ostensible partner for partnership purposes, the holder of the bill, being ignorant of the partnership, was held entitled to prove against the separate estate of such partner, and not against the joint and separate estate of the acceptor. (*Exparte Husband*, 2 Gly. & J. 4.) If an executor, assignee of a bankrupt, or trustee, be a partner in a firm, and apply the trust-money to the purposes of the partnership, without the knowledge of his partner, it can be treated as a separate debt only. (*Exparte Apsey*, 3 Bro. C. C. 265). A bill accepted in the name of a firm by one of the partners, for his separate debt, and without the authority of the co-partner, does not bind the firm, and therefore it is a separate debt only. (*Exparte Goulding*, 2 Gly. & J. 118). And where a joint security is given for the separate debt of one partner, it is upon the creditor to prove the authority of the partners to the giving the security of the firm. (*Exparte Thorpe*, *supra*). There must always be some degree of assent on the part of the creditors to change a separate into a joint debt, although slight circumstances will in general be deemed sufficiently indicative of it.

As to separate fiats, it has always been deemed most equitable that the separate estate of each partner should pay his separate debts, and the joint estate of all the partners pay the joint debts; and as the assignees under a separate fiat have, in fact, but the separate estate, and the bankrupt's proportion of the surplus of the joint estate, after payment of the joint creditors, to distribute among the creditors who prove under the fiat, it has hitherto been deemed right to prevent joint creditors from receiving any dividend under a separate fiat, if there were any joint property, no matter how trifling (*exparte Peak*, 2 Rose, 54), or if there were another partner, no matter whether solvent or insolvent (*exparte Kensington*, 14 Ves. 447), unless it were a dividend out of the surplus of the separate estate, after payment of all the separate creditors (*exparte Copeland*, 1 Cox, 420), or unless the joint creditors agree to pay the separate creditors 20s. in the pound (*exparte Chandler*, 9 Ves. 35); but if separate fiats were sued out against all the surviving partners of a firm, and there were no joint property whatever, in that case, the Court, upon petition, would allow the joint creditors

ditors to prove and receive dividends under the separate fiat of each partner, but not if there is a solvent partner (*ex parte Hayden*, Cook, 261).

As to the exception by which a petitioning creditor is, although a joint creditor, allowed to prove and receive dividends under a separate fiat, vide *supra*.

A security for a separate demand does not extend to secure a joint demand; but if a creditor have two distinct debts due to him, one from a partner individually, and the other from the firm, he must prove them accordingly on the respective estates.

If one of two partners become bankrupt, and the solvent partner pay all the joint debts, he will be entitled to prove upon the separate estate of his partner for so much of the money as he was obliged to, and actually did pay out of his private funds, in order to make up the deficiency between the joint assets and the debts, as the bankrupt's partner would have been obliged had he remained solvent (*ex parte Watson*, Buck, 144). Where a bankrupt borrowed money of his partner by way of personal loan, and upon the dissolution of the partnership the loan formed an item in an account rendered as between the outgoing partner and the late firm, this loan was nevertheless held to be a separate debt (*ex parte Richardson*, 3 Dea. & C. 244). But the assignees of a joint estate are sometimes allowed to prove on the separate estate, and the assignees of the separate estates on the joint estate. And where traders in partnership also carry on business individually, if the separate trades be distinct from the joint, proof will in general be allowed as between the different estates, but not where the separate trades are merely branches of the partnership concern (*ex parte Barbe*, 11 Ves. 413). If one of several partners draw monies out of the partnership, and apply them to his separate use, and conceal the fact, or disguise it in the partnership books, the joint estate will be entitled to prove upon the separate estate (*ex parte Smith*, 1 Gly. & J. 74).

As to mutual debts, I shall, in concluding my answer to this problem, which has far exceeded the limits originally intended, observe that they must be owing by and to the same bankrupt, or set of bankrupts. You cannot set off a joint claim against a separate debt, or *vice versa*, or a debt due from three partners against a debt due to two of them, and so on.

E. A.

TO THE EDITOR OF THE LEGAL GUIDE.

The Author sends the remainder of the Discussion of the Prescription Act; the first part of which was inserted in THE LEGAL GUIDE, July 4th, 1840. In this part the most important decisions on the Statute are remarked upon.

Temple, July 6th, 1840.

A DISCUSSION OF THE PRESCRIPTION ACT.

(2 & 3 W. 4, c. 71.)

(Continued from page 152.)

Section 5, regulates the mode of pleading to be adopted by parties who intend to rely on the statute—the first clause of that section is thus worded:—

“That in all actions on the case and other pleadings, wherein the party claiming may now, by law, *allege his right generally*, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation.”

This clause must be considered as applying only to declarations.

It is undoubtedly true, that, as against a wrong doer, a party, whether plaintiff or defendant, may simply aver possession, and need not set out his title; see *Taylor v. Eastwood*, 12 East. 212. But this rule refers only to a case in which the title to a corporeal hereditament is at issue. For instance, in trespass, for chasing cattle, the defendant may plead his possession of a close on which the cattle were damaged; because, in this case, the question will be, whether the close is the defendant's or not, and no other right will be at issue; and there is no doubt that the first averment of title to a corporeal hereditament, which is alleged in the record, need only be of a title of possession. But there is no case in which this rule has been extended so far as to enable a defendant to plead, that by reason of his possession of a corporeal hereditament he is entitled to an incorporeal hereditament. The practice has been invariably to set out the prescriptive title specially in the plea; and since the statute, the defendant must either plead in the mode previously in use, or in that given by the statute.

It appears from the case of *Welcome v. Upton*, 5 Mee. & Wels. 398, that if a defendant intends to rely on the period given by this statute in proof of the right he claims, he must plead accordingly; that is, that a plea of enjoyment from time immemorial will not be supported by proof of an enjoyment for the particular period specified in the act.

The remainder of the fifth section is as follows:—

“And that, in all pleadings to actions of trespass, and all other pleadings wherein before the passing of this act, it would have been necessary to have alleged the right as existing from time immemorial, it shall be sufficient to allege *the enjoyment thereof as of right* by the occupiers of the tenement, in respect whereof the same is

claimed for, and during such of the periods mentioned in this act, as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done."

"And if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore-mentioned, or on any cause or matter of fact, or of law, *not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth, in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.*"

On this part of the 5th section, most of the cases which have arisen upon the statute have turned—

The words, "the enjoyment thereof as of right" have the same meaning as the words in the first and second sections, "enjoyment by a person claiming right thereto."

The doubt has been as to the manner of replying to a plea, stating the enjoyment as of right, viz. when the general traverse is sufficient, and when a special replication under the last clause of section 5 is requisite.

That clause is, "if the other party shall intend to rely on any proviso, &c. contract, agreement, &c. *not inconsistent with the simple fact of enjoyment.*"

The words, "the simple fact of enjoyment," mean "an enjoyment as of right." See the judgment of the court in *Beazley v. Clarke*, 2 Bing. H. C. P. 709. Again, in *Onley v. Gardiner*, 4 Mee. & Wels. 501, the court says, "The simple fact of enjoyment" referred to in the 5th section is "an enjoyment as of right."

The first question then is, "What is an enjoyment as of right." The next, "What is such a proviso, &c. contract, &c. as is not inconsistent with the simple fact of an enjoyment as of right."

We must look to the cases where these questions have been decided. The first case is *Monmouthshire Canal Company v. Harford*, 1 Cro. M. & R. 614. There was a plea of enjoyment of a way as of right for 20 years, and the general traverse of the right replied. Under this traverse the judge (ALDERSON, B.) allowed the plaintiffs to give evidence, that the enjoyment had been with their licence and permission. A new trial was moved for, on the ground that this fact should have been specially pleaded, but the rule was refused.

PARKER, B. said—"The issue is, whether the occupiers of the closes of *right* and without *interruption* have had the use and enjoyment for 20 years, as they insist under the issue, therefore they must shew an *uninterrupted rightful enjoyment for 20 years*. If they had enjoyed it

for one week and not for the next, and so on alternately, their plea would not have been proved. In the case of *Bright v. Walker*, 1 Cro. Mee. & R. 222, lately decided in this Court, it was held that the claimant must shew that he has enjoyed the way for the period of 20 years, and that he has done so *as of right and without interruption*; and that such claim might be answered by proof of a license written, or parol, for a limited period, comprising the whole or part of the 20 years.

"In the present case, the permission asked for and given shews that the occupiers of the closes did not enjoy the way *as of right*; and also, that they did not enjoy it *uninterruptedly*."

The definition of an enjoyment as of right, given in the case of *Bright v. Walker*, was as follows:—

"Therefore, if the way shall appear to have been enjoyed by the claimant not openly, and in the manner that a person *rightfully entitled* would have enjoyed it, but by stealth, as a trespasser would have done, or if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not an *enjoyment as of right*."

But the plainest definition is given by LORD DENMAN, C. J. who, in delivering the judgment of the Court of Queen's Bench in *Tickle v. Brown*, 4 Adol. & Ell. 369, said—

"It seems, therefore, that the enjoyment as of right must mean, an enjoyment had not secretly, or by stealth, or by *tacit sufferance*, or by *permission asked from time to time* on each occasion, or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser; as a matter of right, whether strictly legal, by *prescription and adverse user*, or by deed conferring the right, or though not strictly legal, yet lawful, to the extent of exercising a trespass, as by a consent or agreement in writing, not under seal, in case of a plea for 40 years, or by such writing, or parol consent, or agreement, contract, or license, in case of a plea for 20 years." His Lordship added, "according to this view of the act, a license in writing must be replied to a plea of 40 years enjoyment if it cover the whole time, and the same of a parol license in the case of a plea for 20 years" (1).

(1) And in support of a plea of enjoyment for 40 years, evidence may be given of enjoyment beyond that period; for if evidence of user beyond 40 years were to be excluded, it might be, that after the claim had been established as far as 38 years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail, because he was unable to carry his case on without going to the distance of 41 years; see *Lawson v. Langley*, 1 A. & Ell. 890.—EDITOR.

From this last sentence we find in what cases a special replication is necessary. Indeed, the rule so to be observed in such cases is laid down very clearly in this same judgment.

"On looking at the report of the case of the *Wenmouthshire Canal Company v. Harford*, we find that the decision rests on this ground, viz. that the asking leave, from time to time, within the 40 or 20 years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission, that at that time, the asker had no right; and, therefore, the evidence of such asking within the period is admissible under a general traverse of the enjoyment for 40 or 20 years, as of right (2). To this ground of decision I quite accede, and it will follow, that not only an asking leave but an agreement, commencing within the period, may be given in evidence under the general traverse, notwithstanding the words of the 5th section. For the party cannot, and does not rely on it, as an answer to an enjoyment as of right, which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but, as shewing that there was not, at the time the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the 20 or 40 years."

In accordance with this decision, it was decided in the case of *Onley v. Gardiner*, that the enjoyment of an easement as of right for 20 years, next before the commencement of the suit, within the statute, means a continuous enjoyment as of right for the 20 years next before the commencement of the suit of the easement, as an easement without interruption acquiesced in for a year; and that it is therefore defeated by unity of possession, during all or part of the 20 years.

It was also decided, consistently with the previous decision, that such unity of possession need not be specially replied under the 5th sect.

Section 6 of the act enacts, that no presumption shall be made in favour of any claim. (3)

"That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour of any claim, upon proof of the exercise or enjoyment of the right, in matter claimed, for any less period of time, or number of years, than such period or number mentioned in this Act, as may be applicable to the case and nature of the claim."

(2) See 2 Bing. N. C. 709; 4 Mee. & Wels. 501.—EDITOR.

(3) The act relieves a party from the necessity of proving the right from time immemorial, and allows an equivalent the proof of actual enjoyment for 30 years, so that no presumption is admissible; see *Bailey v. Appleyard*, 3 Nev. & Per. 280.—ED.

This section confirms and makes imperative the rule, which had previously obtained, enjoyment for twenty years, and even for less having been generally considered as sufficient proof of the right; but by this section, nothing less than an enjoyment for thirty or twenty years, according to the nature of the right can be held to sustain the right.

Section 7 provides for cases, in which the party, against whom the right is asserted, is incapacitated from resisting the claim.

Section 8 introduces an important proviso.

"Provided always, that when any land or water, upon, over, or from which, any such way or other convenient watercourse, or use of water, shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter, as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end, or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof." (4)

Two cases have been decided on this section.

In *Bright v. Walker* a way had been used adversely, and under a claim of right for more than twenty years overland in the possession of a lessee, who held under a lease for lives granted by the *Bishop of Worcester*.

It was contended, that although the *Bishop*, as reversioner, might not be barred, the right was good as against the lessee; but it was held, that under the Act, this user gave no right as against the *Bishop*, and did not affect the see. And also as it could not give a title as against all persons having estates in the *locus in quo*, it gave no title as against the lessee, and the persons claiming under him. And that no title was gained by an user, which did not give a valid title as against the *Bishop*, and permanently affect the see.

PARKE, B. in delivering the judgment of the Court, said, "The important question is, whether this enjoyment (as it cannot give a title against all persons having estates in the *locus in quo*,) gives a title as against the lessee, and the defendants claiming under him, or not at all?"

"We have had considerable difficulty in coming to a conclusion on this point; but on the fullest consideration, we think that no title is gained at all by an user, which does not give a valid title against all, and permanently affect the see."

(4) See 4 Mee & Wels. 500.—ED.



And afterwards—"From hence we are led to conclude, that an enjoyment for twenty years, if it give not a good title against all, gives no good title at all."

See also *Wright v. Williams*, 1 Mee. & Wels. 100.

It will be seen, that the case of a tenancy for life is mentioned both in the 7th and 8th sections. In the 7th, the periods are not to be reckoned during the existence of the tenancy for life, except only in cases where *the right or claim is declared to be absolute and indefeasible*.

In the 8th section, *the longer period* is not to be considered as running during the existence of the tenancy for life, *provided the reversioner expectant on the determination thereof within three years resist the right*.

The construction to be put upon these two clauses, is that the shorter term does not run during the tenancy for life, but if the longer term has elapsed, the right becomes absolute, unless (under sec. 8,) the reversioner resists it within three years from the determination of the life estate. In *Wright v. Williams*, the Court said "The time of a tenancy for life in a person, who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years, absolutely is by the 8th section, excluded from the computation of the longer period of forty years, conditionally only, that is, provided the reversioner expectant on the determination of the term for life shall within three years (that is probably before the end of the years,) after such determination resist the right."

3 & 4 Vic. cap. 26.

*An Act to remove doubts as to the competency of persons, being rated inhabitants of any parish, to give evidence in certain cases.*

WHEREAS it is expedient to remove all doubt whether persons are by law competent to give evidence in cases where they have been formerly held to be disqualified by the liability to pay parochial rates; Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act no person called as a witness on any trial in any court whatever may and shall be disabled or prevented from giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed or liable to be rated or assessed to the relief of the poor, or for and towards the maintenance of church, chapel, or highways, or for any other purpose whatever.

II. And be it enacted, that no churchwarden, over-

seer, or other officer in and for any parish, township, or union, or any person rated or assessed or liable to be rated or assessed as aforesaid, shall be disabled or prevented from giving evidence on any trial, appeal, or other proceeding by reason only of his being a party to such trial, appeal, or other proceeding, or of his being liable to costs in respect thereof, when he shall be only a nominal party to such trial, appeal, or other proceeding, and shall be only liable to contribute to such costs in common with other the rate-payers of such parish, township, or union.

#### TAXATION OF STOCK IN TRADE FOR THE RELIEF OF THE POOR.

Under the stat. 43 Eliz. c. 2, all personal property yielding a certain annual permanent profit is rateable to the relief of the poor. (a) *Stock in trade*, when its value can be ascertained, is rateable. (b)

A Report has been recently made (14th of May last) by the *Poor Law Commissioners* upon the expediency of an *alteration* being made in this law. The Commissioners, after describing the extent of operation under the statute of Elizabeth, and progress of the tax on stock in trade, with its great inequality and easy evasion in many instances, say:—

"The rate on stock in trade, dependent on the amount of profit, cannot be made without minute investigations into the concerns of individuals—investigations so difficult, and the results of which are so fallacious, that a right conclusion can scarcely be obtained, while to the ratepayers every inequality, the result of a wrong estimate, is a subject of dissatisfaction, necessarily begetting disputes and litigation.

"From these difficulties, and from a desire to avoid appeals, another kind of injustice has existed in places where stock in trade has been rated. Those who could most successfully conceal their profits, or could most easily remove elsewhere, or keep their stock away from the parish, have been able to make the best terms with the overseers, to which terms, rather than lose all, the overseers and other inhabitants are compelled to submit; and, as an inducement to avoid appeals by such as might be supposed to be capable of appealing successfully, it has been the practice of overseers to set the rates at sums which, being much below the true amount of the liability, were likely to be undisputed by the ratepayers, and which the overseers were certain of being able to prove.

(a) *Rex v. Hogg*, 1 Term Rep. 727; *Barr. 226*; *Rex v. Ringwood*, Cowp. 326.

(b) Per Lord Kenyon in *Rex v. T. Mast*, 8 Term Rep. 164; *Rex v. Dursley*, id. 68; see also *Rex v. White*, 4 Term Rep. 771.

"There is good reason to believe that there is no parish in the kingdom in which the overseers have ever been able fully to carry out the law. The instances which have come to our knowledge of attempts to carry it out have been instances of compromise, and fully justify Lord Mansfield's enlightened views as to the impossibility of carrying the rating of stock in trade into effect. His Lordship's views appear to be still entertained in the manufacturing districts, and in other parts of the country, since the recent communications on the rating of stock in trade, which we have received, generally express a stronger sense of the impracticability of the law than of its injustice or impolicy.

"It would appear to be unnecessary for us to make any remarks upon the general policy of a tax operating so unequally, affecting some trades and some classes of traders with inevitable burdens, from which others are exempt, without any other reason for the difference than the merely accidental variety in the ease with which the tax can be imposed in one class of cases, as compared with the other. But it is proper to call our Lordship's attention to the fact, that the tax, as yet, has never been imposed on the parishes in the greater part of England and Wales, and is practically unknown in the districts which have become the great modern seats of manufactures. Thus its extension to these would operate with all the disturbing effects of a new tax, and with an effect which we are not prepared to estimate, but which may be considerable in changing the relations of our trade and manufactures, both as regards other parts of her Majesty's dominions (as Scotland and Ireland), where no such tax can be laid, and as regards the competition of our countrymen with the trade and manufactures of other countries.

"On the other hand, as the tax has not yet been practically laid on these districts, the repeal of the law would not deprive the landed interest any benefits now enjoyed by it in the taxation of the commercial and manufacturing classes. The repeal of the liability would leave the whole class of ratepayers in those districts in their existing relative positions. In the districts in which the practice of rating stock in trade formerly prevailed, and has been recently resumed, the alteration, by the total repeal of the liability, would be comparatively small, on account of the limited extent to which the liability has hitherto, on the causes before adverted to, been capable of being enforced.

"It is likewise important to remark, that the assessments are made by the parish overseers, who are paid officers, acting only for a single year, and are therefore not likely to possess or obtain the skill, or bestow the labour, which would be requisite for so difficult a task as that of making a fair and equal rate upon stock in trade.

"It has been sometimes suggested as desirable, that the practice of rating inhabitants for stock in trade should be confined by legislative enactment to the places in which it has already been carried into effect.

"If this suggestion should be adopted, it would be right to couple it with another—namely, that the rate should be made only in the same proportions to the actual profits as hitherto. For, as we have before stated, the practice has been such as to allow of a large escape of profits from the rate; and if ever a rate should be made in any place on the whole amount of profits legally liable to the rate, such a rate would, to the extent of this difference, be a new rate on the trade of the place: this provision, however, from the difficulty of discovering the proportion between the amount of profits which have been rated, and the amount of the true rateable profits, would be difficult of application.

"We think that it would be most beneficial to repeal altogether the effect of the word 'inhabitant' in the statute of Elizabeth. Hitherto no inhabitants, simply as inhabitants, have been rated other than the possessors of stock in trade; but, inasmuch as stock in trade was affected with its liability above a century and a half after the passing of the statute of Elizabeth, and as the words of the statute would undoubtedly admit of a much wider signification than has yet been attributed to them, there is still danger that it may at some time or other have a wider practical effect given to it. It appears to us to be better to prevent such an extension than to postpone the remedy until the evil has arisen; especially as this can now be done without any derangement beyond the repeal of the liability to be rated in respect of stock in trade.

"It would, however, be sufficient for the immediate purpose, to repeal specifically the liability of inhabitants to be rated in respect of stock in trade."

### Law Reports.

#### HOUSE OF LORDS, July 10.

##### APPEALS.

BOOTH AND OTHERS, DIRECTORS OF THE LONDON JOINT STOCK BANK v. THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND.

OPINION of the JUDGES upon the QUESTIONS proposed to them by the LORDS. (a)

TINDAL, C. J. C. P., gave it as the unanimous opinion of all the judges, that the arrangement or agreement entered into by the London Joint Stock Bank with the Kingston Commercial

(a) See ante. p. 187.

Bank in Upper Canada, was only an *indirect* mode of doing that which could not be *directly* done according to law, and consequently was a violation of the rights and privileges of the Bank of England, and that the order of the Master of the Rolls was, therefore, correct; that the judgment of the Court of Common Pleas in the case of *Bank of England v. Anderson*, (b) which laid down the same doctrine, had been taken into consideration upon the present occasion, and had received the unanimous approbation of all the judges.

The LORD CHANCELLOR expressed his entire concurrence in the opinion of the judges, and stated that he never had entertained any doubt about the case.

Judgment of the court below affirmed with costs.

#### BIRTWHISTLE v. VARDILL.

LEX LOCI DOMICILII. (a)

SETTLEMENT OF THE LAW.

*Whether a child born in Scotland of UNMARRIED PARENTS domiciled in that country, who, after the birth of the child, intermarrying in Scotland, is, by such after marriage, rendered capable of inheriting lands in England.*

The very important question raised in this case has been in agitation since the year 1823.

The facts appear to be these:—

In 1823 a bill in Chancery was filed by the plaintiff, John Birtwhistle, against the defendant, in which it was stated that the defendant had entered upon lands of the plaintiff, situate in Yorkshire, during the infancy of the latter, and received the rents and profits, whereby she became liable to account as guardian in socage, charging that the ancestor of the plaintiff had died indebted in various specialties, and praying a receiver, an account and delivery of the title deeds, and that the personal estate might be applied in payment of the specialty debts. Upon motion made before LORD ELDON for a receiver, his Lordship directed an action of ejectment to be brought in the Court of King's Bench, and pressed upon the parties the necessity—in a case of such importance to the settlement of the law—that a special verdict should be taken, intimating a decisive purpose, upon application by either of the parties, to direct a new trial if they came back to the Court of Chancery with a common verdict.

An action of ejectment was accordingly brought, which was tried at the Yorkshire spring

assizes, in 1825, before Mr. BARON BAYLEY, when the jury returned a *special verdict*, in substance as follows:—William Birtwhistle died on the 12th May, 1819, seised in his demeasne as of fee of and in one undivided third part of divers lands in Yorkshire, without leaving any issue of his body. All his brothers died in his lifetime, and, except his brother Alexander Birtwhistle, they all died unmarried, and without issue. Alexander Birtwhistle, in 1790, went from England into Scotland, and became and was domiciled there, and there remained and dwelt so domiciled until the time of his death. While domiciled in Scotland he cohabited during the whole of the period of time with Mary Purdie, being also domiciled there, and during such cohabitation had issue by the said Mary Purdie the plaintiff John Birtwhistle, who was the only son of the said Alexander Birtwhistle, and of the said Mary Purdie, and was born in Scotland on the 15th May, 1799. On the 6th May, 1805, after the birth of John Birtwhistle, Alexander Birtwhistle and Mary Purdie were married in Scotland, according to the laws of Scotland, and on the 5th of February, 1810, Alexander Birtwhistle died in Scotland, seised to him and his heirs of divers lands there, leaving the said John Birtwhistle him surviving, who, after the death of his father was duly served heir thereto, according to the law of Scotland, which he held and enjoyed in his own right, he having from the time of his birth dwelt and remained in Scotland, and been domiciled there. (b) If a marriage of the mother of a child with the father of such child takes place in Scotland, such child born in Scotland before the marriage is equally legitimate by the laws of Scotland with children born after the marriage for the purpose of taking land, and every other purpose. (c)

The case upon this special verdict was argued before the Court of Queen's Bench on the 5th May, 1826, when the present LORD CHIEF JUSTICE TINDAL made a very talented argument as counsel on behalf of the plaintiff, in which he contended that the lessor of the plaintiff being legitimate by the law of the country in which he was born, was legitimate all over the world; legitimacy being a *personal status* which accompanies a man wherever he goes. That the lessor of the plaintiff was born *ex justis nuptiis* according to the law of the country where he was born, and by that law the question ought to be determined.

Mr. *Courtenay* contended against this argument, and cited *Calvin's case* (d) to show that

(b) 2 Keen, 385, see 3 Bing. N. C. 689.

(a) See an Essay upon this subject by the EDITOR, ante Vol I. p. 118, et seq.

(b) See this Verdict more at large 5 Barn. & Cress, 498.

(c) See 5 Barn. and Cress. 499, n.

(d) 7 Co. Rep. 1.

he right of inheriting English lands must be decided by English principles and English law, and that foreign laws, and the decision of foreign courts, could not prevail.

ABBOTT, C. J., said, (e)—The simple question is, who is the heir to the lands in England? The rule as to the law of the domicile has never been extended to real property, nor have I found in the decisions in Westminster Hall any *dictum* giving countenance to the idea that it ought to be so extended. Two decisions in the House of Lords (f) have, however, been referred to, whence it is said such an opinion may be inferred; it is, therefore, satisfactory to me to know that this case may be carried before that tribunal. There being no authority for saying that the right of inheritance follows the law of the domicile of the parties, I think it must follow that of the country where the land lies. Personal property has no locality, and even with respect to that it is not correct to say that the law of England gives way to the law of a foreign country, but that it is part of the law of England that personal property should be distributed according to the *jus domicilii*. The question now to be decided is, whether a person having been born abroad can inherit land here, who would not have inherited had he been born in England. That the descent of land in England follows the law of the place where it is situate, appears by the various customs prevailing in different manors. Is there then any authority that the law of England, as to any lands in England, is to adopt the law of a foreign country? We are not together without an authority upon the subject. It appears by the statute of Merton, that the bishops were desirous of having that very law for which the lessor of the plaintiff now contends, introduced into this country; but it was refused in language which has always been remembered and often repeated. That language, it is said, must be confined in its application to persons born in England; but the Crown had foreign possessions at that time, and persons born there were not aliens, and I see no reason for restraining the meaning of the passage in question in the manner contended for. Having that authority before me, and finding nothing in our law books to support a contrary doctrine (indeed in *Brodie v. Barry*, (g) there is a *dictum* in favour of it), I think we shall not be warranted in giving effect to the Scotch law of legitimacy. It is not against our law that a foreign marriage, however solemnised, should be held good; we adopt the

laws of all Christian countries as to marriage, but it by no means follows, that we are to adopt all the consequences of such marriages which are recognised in foreign countries; it is sufficient if we admit all such consequences as follow from a lawful marriage solemnised in this country. For these reasons I am of opinion that our judgment must be in favour of the defendant.

Mr. Justice BAYLEY concurred in this opinion, and observed, he conceded that the *lex loci* governed the question of marriage; but whether all the consequences recognised in a foreign country, as following upon a marriage there, are also to be recognised in this country, is a very different question, and he thought must be answered in the negative; and the rest of the Court were unanimous in these opinions, and determined that the lessor of the plaintiff could not be received as legitimate heir to land in England, and judgment passed for the defendant. (h)

A *Writ of Error* was then brought in the House of Lords, where, for the plaintiff, the substantial question put in issue was, "Whether the lessor of the plaintiff was, or was not, entitled to the character and *status* of heir of his father, to the effect of inheriting a real estate situate in England, as being, or not being, the *lawful son* of his said father."

(To be continued.)

QUEEN'S BENCH, June 22.

*Sittings in Banquo.*

RIX v. BOSTON AND ANOTHER.

MAGISTRATES, *Actions against.*—*Whether the Statute 5 & 6 W. 4, c. 50, sec. 75, which requires 21 DAYS notice of action, repealed the 24th Geo. 2. c. 50, which requires a month's notice.*

The plaintiff in this case is a labourer, and the defendants are magistrates. It appeared that the plaintiff had two cows impounded, on the ground of their having strayed. He, believing that they had not strayed, desired two of his boys to go and release them from the pound. An information was afterwards laid against him under the provisions of the 5th and 6th Wm. IV., chap. 50, sec. 75, and the defendants convicted him in the penalty of 1*l.* 1*s.* and 8*d.* costs. He refused to pay, and was sentenced to one month's imprisonment and hard labour. This action was subsequently commenced, and the 21 days' notice of action which the statute the 5th and 6th Wm., chap. 50, required, were given. An objection was taken at the trial for the defendants, that a month's notice of trial ought to have been given, according to the provisions of the 24th Geo. II., c. 50, which had not been repealed by the subsequent act, the 5th

(e) 5 Barn. & Cress. 451. B. C.

(f) *Sheddon v. Patrick*, and the *Strathmore Peerage* case, see ante, vol. 2, p. 147.

(g) 3 Ves. & Bea. 127.

(h) This case is very fully reported in 5 Barn. & Cress. 438.

and 6th Wm. IV. c. 50. The objection was overruled, and the jury found a verdict for the plaintiff, damages 40s.

A rule *nisi* to set aside the verdict, and enter a nonsuit, was then obtained.

Mr. Palmer showed cause against the rule.

The COURT was of opinion that the latter statute could not be considered as a repeal of the earlier statute, and that, therefore, the action had been brought *too soon*. Under those circumstances, the rule must be made absolute.

Rule absolute.

#### COURT OF COMMON PLEAS—July 15.

*Sittings at Nisi Prius.*

LANE v. BURGHART.

*Guarantees—Liability of a BANKRUPT upon a GUARANTEE, given previous to his Bankruptcy.*

The plaintiff is the executor of one Mr. Simon. The defendant is a tailor. It appeared that a debt was owing from General Bacon, formerly in the service of the Queen of Portugal, to Mr. Simon, and he was arrested under a writ of *capias* for £275. The defendant then entered into a guarantee that, in consideration of the general's discharge, he would secure the payment of the £275. by half-yearly instalments. The present action was brought to recover the third instalment. The defendant had, since the transaction, become a bankrupt, but had now resumed business.

Mr. Sergeant Channell, for the defendant, contended that the subsequent bankruptcy of Mr. Burghart disposed of this debt, and formed a bar to it.

Verdict for the plaintiff—damages £74. 18s. the defendant having leave to move to enter a *nonsuit* on the question of law, whether the bankruptcy formed a bar to the demand.

#### COURT OF EXCHEQUER—June 9.

*Sittings in Banco.*

MARSTON v. JOHN.

*PRACTICE.—Service of Process upon a Lunatic confined in a Lunatic Asylum.*

Mr. Henderson applied for a writ of *habeas corpus*, to be directed to the keeper of a lunatic asylum, in which the defendant is a patient, in order that the plaintiff might have an opportunity of serving him with a process in this cause, the keeper having refused to allow any access to him.

PARKE, B.—If you take a rule *nisi*, it will answer your purpose.

Mr. Henderson would be glad to listen to any suggestion of the sort, but that he feared his client might be delayed and prejudiced by it. At

present the affidavits disclosed very clear ground for a *habeas* absolutely, and it was feared that, by taking it *nisi* now, much delay and expense might be created, which it would be better to avoid.

PARKE, B., however, after consulting the rest of the Judges, said it was not so clear that the *habeas* ought to issue absolutely in the first instance, and it would be better to take a *nisi*, which would no doubt answer quite as well as the compulsory rule. There was no reason why the keeper should not allow the patient to be served with due precaution, and if a rule *nisi* were to be served with a proper explanation, the keeper would in all probability so act as to render unnecessary the trouble and expense of bringing up the defendant afterwards.

Rule *nisi* granted.

#### COURT OF REVIEW—May 13.

FIAT AGAINST ROBERT HENRY WALSH.

EX PARTE JACOB KING.

*EQUITABLE MORTGAGEE—of a house and fixtures—Whether common house fixtures are goods and chattels within the order and disposition of the Bankrupt, under the 7th sec. of the Bankrupt Act, and belong to the Assignees; or whether they pass to an equitable Mortgagee.*

The petitioner, Jacob King, in his petition, stated that he was possessed of the lease of a house and premises at Mitcham, in Surrey, for the residue of a term of 21 years, which the bankrupt had contracted to purchase from him for £200., and that by an indenture of assignment, dated the 9th March, 1839, the petitioner, in consideration of £200. therein expressed to be paid by the bankrupt, assigned the lease to him for the residue of the term, together with all the fixtures, mentioned in a schedule, to such assignment absolutely.—That the petitioner signed the usual receipt for the £200. purchase-money upon the back of the assignment, but that in fact only £50. was paid in money to the petitioner, the balance of £150. being paid by a bill of exchange, drawn by the petitioner upon the bankrupt, at three months' date, which was dishonored, and in fact had not since been paid. That the fiat of bankruptcy was issued on the 12th September, 1839, and the petitioner claimed a lien upon the lease and fixtures for the balance of the purchase-money remaining unpaid, and prayed an order that the lease and fixtures might be sold, and the proceeds applied in payment of the debt and the charges of sale.

The fixtures consisted of stoves, blinds, and other tenant's fixtures, which were claimed by the assignees.

Mr. *Chandless* supported the petition, and contended that the *fixtures* were not goods and chattels within the order and disposition of the Bankrupt, which the Bankrupt Act would vest in his assignees.

Mr. *Rogers* appeared for the assignees, and insisted upon the right of the assignees to the fixtures.

Ross, J., said, these fixtures might have been reached by an execution. Can they be removed without injury to the freehold? If not, they savour so much of the realty as not to be within the order and disposition of the bankrupt, so as to pass to his assignees; but if they do not savour of the realty, then I think they do fall within that order and disposition, and come within the statute. There is no doubt that fixtures, as such, will pass to the mortgagee, and the only question is whether these were indelibly fixed to the freehold. The legal title of the assignees was paramount to the equitable title of the petitioner, and if these be tenants' fixtures, as a relation between landlord and tenant, they passed to the assignees by order and disposition. The question is, whether they can be detached from the freehold without waste; and what the mortgagee seeks to effect is what the bankrupt might have severed at any time previous to the bankruptcy. A mortgagee's title cannot be put higher than that of a landlord, as was decided in *Horn and Baker (a)*, and subsequent cases. He was of opinion that the petitioner was entitled to no more than the proceeds of the case, and that the proceeds of the removable chattels were the property of the assignees, though what these were was of course a question for inquiry. Upon the question of order and disposition, I have always understood the rule to be, with regard to the *trade fixtures* of a bankrupt, that as the assignees are entitled to reach them as an executor can claim against an heir-at-law, or which a tenant can remove against his landlord, having regard to the particular quality of the estate. In ordinary cases, *house fixtures* are for the most part looked upon as a part of the house to which they are attached, and do not, therefore, raise any credit question of possession; but in the case of *trade utensils and fixtures*, it is otherwise; and the fact of the possession by the trader raises the presumption of property, and induces credit. In the former instance, the possession may well remain in the bankrupt, without affecting the title of the mortgagee, it not being within the mischief of the statute. This is a question of fact merely between the parties. However, there have been some decisions which are supposed to

shake this rule, and to authorize the proposition that whatever article comes within the most extended and comprehensive meaning of the word "fixture," without reference to the injury and waste which may be done to the premises in its removal, forms part of the realty, and passes to the mortgagee as a part of his security; so that it would no longer remain a question of fact between the parties. This, I think, is stating the rule much too widely. If we had to decide this case upon the very early authorities, we should certainly be obliged to consider, that whatever was attached to the realty, formed a part of it; but in modern decisions, personal property has been looked upon as of greater importance; and many exceptions were allowed—for instance, as between heir and executor, landlord and tenant, debtor and creditor. Many exceptions have been allowed for the benefit of trade. A positive rule was laid down in *Horn v. Baker*. The determination in that case raises two questions here to be governed by it. First are the fixtures *trade chattels* annexed to the freehold, which can be removed, or such as when so annexed, are customarily removed. Secondly, if such be the fact, can they admit of being removed without damage to the freehold. If they can, then they are assets of the bankrupt, and pass to the assignees; if they cannot, the petitioner has no claim upon them.

Cross, J., said, the question in this case is a question of law—whether fixtures are goods and chattels within the meaning of the Bankrupt Act. There are *other cases* before the Court depending upon the decision in this case, and I much regret that I cannot concur with my learned colleague in the view that I have taken of the question; but my opinion is, that the petitioner is entitled to the lien he claims upon the *house* and *fixtures*, and I am the more inclined to this opinion by the decision made by the Court of Exchequer in *Boydell v. M'Michael (b)*, which was recently adopted by this Court (c), where it was determined that *fixtures* were *not* goods and chattels within the 72d sec. of the Bankrupt Act, and that consequently in this case the claim of the assignees cannot be allowed. We have the authority of *Lord Lyndhurst* and Mr. *Baron Bayley* to this effect, in *Trappes v. Harper (d)*, where an action was brought for injury to the reversionary interest of the plaintiff by the defendants (assignees), by taking away certain engines, machines, utensils, fixtures, and things affixed and fastened to the closes and buildings. The possession was in the defen-

(b) 1 Crompt. M. & R. 177.

(c) *Ex parte Wilson*, 4 Dea. & Chitt. 143.; 3 Mont. & Ayr. 61.

(d) 2 Crompt. & M. 153.; 3 T. & W. 603.

(a) 9 East, 215.

dants. The plaintiff claimed under a term of 1000 years, by way of mortgage, to secure a sum of £4655, of all the messuages, tenements, dwelling-houses, lands and buildings, and also the steam-engines, mill gearing, heavy gear, mill-wright-work fixed, machinery, and other matters and things erected and then standing and being in or upon the buildings, works, and premises which in any manner constitute fixtures and appendages to the freehold or any part thereof. The bankrupts had all these in their possession; and they were "firmly fixed to the freehold," yet in such a manner that they might easily be removed without any material injury to the articles themselves, or to the buildings. It was contended, that, between mortgagor and mortgagee, the rule against removing fixtures applied in its ancient strictness. But *Lord Lyndhurst* met the argument by observing, "The question is, whether these articles are fixtures, and it arises between mortgagees and a mass of other creditors." And in another place he says, "A mill or steam-engine may be a fixture; but how many other things are affixed to those moving powers upon the condition of which there may be more doubt?" *Bayley, B.*, said, "Here the question is, were these articles fixtures or not? The bankrupts were the reputed owners of the machinery, and in consequence of their being so considered, obtained extensive credit. We are of opinion, therefore, that with respect to machinery of this description, erected by the bankrupts for the purposes of trade, it would have passed to the executor and not to the heir, and that it was the partnership estate of the bankrupts." His Lordship then commented upon cases before *Lord Hardwicke*, between heir and executor; and cited *Lawton v. Lawton* (3 Atk. 13) as affording the principles upon which, as between mortgagees and creditors, these cases are to be decided. "These authorities," says *Lord Lyndhurst*, "lead us to the conclusion, that where utensils and machinery are erected by the owner for the purpose of trade only, in a neighbourhood where such utensils and machinery as these would commonly have been removed, and where this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." And such is the law at this day, unless that doctrine is shaken by *Boydell v. M'Michael*; but there *Mr. Baron Bayley* said, "as the assignment mentioned the fixtures *eo nomine*, it is valid as between mortgagor and mortgagee to pass them to the latter if they are goods and chattels; but whether they are to be considered such between him and the assignees of the bankrupt mortgagor

is worth consideration." And it was held that the mortgagor was entitled in preference to the assignees, because the articles claimed were "fixed to the freehold and parcel of it." This is perfectly consistent with *Trappes v. Harter*; but if it is said, this is an authority for the proposition that if the article claimed be within the common acceptation of the word "fixtures," that is sufficient to take it from the mortgagee I entirely dissent from looking upon it as an authority for such a proposition.

ORDER made by CONSENT, upon condition of APPEAL. Petition dismissed as to the FIXTURES.

## NOTICE TO CORRESPONDENTS.

E. A.—D. S.—Your Answers to Problem VI. in this volume, as regards "the effect of bankruptcy on the tenant's right," require some revision. We direct your attention to the reported case in this number, *ex parte King*, by which you will find the question one of such importance that the Court cannot agree upon a decision. You have not worked up all the cases.

## ERRATA IN NO. 12.

Page 183, column 2, line 9 from the top, for "Joint Stock Company," read "Joint Stock Bank;" and for "Governors," read "Governor."

Page 187, column 1, line 38 from the top, instead of "to pay bills," read "to procure bills." Column 2, line 5 from the top, after the word "Bank," add "founded upon such transactions."

## LAW OF MARRIAGE.

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CONSIDERATIONS on the STATE of the LAW regarding MARRIAGES with a DECEASED WIFE'S SISTER.

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London: Longman, Orme, and Co.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Cornhill, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West, in the City of London.—Saturday, July 25, 1844.

ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

# The Legal Guide.

Vol. IV.]

SATURDAY, AUGUST 1, 1840.

[No. 14.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

#### CARRIERS BY WATER.

(Continued from page 196.)

THE liabilities of CARRIERS by WATER are also much narrowed by the statute, Geo. 4. c. 155. s. 53, of which statute exempts them from liability from damage arising from the want of a duly qualified lot, and the 7 Geo. 4. c. 15, exempts them from making good losses incurred by the misconduct of the master and mariners without their privity to a greater extent than the value of the ship and freight.

In reference to the case last cited, (a) as to the goods with which he is entrusted the last thing the master of a ship should

think of, because it can only be justified by that necessity, which supersedes all human laws. If he sell without necessity, his owners as well as himself will be answerable to the merchant, (b) and they will be answerable if he places the goods at the disposal of a Vice Admiralty Court, in a British Colony, and they are sold under an order of the Court, such a Court having no authority to order the sale. (c) And the persons who buy under such circumstances will not acquire a title as against the merchant, but must answer to him for the value of the goods. (d) The law at the present day upon this subject was very clearly shewn by LORD DENMAN, in a recent case in the Court of Queen's Bench, (e) the facts of which were

(b) Freeman and another, v. East India Company, 5 Barn. and A. 617.; Wilson v. Dickson, ante.

(c) Cannan v. Meaburn, 1 Bing. 243.

(d) Morris v. Robinson, 3 Barn. and Cress. 196.

(e) Shipton v. Thornton, 1 Perr. and Dav. 216.

(a) Ante, p. 194.



these. In January, 1836: the agent of the defendant, shipped at *Singapore*, on board the *James Scott*, belonging to the plaintiff, certain goods under a bill of lading, by which it was stipulated, "That the goods were to be delivered at the port of London to *Richard Thornton, Esq.* or his assigns, he or they paying freight for the said goods, as per margin." The *James Scott* proceeded on her voyage with a general cargo; but, encountering severe gales, was obliged to put into *Batavia*; and on her arrival there, in consequence of the damage to the ship and cargo, a transshipment was found necessary, and the cargo, including the goods of the plaintiff, was transhipped to the *Mountaineer* and *Sesostris*, and bills of lading were drawn for delivery of the cargoes to *William Ellward, Esq.* or his assigns, he or they paying freight. On the arrival of the last-mentioned vessels with their cargoes in *London*, the defendant claimed and obtained both parcels of goods, under the bill of lading, *per James Scott*, but contended that he was only bound to pay freight *pro rata* from *Singapore* to *Batavia*, and the actual freight *per Mountaineer* and *Sesostris*.

*Lord Denman*, in delivering the judgment of the Court of Queen's Bench, said, "Upon the trial, it appeared that the plaintiff had been paid freight by the *James Scott*, at the rate originally agreed on, for so much of the voyage as had been performed up to the ship's arrival at *Singapore*, and for the remainder of the voyage to *London*, at the rate of which he had contracted for the carriage of the goods by the *Mountaineer* and the *Sesostris*. The action was brought for the difference between the two rates for that portion of the voyage; and it was objected, that for this portion of the voyage he was not entitled to receive more than he had actually paid; while, on the part of the plaintiff, it was contended, that the necessity of the transshipment being assumed, which it must be for the purpose of the argument, the

*Mountaineer* and *Sesostris* were to be considered as the *James Scott*; that the master had fulfilled his undertaking in carrying the goods to their destination, and had, therefore, earned his full freight, while it was a matter of indifference to the owner of the goods whether they had arrived safe by one vessel or the other. It is clear, "That by the contract, the shipowner, and the master, or his agent, is bound to carry the goods to their destination in his own ship, if not prevented from doing so by some event which he has not occasioned, and over which he has no control. When, however, such an event has occurred to interrupt the voyage as above defined, and the shipowner or master, (for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists on the point, whether or not, he is bound to tranship, or having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise, by the *vis major*, which prevents his accomplishing it in the literal terms of his undertaking. By the *Rhodian law*, the laws of *Oleron*, Art. 4, and the ordinances of *Wisbuy*, Art. 16, the master was at liberty, but was not bound to tranship. The *old French Ordinance*, on the other hand, in precise terms, imposed the obligation upon him: *En cas que la roisne ne puisse être raccommode, le maître est obligé d'en louer incessamment un autre*. Art. 11, *Du Fret* (f). The terms of this ordinance occasioned, however, much controversy, *Pathier* and *Valin*, maintaining that they were not imperative, except as the condition of earning full freight; *Emerigon*, on the other hand, insisting that the duty was strictly cast upon the master as the agent of the freighters (g). The modern French

(f) Pothier, vol. 11, *Traité des Contrats de Louage Maritime*, part 1—3, n. 66. Valin, Art. 11, *de Fret*, l. p. 618.

(g) *Traité des Assurances*, vol. 1, chap. 12—14.

code appears to adopt this view of the question. The words of the Code de Commerce, 296, are, on this point, almost the same as those we have cited from the ordinance and it is stated by *Chancellor Kent*, who, in his *Commentaries*, vol. 3, p. 207—12, 3rd ed. very ably and learnedly sums up the whole question, that *Boulay, Paty*, and *Hardessus*, in their commentaries on it, have agreed in holding to the construction adopted by *Emerigon*.

All authorities, however, are in unison to this extent, that the master is *at liberty* to procure another ship to transport the cargo to the place of destination; and, in these words, Lord Tenterden cautiously lays down the rule of our law. It may, therefore, safely be taken to be either the duty or the right of the shipowner to tranship in the case we supposed, if it be the former, it must be so in virtue of his original contract; and should seem to result from a performance by him of that contract, that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending its fulfilment; on the other hand, if it be the latter, a right to the full freight seems to be implied—the master is *at liberty* to tranship; for what purpose, except for that of receiving his full freight at the rate agreed.

In the case supposed, we may introduce another circumstance. Let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not be delivered to him at the immediate port; there is no question but that the full freight at the original rate must be paid; and that, because the freighter presents the master, who is able and willing, has the right to insist on it, from fulfilling the contract on his part, and because sending the goods to their destination in another vessel is deemed a fulfilment of the contract. If, therefore, the owner of the goods is not present and personally exer-

cises no option, still the shipowner, in forwarding the goods, must have the same rights, and in so doing, must be taken to exercise them with the same object in view.

“ One question, however, has been asked, which it will not be right to pass over: what, it has been said, if the transshipment can only be effected at a higher than the original rate of freight, which party is to stand to that loss? By the French Ordinance and the *Code de Commerce* (to which *Chancellor Kent* refers), the shipowner is entitled to charge the cargo with the increased freight; and, as a consequence of that rule, it becomes an average loss; and in case of an insurance, must be made good by the insurers (A). No case of the sort, that we are aware of, has occurred in this country, nor is it necessary for us to express any opinion further than as bears on the present question.”

“ It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighters; and that, where freight cannot be procured at the rate, another, but familiar principle, will be introduced—that of agency for the merchant. For it never must be forgotten that the master acts in a double capacity; he is agent of the owner as to the ship and freight, and agent of the merchant as to the goods. These interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty, under all circumstances, in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and therefore the owner's *right* to tranship will be at an end, but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be

(A) *Emerigon*. *Traité des Assur.* c. 12, s. 16; *Code de Commerce*, 350.

forwarded to their destination, even at an increased rate of freight; and if so, it will be the duty of the master, as his agent, to do so. In such a case, the owner will be bound by the act of his agent, and, of course, be liable for the increased freight. The rule will be the same, whether the transshipment be made by the shipowner or the master; and, in applying it, circumstances make it necessary, on the one hand, to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched."

(To be continued.)

#### PROBLEM XIV. VOL. IV.

##### LESSOR AND LESSEE.

COVENANTS—WAIVER. What amounts to a WAIVER of a breach of Covenant?

TO THE EDITOR OF THE LEGAL GUIDE.  
ANSWER TO PROBLEM 26. --VOL. 3.  
WHAT IS DEEMED AN ILLUSORY APPOINTMENT?

By the Act 1 Wm. IV. cap. 46, no appointment shall be construed illusory and invalid, by reason of the share appointed being unsubstantial and nominal. But it is necessary to understand the doctrine as it stood before that act. (a)

Where a power was given to A. B. to appoint property to a set of persons, or where property was given to a set of persons in such proportions as A. B. should appoint; an appointment of a merely nominal or very small portion of the property divisible was, at law, held a good and valid appointment. If any part was allotted to each, a court of law would not enter into the question as to the adequacy or sufficiency, but would hold it good, although the fund divisible was never so large. (b) But in equity relief would be granted where the share was nominal and disproportionate. (c) Thus in *Gibson v. Kinven*, 1 Vern. 66, the testator gave personal estate to his wife, "upon trust and confidence that she would not dispose thereof but for the benefit of her children." She gave five shillings

to one, and the court granted relief. (d) And in *Wall v. Thurbane*, 1 Vernon, 414, (e) where the testator devised that his real estate should descend amongst his three daughters, provided that his wife should distribute it in such proportions as she should think fit in her lifetime, and the mother appointed a very small share to one daughter,—the court, after long debate, declared that the case was relievable in equity. In this case was cited *Gibson v. Kinven*; (ubi sup.) but note, says the reporter, one main reason in that case was that the wife had married a second husband, and, being under coverture, her distribution might be influenced by her husband's authority. (f)

The disproportion of the sum appointed to the share which the object would have taken in default of appointment, and not the actual amount, seems to have been the point looked at by the court in deciding whether the appointment was illusory or not, 1 T. R. 785. And to determine what proportion of a fund should be the standard in adjudicating on cases of this nature has caused much controversy. In *Wilson v. Piggott*, 2 Ves. jun., 351, LORD ALVANLEY held that one sixteenth to one of four objects was not an illusory appointment. In that case the share was not appointed, but came to one of the objects, in common with others, in default of appointment, but LORD ALVANLEY said that made no difference, and assimilated the case to one where lands suffered to descend were held to be in satisfaction of a covenant to purchase. In *Kemp v. Kemp*, 5 Vesey, jun. 855, the same learned judge decided, that an appointment of 10l. to one of three objects, the fund being paid 1900l., was illusory, and decreed an equal division. (g)

(d) But all the interests given to the child were taken into consideration.—See also *Vanderzee v. Aclom*.—EDITOR.

(e) Reported also there, p. 355.—EDITOR.  
(f) This book is so inaccurate that much relief cannot be placed upon it. See also *Craggs v. Foster*, and *Swetnam v. Woolston*, there also cited but it is unknown who decided these two cases.—EDITOR.

(g) The decision made in this case was this:—under a power to appoint among several objects, each must have a share, and by the rule in equity of illusory appointments, a substantial share; and a good reason appears, as another provision by the person executing the power, not from any other quarter. Under such an appointment, the fund is this: being appointed 10l. to one, 50l. to another, and remainder to a third child, all having other portions aliunde, it was set aside as illusory; but in *Wilson v. Piggott*, LORD ALVANLEY held an appointment to one of four children, amounting only to one sixteenth of the whole fund, (being a fourth less than the equal proportion,) to be good. His Lordship often expressed his desire to get out of the rule altogether, and lamented that equity had not followed the rule of law, and in *Kemp v. Kemp* he said he was compelled, against his will, to hold the appointment in that case illusory.—EDITOR.

(a) Because the Act is not retrospective.—EDITOR.  
(b) See *Spring dem. Titcher v. Biles*, 1 Term. Rep. 438 n. per Lord Mansfield.

(c) In equity an appointment of a very small share is not illusory, if justified by circumstances, as where that object is otherwise provided for, *Vanderzee v. Aclom*, 4 Ves. jun., 785.—EDITOR.

But in *Butcher v. Butcher*, 9 Vesey, junior, 82, Sir WILLIAM GRANT held that an appointment of £200 out of a fund of about £17000 was good (h). He made a distinction between a substantial share and a substantial provision. And in *Dyke v. Sylvester*, 12 Ves. jun. 126, that Judge followed up the principle which he had established in the last case; and though, of each of seven objects out of nine, only about £71. were given, the fund being £7100, and, consequently, the disproportion much greater—like decision was made.

And it seems that, in decreeing the appointment illusory, the conduct of the appointees could not be taken into consideration (*Kemp v. Kemp*, ubi supra).

But the previous advancement of a child, as an marriage, would operate in favour of the validity of the appointment (*Bristow v. Warde*, 1 Vesey, jun. 336).

Nor would the appointment have been considered illusory where such appointee was at the time an uncertificated bankrupt (*Bax v. Whitbread*, 10 Vesey, jun. 31). In this case the bankrupt took interests in other property by the same deed of appointment; and this circumstance seemed to weigh much with the Court.

The appointment would have been valid if the child had been before provided for by the donor of the power, *Kemp, v. Kemp. Mocatta v. Lousada*, 12 Ves. jun.

But such provision must not have been made by the donor of the power, *Kemp v. Kemp*.

It may be added, that if the property to be appointed was mixed, it was not necessary that the appointee should take some of each; *Moran v. Surman*, 1 Taunt. 289. (i)

The late act of 1 Wm. IV. cap. 46, has properly put an end to all further inconvenience arising from these differences by enacting, "that no appointment to be made in exercise of any power to appoint amongst several objects, shall be invalid, or impeached, in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed, or left unappointed, to devolve upon any one or more of the objects of such power; but that such appointment shall be as good in equity as at law: provided that nothing in the act shall affect any provision in the instrument creating any such power, which shall declare the amount of the share or shares from which no object shall be excluded; provided also that nothing in the act shall be taken at law or in equity, to give any other validity to any appointment than such appointment would have had if a substantial share of the property affected by the power had been

thereby appointed, or left unappointed, to devolve on any object of such power." A. J. H.

(i) The result of the authorities, then, was rather a negative than an affirmative rule. LORD ALVANLEY determined, that where a party is, in default of appointment, to take a third share, a gift of a hundred and ninetieth share to him is illusory. There the MASTER OF THE ROLLS drew the line, so that any share which, squared by this rule, would exceed that in amount, was not deemed illusory. But upon an appeal to the LORD CHANCELLOR, in *Bax v. Whitbread*, for the express purpose of restoring the old rule, his Lordship thought that the principle stated in the late cases, in effect destroyed all the authorities. The sum of £50. being given, he said, in one family, and by one will, it is difficult to conceive that the identity of the sum, or the proportion, can afford the ground of determination in another family and upon another will. The motives also must be furnished by the same circumstances, whether good conduct or misconduct; a provision by a parent or a third person; circumstances, if the Court is at liberty to regard them, of utility. The result of the authorities, he added, was, that from the time of LORD NOTTINGHAM, the Court has taken upon itself the duty of exercising a discretion in these cases; and his Lordship seems to have considered himself still bound by those decisions. Upon a later appeal to LORD ELDON, in *Butcher v. Butcher*, he expressed the same opinion (1 Ves. & Bea. 79). The law, therefore, on this head appears to stand as it did before the case of *Butcher v. Butcher* was decided by the MASTER of the ROLLS; and yet although LORD ELDON decided that the Court was bound to inquire whether the share was substantial or not, his Lordship showed a strong disposition to narrow the doctrine. In both the appeals, the decrees of the MASTER of the ROLLS were confirmed, on the ground that the shares were not illusory. In *Butcher v. Butcher, Elizabeth Butcher*,

(h) The share in this case did not exceed a hundred and twenty-second part of the fund.—EDITOR.

had a power to appoint the fund amongst her children, by her present or any future husband, by deed or will, from time to time. The power was quite in the common form; and therefore, perhaps, much weight could not be given to the circumstance, that at the time of making any particular appointments, he could not know what the number of objects would ultimately be; and, indeed, as appointments are not often made till the children require their portions when the probability of many other children must have ceased, this is a difficulty which is not likely to arise. In default of appointment, the fund was given in the usual way to sons at twenty-one, and to daughters at twenty-one or marriage; but it was provided, that if any son of her present marriage should attain twenty-one, or any daughter twenty-one, or marry, no child by any future husband should, by marriage or otherwise, be entitled to more than a moiety of the property, which provision, it might be contended, could not affect the right of each class of children, as between themselves, to a substantial share. She made the unequal appointment which has been mentioned; and LORD ELDON held, that attending to all the circumstances, and the nature of the trust collected from the deed, he was not authorised to say that the share was not substantial. He relied upon the circumstances, that the power was from time to time, and the number of objects was incapable of being ascertained until she reached an age at which she could not have more; and if there had been one child by a subsequent marriage, after all her particular appointments, that child might have taken a moiety of what constituted the whole fund before any appointment, though that should leave to perhaps twenty children of the former marriage, only their respective shares of what remained unappointed. It is evident, he observed, how immensely large a discretion was given, and to what the fund

might, by repeated executions of the power, be reduced, and this went far to shew that her discretion must, as far as it can in any case, be unfettered. See 1 Sug. Powers, 568.

EDITOR.

## Law Reports.

### HOUSE OF LORDS, July 20.

#### Appeals.

BIRTWHISTLE v. VARDILL.

LEX LOCI DOMICILII.

SETTLEMENT OF THE LAW.

*Whether a child born in SCOTLAND of UNMARRIED PARENTS domiciled in that country, who, after the birth of the child, intermarrying in SCOTLAND, is, by such after marriage, rendered capable of inheriting lands in ENGLAND.*

(Continued from page 205.)

The following QUESTION was put by the LORDS to the Judges:—

“A. went from England to Scotland, and resided and domiciled there, and so continued for many years till the time of his death. A. cohabited with M. an unmarried woman, during the whole period of his residence in Scotland, and had by her a son B., who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child born in Scotland before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land, and for every other purposes (a). A. died seised of real estate in England and intestate. B. entitled to such property as the heir of A.”

On the 10th of June, 1830, Sir W. ALEXANDER, C. B., delivered the opinion of the judges, of which the following is the substance. (b)

There are two points to which attention must be directed, separately, and in succession to each other.

The 1st regards the *status* or condition of the claimant. The 2nd is, what rules of inheritance the law of the country where the property is situated, and the tribunal sits, has impressed upon the land the subject of the claim?

(a) This was the CIVIL LAW established by the Emperor Constantine, and confirmed by the Emperor Justinian; and was established in the CANON LAW by the Constitution of POPE ALEXANDER III. in 1160.

(b) See a full Report of this Opinion, and of the case of Blyth, 45.

As to the 1st, LORD STOWELL in *Dalrymple v. Dalrymple*(c) said,—The cause being entertained in an English Court, must be adjudicated according to the principle of the English law applicable to such a case: but the only principle applicable to such a case by the law of England, is, that the *status* or condition of the claimant must be tried by reference to the law of the country where the *status* originated: having furnished this principle, the law of England withdraws altogether, and leaves the question of *status* in the case put to the law of Scotland. I will suppose a case in many circumstances resembling the present. In addition to the circumstances stated in the question, let it be further supposed that the father and mother of the claimant, had after their marriage, one or more sons born to them. Suppose then the present claim to be made. The first inquiry having been satisfied, and it being upon that inquiry perfectly ascertained that the claimant is the eldest legitimate son of his deceased parent for the purpose of taking land, and for every other purpose, by the law of Scotland, it will next be requisite to inquire what are the rules and maxims of inheritance which the law of England has impressed upon that land which is the subject of the claim. Let it further be supposed that upon this inquiry it shall turn out that the land claimed is of that description which is called *Borough English*. This being proved, we think it clear that the claimant's legitimacy by the law of Scotland, his right to inherit by that law will give the claimant no right whatever to the land in England held in *Borough English*. Take also the case of *Ilderton v. Ilderton* (d) a case of a claim to dower by a foreign widow, whether she is a widow or not, that is, whether she was the lawful wife of the man who was, during the coverture, seised of the land, is a question which the law of England permits, upon a claim to English land, to be determined by the foreign law, the law of the country where the contract of marriage was made (e): there the comity between

nations stops. When her character of widow shall have been fixed according to these foreign rules, the law of England comes into action, and, proceeding inexorably by its own provisions and regulations, decides what are the interests in the English land which her character of widow has conferred upon her. It inquires what are the rules which attach upon the particular land in favour of a widow. If, upon that inquiry it appears that the land is subject to the common law, it will give her a third; if it appears to be gavel-kind, one half, while she remains *casta et sola*. If the land be customary land of any manor, the custom must be looked into; and she can have only what that custom shall bestow, however strange and capricious that custom may be.

This distinction is very familiar to foreign jurists, and is noticed by them as the difference between real and personal *status*: the last being those which respect the person, and follow it everywhere; the first being those which are connected with the land and adhere to it, and are as immoveable as the subject to which they are applied.

The answer to the question must be founded upon this distinction: while we assume that B. is the eldest legitimate son of his father, in England as well as in Scotland, we think that we have also to consider whether that *status*, that character, entitles him to the land in dispute as the heir of that father; and we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real property in that country, without the least regard to the rules which govern the descent of real property in Scotland. The circumstance which dictates the answer we must give is, that in selecting the heir for English inheritance, we must inquire only who is that heir by the local law. If the argument from the comity of nations be shaken off, no man will doubt that a person legitimated *per subsequens matrimonium* is not the heir of English land. What Lord Coke says, (e) affords the rule "*Hares*, the legal understanding

(c) 2 Hagg, 58.

(d) 9 Hen. Blacks, 145.

(e) In England, if the succession to real estate was ruled by the laws of other countries, the inconveniences and difficulties would be endless; if a person married in a country where polygamy was allowed, would each wife be dowable? if a person having several daughters, went abroad and married again in a country where the canon law (which permits a second marriage to be good if there is no knowledge of the existence of the first wife) prevails, and by such second marriage has a son he would be legitimate in that country, but would he succeed to lands in England? Would the son of a second marriage born abroad, where the rule of *possessio fratris* does not prevail, succeed to the brother of the half-blood in England? these inconveniences would be consequences if the international law regulated the real property of a state. Land is held by title; personality by possession, and who under these conflicting circumstances could by

any possibility advise upon a title to land? the difficulties of such an admission would be insurmountable. The laws of *gavel-kind* and *borough English* are not affected by the residence of the proprietor in a different part of England from that where those laws are in force; the incidents of the feudal tenure were not personal, but savoured strongly of realty; had they been personal, the kingdom might have been deprived of its defence, therefore, every thing shews that the *lex loci*, should control the international law with regard to the succession to real estate: and as these inconveniences, arising from the contrary, would prejudice the Queen and the State, therefore, by the law of the civil jurists themselves, international law is in this instance perfectly inadmissible.

(e) 1 In

of the common law, implieth that he is *ex justis nuptiis procreatus* for *Hæres legitimus est quem nuptiæ demonstrant.*" Perhaps Lord Coke's expression would have been more precise and accurate, if instead of saying "*ex justis nuptiis procreatus*," he had said "*ex justis nuptiis natus*." But this is what is meant, this maxim is in substance, in our opinion, a maxim regarding the land, describes one of its most important qualities, traces out the course in which it shall descend, and is no more liable to be broken in upon by any foreign constitution, than are the degree of interest which the heir shall take in the land, the conditions on which she shall hold it, the proportion which a woman shall obtain as a widow, or the limitations and conditions attached to her estate. I have endeavoured to state the principles, and to shew the course of reasoning which has conducted my learned brothers and myself to the conclusion, that B., the person designated by your lordships, is *not* entitled to the property in question as the heir of A.

The question is, what the law of England requires, and, as we are advised, the law of England requires that the claimant should *actually*, and, in *fact*, be born within the pale of lawful matrimony, we cannot agree that the presumption of a foreign jurisprudence, contrary to the acknowledged fact, should abrogate the law of England, and that by such a fiction a principle should be introduced, which, upon a great and memorable occasion the legislature of the kingdom distinctly rejected: your lordships will perceive that I allude to the statute of *Merton*.<sup>(f)</sup> It would seem strange to introduce indirectly, and from comity to a foreign nation, a rule of inheritance which may affect every honour and all the real property of the realm, which rule, when proposed directly and positively negatived and refused: a refusal that in England has obtained the approbation of every succeeding age.

Again, it is said that two cases have been decided in this House which are nearly in point, and will prove that the claim of B. should be supported. These cases are the cases of *Shedden v. Patrick*, and the case of *Lord Strathmore*.<sup>(g)</sup> These two cases are alike in principle, and establish the same proposition. In the one case the parents lived in a state of concubinage in America, and in the other in England. In both, children were

born to them. Afterwards the parties married in their respective countries: by force of their marriages the American issue claimed Scottish land, and the English issue claimed Scottish honours; in both, your lordships decided against the claimants. Now, it is said, these authorities are exactly the converse of the present case. They establish the principle, that the Courts of the country where the lands lie, in a question respecting the heirship to these lands or honours, inform themselves whether the claimant is heir, not by the law of the country where the lands lie, but in the country of the domicile, where the marriage of the parents was contracted; and if he is not heir by that foreign law, his claim is rejected, from which they deduce this consequence, that if he is heir, his claim should be sustained.

It is obvious, that if in the cases to which I am now referring, the claimants had been declared heirs by the Scottish law,—the Scottish law admitting of no heirship without legitimacy, and have been called in aid to bestow upon them that personal character of legitimacy refused to them by their own law; in other words, a law foreign to their birth, to their domicile, and to the marriage of their parents, would have been held to bestow upon them their personal status and character,—a decision certainly contrary to the acknowledged principles upon this subject. The character of illegitimacy attached to the persons of the English and American claimants by their own law, accompanied them every where, and would prevent them being received as heirs any where within the limits of the Christian world. This view, in our judgment, renders these decisions entirely consistent with the principles I have unfolded, and prevents our considering them as objections to the opinion all the judges entertain, that B is not entitled to the property in question as the heir of A.

The Earl of LAUDERDALE then submitted to the House that the following questions should be put to the Judges; and in putting them his Lordship observed,—I cannot easily admit, but it is said, "By the law of Scotland, if the marriage of a mother of a child with the father of such child takes place in Scotland, such child born in Scotland, before the marriage, is equally legitimate with children born after the marriage." My Lords, I hold that this—a statement of the law which is incorrect—is the very question in discussion under the law of Scotland. I contend that the law of Scotland considers the contract of marriage under such circumstances to have taken place before the procreation of the child. When, therefore, your Lordships say that the child was born before marriage, you are making a statement that defeats the law of Scotland, and gives in effect to the learned Judges a different impression of the case from that which a full knowledge

(f) 20 Hen. 3, c. 9. The law of succession as established in Scotland is directly contrary to the law of England, as declared by this statute: "*Rogaverunt omnes episcopi magnates ut consentirent quod nati ante matrimonium essent legitimi, ac si illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia ecclesia, tales habet pro legitimis. Et omnes comites et barones sua voce responderunt, quod nolunt leges Angliæ mutare quæ horemque utilitates sunt et approbatæ.*"

(g) See ante p. 205.

of the law of Scotland would give them. My Lords, I could enlarge upon this if necessary; but, as I am most anxious to save your Lordships' time, I will simply read the questions, which, as I apprehend, would bring before your Lordships and to your knowledge a more distinct view of the law of Scotland upon this subject. 1. If the fact of the legitimacy or illegitimacy of a native of Scotland is at issue in the courts of law in England, is it or is it not a principle of the law of that country, that in judging whether he is born in *justis nuptiis*, is (the law of England) withdrawn and leaves that legal question to the exclusive judgment of the law of Scotland, where his parents are domiciled, where the alleged marriage took place, and where he was born? 2ndly. If, in the judgment of the law of Scotland, a native of that country is born in *justis nuptiis*, does or does not the law of England, in that comity established by international law, hold him to be possessed of every right which an Englishman born in *justis nuptiis* enjoys; and, independent of every view of international law, must or must he not in law be deemed to enjoy such rights under the 4th and 25th articles of the union betwixt England and Scotland, approved of and confirmed by the Parliaments of both countries, the former of which provides that there shall be a communication of rights, privileges and advantages which do or belong to the subjects of either kingdom, except when it is otherwise expressly agreed in the treaties, and the latter of which provides that all laws and statutes in either kingdom, so far as they are contrary to or inconsistent with the terms of these articles or any of them, shall from and after the Union cease and become void, and shall be declared to be by the respective Parliaments of the same kingdoms? 3rdly. A, a native of Scotland, domiciled in that country, where he possessed landed property, lived with a female, B, whom he had two children, C and D. Some years after the birth of these children A went through a ceremony of marriage. (I cautiously said saying that A was married, and refer to the question of marriage, it being a proposition decided under the law of Scotland, whether that ceremony of marriage has the effect of establishing a matrimony antecedent to that period, or whether the marriage was only from the moment of the ceremony of marriage with B, by which, according to the law of Scotland, C and D undoubtedly became legitimate at the death of the father A.) C, the eldest son, inherited his estates in Scotland, and some years afterwards purchased freehold estates in England. C afterwards died intestate, leaving no children. His legitimate brother D inherited his estates in Scotland, and was regularly served heir to them. D claims the freehold estates in England, of

which his brother died possessed, on the ground that he is the nearest heir to his brother C. In opposition to this claim it is asserted that D, though the legitimate brother of C, cannot inherit his English estates, because, though the law of Scotland holds that the ceremony of marriage which took place is only evidence of that consent which constitutes marriage having been given before the birth of C. and D, and therefore regards them as being born in lawful wedlock, the law of England considers the fact that they were born before the marriage ceremony and, therefore, though it admits their legitimacy, holds that they cannot inherit. By the law of England, must or must not this question be decided according to the law of Scotland, where these two children were born, where the marriage ceremony took place, and where the parties were domiciled: and if it is to be decided by the law of Scotland, assuming that the law of that country is here accurately stated, does it not follow, that C. and D. being born in *justis nuptiis*, according to the law of that country, D. has a right to inherit the lands in England of which his brother C. died possessed? 4thly. As to what would be the consequences with regard to personal estate, A, a domiciled Scotsman, possessed of estates in that country, cohabited with B, by whom he had a son, C; some years after which a marriage ceremony passed betwixt him and B, which, according to the law of that country, furnished evidence of that mutual consent having taken place antecedent to the birth of C, which constitutes marriage, and gave to his son C. the status of a son born in lawful wedlock. A, some years after this marriage, retired to England, and acquired a domicile there, when he became possessed of a large personal estate; at the death of A, C. was served heir to the Scotch landed property. Is he, or is he not, also entitled to the personal estate in England, consisting of leasehold and funded property, of which his father, supposed to be a domiciled Englishman, at the time of his death, died possessed? 5thly. A, an unmarried man, went from England to Scotland, where he acquired landed property, resided, and was domiciled for many years. Soon after his arrival in that country, he formed a connection with a female M, with whom he lived, and by whom he had a son B. Some years after the birth of this child, a regular marriage ceremony, according to the forms prescribed by the law of that country, took place betwixt A. and M. Assuming, as is laid down by all the great authorities who have written on the Law of Scotland, that B, in consequence of this ceremony, is held to be legitimate by a presumption or fiction of law, that the marriage had taken place betwixt his parents before he was born; or, in other words assuming that the



ceremony of marriage which so took place, is, by the Law of Scotland, regarded as evidence, that before the procreation of B, that mutual consent to marry had passed betwixt A. and M, which the law of that country regards as constituting marriage, and that he is therefore held to have been born in *justis nuptiis*, and as such was in truth served heir to the landed property in Scotland, in which his father died infest. Under such assumption the learned Judges are requested to say whether B. is, or is not, entitled, as the heir of A. dying intestate was seised? Lastly, in order to obtain information with regard to the practice of the Courts, is there any case in which, under the Law of England, an only son, whose legitimacy is admitted, is nevertheless debarred from inheriting landed property, of which his father dying intestate, was possessed? If such case or cases exist, the learned Judges are desired to give to the House references to the authorities, and by whom they are reported, and to state the principles of law on which such judgments proceeded.

LORD COTTENHAM, C. said (A)—This is a question upon a special verdict. The Law of Scotland was found in the Court below, or supposed to be found by the verdict of a jury. The moment that question of fact was decided by the verdict of a jury, and formed a part of the special verdict, the Court below was called upon to draw the conclusion of law from the finding, right or wrong, contained in that special verdict. The Court below had no power after that special verdict was formed, to new model it. If that were to be done, it would have been necessary the case should have gone down again for the jury to find the fact. If there had been any suggestion of error in point of fact; but the fact being assumed, right or wrong, the Court of King's Bench was called upon to pronounce as to the conclusion of law upon that state of facts. It was suggested that the conclusion of the Court below, being a conclusion in point of law upon that assumption of facts, was erroneous, and in consequence of that, a writ of error being brought into your Lordships' House, I apprehend there is no power in this state of the proceedings to inquire into the fact. Your Lordships have no power to inquire what is the Law of Scotland, if the Law of Scotland is stated upon the record; and the question is, supposing the law as found to be correctly stated, whether the opinion of the learned Judges stated in the Court below, was, upon the assumption of the facts there stated, a correct one.

LORD BROUGHAM, after observing upon the extreme importance of the question, said, in approaching it there are some things not disputed. It is admitted that the validity of a marriage must depend on the law of the country where it is had, and that consequently the parents of the party were validly married. It seems also to be agreed, that, generally speaking, legitimacy is a *status*, and must be determined by the law of the country to which the party belongs. But it is said by those who support this judgment that whether the party here is legitimate or not is no question before us, the only question being, it is alleged, whether or not he is the heir to an English real estate. This distinction, I confess, appears to me founded on an *inaccurate* view of the subject. It is true, that the question here arises upon the claim of an heir as such, and that, therefore, the only question may be said to be, whether he is heir or not. But it is also very possible that this question may turn wholly upon another, namely, whether or not the claimant is eldest legitimate son of his father, the person last seised? Nor do I well see how legitimacy can ever come into question in any other way than as connected with the claim to succession, either real or personal, in England or in Scotland either, unless in a single case of a declaration of bastardy, or of legitimacy—a proceeding unknown in the English law. It is therefore, by no means sufficient for deciding this case to say that the question touches not legitimacy, but inheritance: not the personal *status* of the party, but his right to real property. It may touch both these matters, and the latter may wholly depend upon the former.

LORDS LYNDHURST and DENMAN thought the importance of the case such, and the doubt which existed so considerable, that they ought to be further investigated before the case was determined, to which LORD BROUGHAM assented, and it was determined that the case should be again argued at the bar of the House, in the presence of the judges, with a view to the final settlement of the law upon this important question.

The case was accordingly argued again at the bar of the House, in the presence of the judges, whose unanimous opinion was again in favour of the judgment of the court below.

The LORD CHANCELLOR concurred in opinion with the judges.

LORD BROUGHAM said he was disposed to believe that he was mistaken in the inclination which had prevailed in his own mind upon this important question in controversy.

*Judgment of the court below affirmed.*

(A) See 9 Bligh, p. 63, where the arguments of the Law Lords are fully reported.

ROLLS' COURT—July 13.

EDWARDS V. LAMPART.

*Injunction—PARTNERSHIP.*

Mr. *Pemberton* moved for an injunction in his cause.

Mr. *Hindes* stated the case for the plaintiff, as appeared by the bill. The plaintiff had for twenty-five years carried on the business of a meat salesman and carcase butcher on commission, in Newgate-market, and at the same place carried on a very extensive trade in the sale of mutton, he killing on an average 500 sheep per week; about two years ago, wishing to increase his business, and to engage some person to assist him in carrying it on, he applied to the defendant, George Lampart, who then carried on the business of a meat salesman and carcase butcher, in the same market, on a very limited sale on his own account, and it was agreed between them that the defendant should assist the plaintiff in the commission business, and should bring his own business to the plaintiff's shop to be conducted there, and that the defendant should receive by way of remuneration and salary one-third part of the profits of the commission on the meat consigned either to him or to the plaintiff, deducting expenses; and that the plaintiff should have the other two-thirds, but that the defendant should not give any credit without the consent of the plaintiff, nor bear any portion of the debts, or of any loss whatsoever, the whole of which losses should fall upon the plaintiff, and that the defendant should receive for his use the whole profit to arise from his purchasing meat on his own account, the plaintiff participating only in the profits of the commission. Under this agreement the defendant brought his business to the plaintiff's shop, entered into his service as an assistant, and continued so to the 20th of June last. Plaintiff assisted defendant with the loan of cheques to enable him to make purchases of meat upon his own account. Plaintiff had a clerk of the name Brown, who paid defendant £2. a week on plaintiff's behalf, made out the weekly bills, and gave a portion of them to the defendant to collect, and he handed over the monies when collected to Brown, to be paid into the plaintiff's bankers. It was usual also for plaintiff to place defendant's hands cheques in blank, both as to date and amount, signed by the plaintiff, that they might be paid to the country customers. The settlement of accounts took place at Christmas, 1839, as plaintiff believed, but he could not state positively, the defendant having possessed himself of the plaintiff's books, which he refused to deliver up or to allow plaintiff to inspect. The plaintiff, desirous of advancing the interest of the defendant, assisted him with the loan of cheques, and down to the 15th of June

last he gave to the defendant by way of loan three cheques for £100. each, to enable him to purchase meat on his own account, but the plaintiff had nothing to do with the profits from such purchases, he participating only in the profits of the commission, and the defendant repaid the amount of all such cheques except one, which he had not repaid or returned to the plaintiff. The plaintiff also was in the habit of giving the defendant cheques in blank for the purpose of being filled up and sent to the country customers, in respect of the commission business.

In November, 1839, the plaintiff was desirous of retiring from business, and told defendant, that if he could procure a person to take his premises he would wait until Christmas, otherwise he should advertise them, which he did, and plaintiff in May last came to an agreement with Messrs. Chandler to sell them the lease, possession to be delivered on Midsummer-day last. On the 12th of June plaintiff informed defendant of this, who said he was sorry for it.

On the 14th of June the defendant had in his possession, besides the cheque for £100. lent him as before stated, five blank cheques to be filled up for the country customers in respect of the commission business, which he retained. On the 20th of June the plaintiff sent his clerk Brown to the defendant for the books, which he refused to give up, alleging that he was a partner with the plaintiff in the commission business. Brown informed plaintiff of this refusal on the 21st of June, on which plaintiff immediately went with Brown to Newgate-market, where he found his counting-house door locked, and defendant told him, that as he had chosen to let the shop without consulting him, defendant, he should cut down whatever meat Messrs. Chandlers hung up. The plaintiff afterwards endeavoured to obtain his books from the defendant, and fastened up his own shop, but the defendant forced an entrance, and had since been carrying on his business there on his own account, and retained the books, and refused to return the cheques. The bill prayed that the said defendant might be compelled to deliver to the plaintiff the said books belonging to the said commission business, and also the said five cheques, signed by the plaintiff in blank as to dates, as well as to amount; and also the said cheque for £100. dated the 15th of June, 1840; and that the profits of the said commission business from the said last settlement of accounts down to the said 20th day of June, 1840, might be ascertained, the plaintiff offering to allow to the defendant in account one-third part of such profits, and that an account might be taken of all dealings and transactions between the plaintiff and the defendant, in respect of the commission business, since the said last settlement of the accounts thereof; and that the defendant might pay to the plaintiff what upon the taking of such

accounts should appear to be due. And that in the mean time the defendant might be restrained by injunction from filling up, negotiating, or in any manner making use of the said five cheques, signed by the plaintiff in blanks as to dates as well as amounts, or any, or either of them; and also from negotiating, or in any manner making use of the cheque for £100., dated the 15th of June, 1840, so retained by defendant as aforesaid, and also from getting in, or from receiving any debts or other monies due to the plaintiff, in respect of the said commission business.

The affidavit of *Mr. Brown*, the plaintiff's clerk, stated that the defendant last week frequently told him that he could fill the cheques up for any sums he pleased, — that he could fill them up for £16,000., and that he had got a person who would give £8,000. for them.

Lord LANGDALE granted the injunction, as prayed.

#### COURT OF QUEEN'S BENCH—July 22.

(Before Mr. JUSTICE BOSANQUET at his Chambers.)

REGINA V. DUNN.

##### ARTICLES OF THE PEACE—PRACTICE.—

*Whether the Court has power to amend the Articles after commitment? Whether a Jurat must be appended to each affidavit?*

The defendant was brought before the Judge by *Habeas Corpus*, to argue his objections to the commitment. He was attended by Mr. Kirk his solicitor.

Mr. Jones read the *certiorari*, which had been issued, commanding the justices of the peace for the county of Middlesex to return into the Court of Queen's Bench the articles of the peace that had been exhibited by Miss Angela Burdett Coutts against Richard Dunn, Esq. The return made to the writ was, that the articles of the peace were annexed.

Mr. Dunn expressed his desire to put in a contradictory affidavit.

Mr. Justice BOSANQUET said that any contradictory affidavit should have been put in before, and therefore he could not allow Mr. Dunn's to be read.

Mr. Dunn commented on his case at some length.

Mr. Justice BOSANQUET went through the objections made to the commitment of the defendant, and decided that the Court of Queen's Bench possessed the power to amend and alter a commitment, and that if the articles of the peace were informal, the judges were empowered to alter them if they were exhibited in their own court, and in this view he was borne out by the Master of the Crown-office, who had informed

him that he had seen LORD DENMAN upon one occasion alter articles of the peace with his own hand. With respect, therefore, to the objection that the articles had been altered since their exhibit, the Court of Session, in his opinion, had a right to make an amendment; but that should be matter of complaint to them. The next objection was, that the jurat was bad, inasmuch as it stated that the witnesses were severally sworn in court, instead of a jurat being appended to each of the affidavits. This, it was contended, was not a sufficient of each and every of the parties having been sworn, and that it was not sufficient to support an indictment for perjury. He had referred to the practice on this subject, and he did not think the objection was sufficient to make the articles of the peace altogether illegal. Then came the more important question which had been ably commented upon by Mr. Dunn—namely, whether the facts stated in the articles were sufficient to lead to the conclusion that there was ground for supposing that the defendant would do Miss Coutts bodily harm. Looking at all the circumstances set forth, he thought there was abundant ground for entertaining such a supposition, and he was of opinion that any lady circumstanced as Miss Coutts had been could not have acted with more propriety and caution than she had done, and it was his duty to say that Mr. Dunn was remanded.

#### COURT OF COMMON PLEAS—July 9

Sittings at Nisi Prius.

SPECIAL JURY.

WATERS V. SAPTE AND OTHERS.

*DETINUE. — Property deposited with Banker for safe custody—Whether the Banker may detain it for a debt due from the depositor.*

Mr. Kelly stated the case for the plaintiff who it appeared was the administrator of the late Mr. Edmund Waters, some years since proprietor of the Opera House, and who died in October, 1839. The defendants were Messrs. Sapte and Co., the bankers. In 1809 or 1810, the deceased, Mr. Waters, deposited the chests with the defendants, containing title deeds and plate. After his death, the plaintiff took out an administration of the effects. A letter was then written by his solicitor on the subject of the property so in the defendant's possession, and the answer was, an admission the chests being at the bank, and a statement that as there was a debt due from Mr. Edmund Waters amounting to upwards of £1,500. it would be detained until that debt was discharged. The property, it was now contended, was deposited with the bankers for the plaintiff's use.

and safe custody, but not as a pledge for any debt that might exist. In 1817 one of the three chests had been delivered up by the bankers, upon a decree by the Master of the Rolls, in a case of "*The Earl of Macclesfield v. Vere and others*." In the defendants' answer, in that instance, they stated that the boxes were left by Mr. Waters for safe custody; and that they were, further, ready to deliver them to him, upon his request to that effect. This document was put in to show the admissions of the defendants on the subject, and the present proceedings had been adopted to gain possession of the two remaining chests now at the defendants' bank.

Mr. *Moody*, for the defendants, stated that the answer that had been put in evidence was prior to the existence of the debt on account of which the property was now detained. The chests were allowed to remain during this long series of years as security for any advances that had been, or might be, made to Mr. Edmund Waters. The present defendants were not personally interested in the matter, because the debt was due to those who were no longer members of the firm; but it was necessary to retain the goods, because, if they were improperly given up, the defendants would be liable to the creditors. It was submitted, that the most likely view of the case was, that the chests were left as pledge, though, perhaps, they were not originally deposited for that purpose. Mr. Edmund Waters was at the time a distressed man, and it was contended to be the only explanation of his being allowed to overdraw his account, by supposing that this property was the security.

ERSKINE, J., said that the defendants were perfectly justified in seeing that the plaintiff made it a title to these chests. The questions for the jury would be three—whether this property had been proved to belong to Mr. Edmund Waters? whether, if so, the defendants had detained it? and whether they had the right to do so, on account of the deposit of the property being made as a security to the former firm of Eres, Smart, and Co.?

Verdict for the plaintiff on all the issues, with 1s. damages, it being understood that the defendants would deliver up the chests immediately.

#### July 15.—Sittings at Nisi Prius.

PERCIVAL v. HORNE AND OTHERS.

**AFFIDAVITS.**—*Whether the Statute 1 W. 4, c. 68, protects Carriers who shall neglect to have the notice required by that Act affixed in legible characters in the booking-office.*

This was an action brought by the plaintiff, soap manufacturer, against the defendants, coach proprietors, to recover a sum of £50 that

had been enclosed in a parcel, and left at the defendants' booking-office, to be conveyed to its destination.

Mr. Serjeant *Acherley* stated the plaintiff's case. It appeared that the plaintiff's son, who was his traveller, being at Newbury, required to send to town a parcel that contained £50 in notes and sovereigns. This he booked at the defendants' office, in that place, paying twopence at the time, and telling the person in the shop that the contents were valuable, and must be taken care of. The act of 1st Will. IV. c. 68, s. 2, enacted, that when any parcel or package containing any of the articles above specified, shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of £10, it shall be lawful for such mail contractors, stage-coach proprietors, and other common carriers, to demand and receive an increased rate of charge, to be notified by some notice affixed in legible character in some public and conspicuous part of the office, warehouse, or other receiving house, where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge.

Mr. Percival, junior, however, stated that he saw no notice in the booking-office belonging to the defendants. And it was the duty of such persons to have that notice so placed as to be visible to all who entered the office. So far, however, from that being the case, the plaintiff's son, when he heard of the loss of the parcel, asked for the board, and it was ultimately found (as he stated) with its face to the wall, and in a condition to shew that it had been there for some time, being in a dilapidated and dirty condition; and these facts were supported by his evidence.

Mr. Serjeant *Talfourd* for the defendants, contended that the board containing the notice was always placed conspicuously in the office, and that it was there on the day when Mr. Percival's parcel was booked. That notice stated, that for packets containing money, plate, &c. the proprietors would not be held answerable unless an increased sum was paid for the safe carriage of them. That was not done by the plaintiff's son; and the defendants could not, therefore, be liable for the loss.

Evidence was given for the defendants, that the notice was affixed to the walls of the office so as to be seen by those who entered it to book parcels.

TINDAL, C. J. said it was a question for the jury. If they were satisfied with the evidence given by the defendants' witnesses, the verdict must be for the defendants; but if not, they must find for the plaintiff.

Verdict for the plaintiff—Damages £50.

#### COURT OF EXCHEQUER.—June 30.

##### *Sittings at Nisi Prius.*

RUGBY v. MOSS AND HUMPHREYS.

##### *ATTORNEYS' Liabilities.*

The plaintiff in this case is a Surgeon, the defendants are *Attornies*, and the action was brought by the plaintiff to recover damages for his wrongful arrest on a charge of forgery, alleged to have been preferred against him by the defendants. It appeared from the evidence adduced by the plaintiff, that the defendants being anxious to take the person of the plaintiff on a writ of *capias ad satisfaciendum*, they had instructed one Callam, a clerk in their employ, to devise means for the purpose, who adopted the novel scheme of trumping up a criminal charge against the defendant, by which he might be taken by the police before a magistrate, so that when the plaintiff was taken upon the criminal charge so preferred by him, they might take him upon the civil process as soon as he was discharged by the magistrate.

Mr. Corrie, for the defendants, addressed the jury, and called Callam himself and another witness, the purport of whose testimony was to the effect that Callam, who was only an occasional clerk, had misconceived their intentions, and had of his own accord made the charge in question, which they now said, as they said by a friend when the plaintiff was dismissed from the bar by the magistrate, that they never intended to make any such charge, which, so far from authorising, they were totally ignorant of.

Lord ABINGER summed up the case to the jury, leaving it to them to decide between the principal witnesses on each side, the case being one of credibility, which was a point purely for their consideration. If they attached credit to the plaintiff's witness, and thought that the evidence given by him was sufficient to convince them that the defendants, or either of them, had directed or were cognisant of this proceeding, and that it had been adopted by them as a means of serving the plaintiff with civil process, and, that satisfied, they had then volunteered to discountenance the engine they had used, it would be their duty to find them guilty of the offence against the plaintiff of which he now complained, and give such damages against them, or either of them, as they should think proper under all the circumstances.

Verdict for the plaintiff against both the defendants—Damages £400.

##### *Sittings at Nisi Prius.—July 13.*

GILLET AND OTHERS v. GREEN.

##### *LAW OF PATENTS.—Necessity for proving the novelty of the Invention.—HANSON'S CABS.*

The plaintiffs are the patentees of a patent granted for the building of cabs, commonly known as those used by Mr. Hansom, to whom the plaintiffs have granted licenses.

The defendant is a cabowner, and this action was brought by the plaintiffs for infringing upon their property in the patent by imitating and pirating the same.

The case occupied the Court during the whole day. At the close of the evidence,

Lord ABINGER left it to the jury to say whether the defendant's cab was an imitation of the form used by the patentees; and whether the patent claimed by them was really an invention and a novelty, or whether its principle had not been in fact in common use previous to the granting thereof to them. The plaintiffs claimed their patent as a combination of a seat behind for the driver, and an access in front for the passenger, the result of which was, that the weight would be balanced; and it would be a question for the jury to say whether that was a necessary part of that combination: if an equipoise might be produced by a side entrance, combined with a seat behind for the driver, as well as by that in front, his Lordship thought that there was no subject proved for a patent. If otherwise, then the plaintiffs would have the benefit of that finding hereafter. The important point, however, was, whether the seat behind for the driver, and an entrance in front, were new or not. Several of the defendant's witnesses had spoken to having seen tandems and other vehicles driven from a seat behind, and if they were believed, his Lordship thought the plaintiffs had failed in proving the novelty of their invention. Another point was the application by the plaintiffs of a spring to break the fall of the cab to one in which the driver sat behind, above or in front of the carriage, it being admitted by the plaintiffs that it had been already in use in the cabs which were driven from a seat at the side. This appeared to him not to be any novelty or invention for which a patent could be granted, any more than one might be claimed by a man who first applied an old pair of nutcrackers to a species of nut for the first time imported into England.

The jury returned a verdict to the effect that the defendant's cab was an imitation of the plaintiff's patent, which they thought was a new invention, while they could not say the result of the equipoise could not have been obtained by any other combination.

## PREROGATIVE COURT—July 8.

## MACKENZIE v. YEO.

*Whether an attesting witness to a Will, who afterwards marries one of the legatees, is a competent witness to prove its validity, where disputed.*

In this case Mr. G. A. Barber, deceased, by a codicil to his will, gave to a lady, who had since become the wife of T. D. Mackenzie, £5000. Mr. Mackenzie was one of the attesting witnesses to the codicil, the validity of which is disputed, and he had been examined as a witness; at his competency was now objected to on the ground that he had an interest in the event of the suit, and his answers had been called for on the ground that he was a party in the suit, his wife having propounded the codicil, of which the executors declined to take probate.

The *Queen's Advocate*, for Mrs. Mackenzie, contended that, being an attesting witness (whose disqualification was never dispensed with), and his interest having accrued subsequent to the death of the testator, he was not disqualified.

Dr. Haggard, for the executors contended that the paper purported to bequeath a legacy to Mrs. Mackenzie, but not to her separate use, therefore her husband had an interest in the suit, and he had jointly executed a proxy with her, and would be liable to the costs.

Sir H. JENNER was of opinion that Mr. Mackenzie was incompetent as a witness, he being liable to be called upon for his answer as a party in the cause.

## 3 Vic. c. 16.

*An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and for extending the Time limited for those Purposes respectively until the Twenty-fifth Day of March One thousand eight hundred and forty-one; and for the Relief of Clerks to Attorneys and Solicitors in certain cases.*

[19th June, 1840.]

We think it sufficient for the purpose of this work that we confine ourselves to such sections of this statute as apply to ATTORNEYS and ARTICLED CLERKS, and we direct attention in particular to ss. 8, 9, and 11.

Sec. 6. "And whereas many persons who may have paid the proper stamp duties, either before or within six months after the execution of the contracts in writing entered into by them to serve clerks to attorneys or solicitors, scriveners or notaries public, in Great Britain, have omitted to cause affidavits to be made, and afterwards to file in the proper office, of the actual execution of such contracts, and have also omitted to

cause such contracts, and the indentures thereof, or the assignment of any such indentures, to be enrolled within the time in which the same ought to have been done; and many solicitors, attorneys, notaries public, and others have omitted to take out annual certificates, or to enter the same in the proper office; and many infants and others may thereby incur certain disabilities:" For preventing thereof, and relieving such persons, be it enacted, that every person who shall, either before or within six months after the execution of such contract or indenture, have paid the proper stamp duty in that behalf, who at the passing of this act shall have neglected or omitted to cause any such affidavit or affidavits as aforesaid to be made and filed, or such contract or indenture or assignment to be enrolled, and who, on or before the first day of Hilary Term one thousand eight hundred and forty-one, shall cause such contract or indenture or assignment to be enrolled with the proper officer in that behalf, and one or more affidavit or affidavits to be made, and afterwards to be filed in such manner as the same ought to have been made and filed in due time, shall be and is hereby indemnified, freed, and discharged from and against all penalties, forfeitures, incapacities, and disabilities in or by any act or acts mentioned and incurred or to be incurred for or by reason of such neglect or omission; and every such affidavit or affidavits so to be made, and which shall be duly filed on or before the first day of Hilary Term one thousand eight hundred and forty-one, shall be as effectual to all intents and purposes as if the same had been made and filed within the respective times the same ought, by the laws now in being for that purpose to have been made and filed; and that the respective officer or officers who ought to receive, file, enter, or register such contract or indenture, or affidavit or affidavits, shall not refuse to receive, file, enter, or register the same by reason that the attorney, solicitor, or notary public to whom such infant or other person shall have been articulated or assigned, or have contracted to serve, shall have neglected to take out his annual certificate, or to register the same, but such officer or officers are hereby directed and empowered to receive, file, enter, or register the same, notwithstanding such omission; and that every person who shall have regularly served any attorney or attorneys, solicitor or solicitors, notary public or notaries public, for the term of years required by law, shall not be prevented or disqualified from being admitted an attorney, solicitor, or notary public, by reason of any omission of the person or persons to whom he served for the same term, or for any part thereof, having so neglected to take out his annual certificate, or to register the same, provided that such person is otherwise entitled to be created and admitted to

such office by the laws now in force relating thereto.

Sec. 7. And be it enacted, that in case the attorney, solicitor, proctor, or notary to whom any person shall have duly served his clerkship under articles in writing for that purpose shall after such service of the clerk be struck off the roll in consequence of some defect in the service under the articles of clerkship or of the admission and enrolment of such attorney, solicitor, proctor, or notary, the person who has so duly served his clerkship shall not be prevented or disqualified from being admitted and enrolled as an attorney, solicitor, proctor, or notary, nor liable to be struck off the roll if admitted, by reason of any such defect as aforesaid, provided that such clerk or person be otherwise entitled to be admitted and enrolled according to the laws now in force relating thereto.

Sec. 8. And be it enacted, that no person who has been admitted and enrolled and in actual practice as an attorney, solicitor, proctor, or notary, shall be liable to be struck off the roll for or on account of any defect in the articles of clerkship, or the registry thereof, or the service under such articles, or of his admission and enrolment, unless the application for striking him off the roll be made within *twelve months* from the time of his admission and enrolment.

Sec. 9. Provided always, and be it enacted, that in any case in which the *original articles* of clerkship shall have been or shall hereafter be *lost* or *destroyed before or after payment of the duty*, it shall be competent to either of her Majesty's Superior Courts at Westminster to direct the enrolment of a copy of such articles, upon being satisfied, by such evidence as shall appear to the Court sufficient to prove the loss of such original articles, of the authenticity of the paper proposed for enrolment, and that the duty has been duly paid upon such articles or upon a copy thereof, to be shown by the denoting or other appropriate stamp, as the case may require, and provided such Court shall be satisfied that the clerk has duly served under such articles from the time of the execution thereof, or for such time as shall appear satisfactory to the Court under the circumstances of the case.

Sec. 10. "And whereas by an act passed in the seventh year of the reign of his Majesty King George the Fourth, to allow, until the tenth day of October, one thousand eight hundred and twenty-six, the enrolment of certain articles of clerkship, and for other purposes therein mentioned, it was enacted, that it should not be lawful for the Commissioners of Stamps, or any of their officers, to stamp, under any pretence whatever, after the expiration of six months from their date, any articles of clerkship to attorneys or others, as therein specified: And where-

said last-mentioned act, in this respect, without the addition of the word 'calendar,' occasioned mistakes and inconveniences;" be it enacted, that from and after the passing of this act the word "months" used in the said last-mentioned act, so far as the same relates to the stamping of articles of clerkship to attorneys and others therein specified, shall be understood to mean calendar months.

Sec. 11. "And whereas several persons bound to serve as clerks or apprentices to attorneys or solicitors have applied to have the indentures or contracts of such clerkship stamped after the expiration of six lunar and *before the expiration of six calendar months from the date thereof*;" be it enacted, that it shall and may be lawful for the Commissioners of Stamps and Taxes, or any of their proper officers, at any time *before the last day of Michaelmas Term, one thousand eight hundred and forty*, to stamp any article of clerkship, contract, indenture, or other instrument, whereby any person hath become bound to serve as a clerk or apprentice, in order to his admission as an attorney or solicitor in any of the Courts of Law or Equity, although the period of six calendar months from the date thereof hath now elapsed, upon payment of the proper duty payable in respect of the same, and of the further sum of five pounds by way of penalty, provided it shall be proved, to the satisfaction of the said commissioners, that application was made to them, or to their proper officers to have such articles, contract, indenture, or instrument stamped within six calendar months from the date thereof.

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By H. R. REYNOLDS, Jun. A.M., Barrister at-Law.

London: Longman, Orme, and Co.

Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookbinder, 194, St. Paul Street, in the Parish of St. Dunston-in-the-Fields in the City of London.—Saturday, Aug. 1, 1844.

ADVERTISEMENTS RECEIVED BY BARKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

# The Legal Guide.

VOL. IV.]

SATURDAY, AUGUST 8, 1840.

[No. 15.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

#### CARRIERS BY WATER.

(Continued from page 212.)

WE have already distinguished the contract made for the carriage of goods from the contract of letting to hire. Lord Brougham, in speaking of the former, when made by a person in a public employment, says, "The law charges the person (viz. a common carrier, hoyman, and master of a ship), thus entrusted to carry goods, against all events; but "Acts of God and the King's enemies;" so that a common carrier is an insurer against all perils and losses not within the exception. The expression, Act of God, was thus defined by Lord Mansfield.

FIELD: (a) — "It appears from all the cases for 100 years back, that there are events for which the carrier is liable *independent of his contract*. By the nature of his contract he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm—that is, by the common law; a carrier is in the nature of an *insurer*. It is laid down that he is liable for every accident, except by the act of God or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man; for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, conclusion, and the necessity of going into circumstances impossible to be unravelled, the

(a) *Forwood v. Pittard*, 1 Term. Rep. 321



law presumes against the carrier unless he shews it was done by the King's enemies, or by such act as could not happen by the intervention of man; as storms, lightning, and tempests." Masters and owners, like other common carriers, are sometimes answerable, although no actual blame may be imputable to them; for in considering whether they or other carriers are chargeable for any particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular contract of the parties, afford an excuse for the nonperformance of the contract.

By the statute, 26 Geo. 3. c. 86, masters and owners of vessels are exempted from responsibility for accidents, "by the King's enemies, the perils of the seas, or the act of God." The only exception formerly made in the common bill of lading, was of the *perils of the sea*. In *Smith v. Shepherd*,<sup>(b)</sup> which was an action brought against the master of a vessel, navigating the river *Ouse* and *Humber* from *Selby* to *Hull*, by a person whose goods had been wet and spoiled; at the trial whereof, it appeared in evidence, that at the entrance of the harbour at *Hull* there was a bank, on which vessels used to lie in safety, but of which a part had been swept away by a great flood, some short time before the misfortune in question, so that it had become perfectly steep, instead of shelving towards the river; that a few days after this flood, a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river, tied to some part of the vessel; and that the defendant, upon sailing into the harbour, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe, had the bank been in its former state.

At the ebbing, her

stern sunk into the water, and the goods were spoiled; upon which the defendant tendered evidence to show that there had been no actual negligence. Mr. Justice *Heath*, before whom the cause was tried, rejected the evidence; and he further ruled that the act of God which could excuse the defendant, must be *immediate*; but this was too remote, and directed the jury to find their verdict for the plaintiff; and they accordingly did so. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction given by the learned judge at the trial, and the plaintiff succeeded in the cause. There does not appear to have existed in this case any bill of lading, or other instrument of contract; and the question, therefore, depended upon general principles, and not upon the meaning of any particular words, or exception.

The decision in this case caused much alarm among Ship-owners, and led to the alteration of the Bill of Lading as formerly in common use, the Legislature having refused to interfere for their protection, and these bills have since, and do now contain the following exception from responsibility, viz. "*The Act of God, The King's Enemies, Fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever*;" and in ships homeward bound from the *West Indies* an exception is added of "*risk of boats*" far as ships are liable thereto, but since these exceptions have been added to Bills of Lading, only one case has found its way to a judicial determination. <sup>(c)</sup>

Having considered the meaning of the words "*The Act of God*," we will now consider the meaning of the extensive phrase "*Perils of the Sea*." The precise meaning of this phrase has not received any satisfactory explanation. The late Lord *Tenterden*, in his admirable work on Shipping, <sup>(d)</sup> says

(c) See *Johnson v. Benson*, 4 B. & Ald. 384.

(d) p. 339.

"In considering the subject, the first question that presents itself to the mind of an *English Lawyer* is, how is the question of *peril of the sea* to be decided? The particular manner in which a loss happens, must always be a question of fact; but admitting it to have happened in a particular manner, is the judge, before whom the cause is tried, to pronounce whether that manner be a peril of the sea, or are the jury to declare it by their verdict? In general, the construction of ambiguous expressions in written instruments is the proper province of the judge; but in mercantile instruments it often happens that the judge must have recourse to the usage of trade, and the practice among merchants to obtain a proper knowledge of the meaning of the words. When the meaning of the words is ascertained, it will rarely happen that the judge and jury can differ in the conclusion; and, probably this question, though it might afford matter of speculation, will never become a subject of serious practical inquiry." So that it appears, that even if the decision of this question does strictly and properly belong to the judge, this decision will be guided by usage and the course of practice among merchants, which are matters of evidence and of fact. (e) The rule of the civil law is, *Inde Labeo tribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem et tri.* (f)

(To be continued.)

## PROBLEM XV. VOL. IV.

### EJECTMENT.

For what will this action lie?

(e) See *Pickering v. Barclay*, 2 Roll. Abb. 248—le. 132.; *Barton v. Wolliford*, Comb. 58.; *Morse v. Blue*, 1 Ventr. 190.; *Fletcher v. Inglis*, 2 Barn. A. 315.; *Rohl v. Parr*, 1 Esp. Rep. 445.; *Buller v. Fisher*, 3 id. 67.; *Cullen v. Butler*, 1 Stark. 138.; *Bedorn and another v. Whitmore*, id. 157.; *Smith v. others v. Scott*, 4 Taunt. 126.; *Thomson v. Whitmore*, 3 id. 227.; *Buller v. Fisher*, Abbot on pleading, 340.; *Bever v. Tomlinson*, id. 341.; *Amies v. Stevens*, 1 Str. 128.; *Hunter v. Potts*, 4 Camp. 203.; *Igaon v. Malcolm*, 5 Bos. and Pull. 336.; *Hahn v. Best*, 2 Bing. Rep. 205. As to an injury done to a ship by STEAM, see *Siordet v. Hall*, 4 Bing. Rep. 607. (f) Dig. 4, 9, 3, 1.

## TO THE EDITOR OF THE LEGAL GUIDE. ANSWER TO PROBLEM 1.—VOL. 4.

**OYER OF INSTRUMENTS.**—What is the import of the term Oyer? In what cases, and how is it demandable? In what cases will an Inspection of Instruments be granted to a plaintiff, and in what cases to a defendant?

Sir,—This answer I shall divide into three parts, following the arrangement adopted by you in stating the problem.

### 1. What is the import of the term OYER?

In ancient times previous and preparatory to pleading in bar, the defendant might crave oyer of the writ, bond, or other specialty upon which the action was brought, that is, to hear it read to him, whereupon the whole was entered verbatim upon the record, in order that the defendant might take any advantage of a condition or other part of it not stated in the plaintiff's declaration (3 Bl. Com. 299). But the practice of praying Oyer of the original writ having been much used for delay, the courts came to resolution not to grant such oyer in future, the authorities are cited by *Sergeant Williams*, in his note to 1 Saund. 318, a, and he infers therefrom that no advantage can be had either of a defective original, or of a variance between it and the declaration, and in *Deshons v. Head*, LORD ELLENBOROUGH somewhat unwillingly admitted the establishment of the rule (7 East, 384). OYER is now given by delivering a copy of the Instrument, and permitting it to be examined with the original, and in order to render this method as advantageous to an adverse party as the one formerly in use, the courts require that such copy should be minutely accurate, *Longmore v. Rogers*, Willes, 289-291.

### 2. In what cases, and how is it demandable?

OYER is demandable in all cases where the declaration in an action on a bond, deed, or other instrument under seal, (of which it can only be demanded,) sets out such bond, deed, or instrument, and makes a profert of it, that is, stating the deed or instrument to be brought into court. It is also demandable if the defendant in his plea makes a necessary profert of any deed, and where a plaintiff is entitled to have oyer of a deed it cannot be dispensed with by the court, nor can a defendant be compelled to plead without it even though the deed be lost. But where the deed is in the hands of a third party, the court will oblige him to give oyer and produce it (2 Stra. 1198). When oral pleading was in practice, the deed was actually produced in court, but it is now in fact retained in the parties own custody. OYER cannot be had of a record. *See only of deeds, probates, letters of administration, &c. Stephen on pleading*, 74, et seq. 2. ART. P. 1059. Where a defendant pleaded *letter*

patent to a *quo warranto* information, and made a profert of them, oyer was refused in another term from that in which the profert was made, *Rez v. Amery*, (1 T. R. 149). It seems that oyer is—not demandable of an act of Parliament. If a defendant after craving oyer fails to set out in his plea the condition entirely and truly, the plaintiff is warranted in signing judgment as for want of a plea, *Wallace v. Duchess of Cumberland*, (4 T. R. 371). Where there may be oyer, the party demanding it is not bound to plead without it. But defendant may plead without it if he will upon taking upon him to remember the bond or deed, though if he plead without oyer, he cannot afterwards waive his plea and crave oyer. OYER may be prayed for any time before the expiration of 24 hours after the demand of a plea, though the rule to plead be out, *Sparkes v. Simpson*, (2 B. & P. 379); and the defendant has as many pleading days to plead after oyer is granted as he had when it was demanded (*Webber v. Austin*, 8 T. R. 356).

The demand of oyer is a kind of plea, and should regularly be made before the time for pleading is expired, for if it be not made till after that time, the plaintiff may consider the demand as a nullity and sign judgment, and if oyer is not in strictness demandable, yet if it be given, the party demanding has a right to make use of it. If a defendant would insist upon his demand of oyer, he should move the court to have it entered upon record. On the other hand, if the plaintiff would contest the oyer, he may either counterplead it or strike out the rest of the pleading and demur, upon which the judgment of the court is either that the defendant have oyer, or that he answer without it. On the latter judgment defendant may bring writ of error, for to deny oyer where it ought to be granted is error, but not *e converso*.

The time allowed for the defendant to give oyer of a deed, &c. to the plaintiff is two days exclusive after it is demanded, and if it be not given in that time, plaintiff may sign judgment as for want of a plea. If given, the plaintiff shall have the same time to reply after oyer given by the defendant, as he had at the time of demanding it, and therefore, demand of oyer will operate as a stay of proceedings until it be given, and on receiving the copy of the deed, &c. the party demanding oyer of it is bound to pay for it at the rate of four-pence per common law-folio. Tidd.

I now come to consider lastly,

In what cases will an inspection of Instruments be granted to a plaintiff, and in what cases to a defendant?

Where a defendant has the custody of a written instrument as a trustee, the

court will in some instances order him to give an inspection and copy of it to the plaintiff at his expence, for various purposes. Thus where the defendant was a stakeholder, the court ordered him to give the plaintiff at his expence a copy of the articles for Epsom races, and to produce the same at the trial (*Barnes*, 439). So the plaintiff may have a rule nisi for the defendant to produce a deed before the Commissioners of Stamps to be stamped, and also to furnish the plaintiff with a copy of it in order that he may declare thereon. And where an action is brought by a sailor for his wages on ships articles against the captain in whose custody they are, it seems that under the equity of the statute, 2 G. 2. c. 36, the defendant if required must produce and give a copy of the articles (a) (*Abbott on Ship*, 389). The Court of Common Pleas will compel a defendant in covenant on a deed which he holds to produce it to the plaintiff for the purposes of the cause, and that although the plaintiff's object in seeking such inspection is to discover some defect in the deed, *King v. King*, 4 Taunt. 666. If one part of an indenture of apprenticeship be executed by the plaintiff and defendant, and sworn to be in the possession of the latter, held on a notice given by the plaintiff to produce it, that an affidavit of the defendant, wherein it was stated that he had no such indenture in his possession, and that he had not divested himself of it nor destroyed it, and that he did not know in whose possession it was or what had become of it, was insufficient. Because he ought to have stated that it never existed, that he had never possessed it, or that he had not been able to find it. *Cooke v. Tanswell* (1 Moore, 453). In trover for a written instrument it seems unnecessary to give the defendants notice to produce it, because it may be proved by description. *Scott v. Jones* (4 Taunt. 865). The Court of Queen's Bench will compel a defendant to produce an unstamped agreement in his custody to which the plaintiffs claim to be parties in interest, upon the instance of the plaintiffs, in order to their getting it stamped; although the plaintiff be not an instrumentary party, and although the plaintiffs' interest no otherwise appears than upon their own declaration, which proves a claim but not an interest. *Bateman v. Phillips* (4 Taunt. 157). But the courts will not, at a plaintiff's instance, compel the production of an instrument to be stamped which is

(a) In order to enable the plaintiff to frame his declaration correctly, a Judge will order the defendant to show the articles to the plaintiff, and, if necessary, to give a copy of them. By the new Statute, 5 & 6 W. 4. c. 19, s. 5, the burden of producing the written contract in cases of dispute with the mariner, is cast on the master and owner.

the hands of the defendant, and to which the plaintiff is neither an instrumentary or interested party. *Taylor v. Osborne* (4 Taun. 159, n.) The rule restraining the production of instruments to the application of a party named therein was much too strict; for suppose a person, though no party to a deed, took an estate by way of remainder, he had nevertheless a strong interest in the deed, and was entitled to compel the production. *Bateman v. Phillips*. A plaintiff in replevin was refused inspection of a deed assigning to the avowant the reversion of the demised premises, such plaintiff being no party to the deed.

Where two parts of an indenture of charter party were supposed to have been interchangeably executed, and the part of which the master of the chartered vessel had the custody was lost at sea with the ship, the Court of Common Pleas would not compel the charterer, being sued thereon, to grant inspection and a copy of the other party for the purpose of enabling the plaintiff to declare with certainty. *Street v. Brown* (1 Mar. 610. s. c. 6. Taun. 392.) The reason for which, I presume, was, because the court will not in general oblige a party to discover the evidence in his support previous to the trial.

Heretofore I have considered of such documents only as are of a private nature, and therefore think it will not be out of the way here to notice the general rule that a party has a right to inspect and take copies of such books, &c. of a public nature as he has an interest in, they being in some degree material to the suit, and the party in possession not being obliged to furnish evidence against himself, as in case of a criminal prosecution. *Tidd's P.* The books of the sessions are considered as public books, which every one has a right to inspect, and every man has a right to inspect the proceedings to which he himself is a party. Parish books, Custom-House books, books of the Post Office, Bank, South Sea House, India Company, &c. are, to some persons considered as public books, and persons having any interest therein are entitled to inspect them. The tenants of a manor have an interest in the court rolls thereof; therefore are they entitled to inspect them when in the possession of the lord or steward, who for this purpose has not been inaptly described a trustee for the mutual benefit of each, but I apprehend more particularly so for the tenants. Every member of a corporation having an interest therein has a right to inspect and take copies of the books thereof; but inspection, when granted, is confined to the subject matter in dispute. What I have penned immediately preceding, you will observe, applies to either party as the case may be, but those in-

stances in which a defendant is more particularly entitled to the inspection of instruments within my construction of the intendment of this problem are in such actions as are founded in a written instrument not under seal, and in which the defendant is therefore debarred of his right to demand oyer. A distinction formerly taken was that where the plaintiff declared upon a writing the court, upon an affidavit that he had no part, would let him have a copy; but where the declaration was on an agreement generally, and the writing but evidence, they would not grant it. And accordingly where an action was brought upon a special agreement contained in a note, and a rule made to shew cause why the plaintiff should not give the defendant a copy upon cause shown, the rule was discharged, because the contract upon which the action was founded was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copy. But at present whenever an action is founded on a written instrument, as a policy of assurance, bill of exchange, promissory note, special agreement or undertaking in writing to pay the debt of a third person (which latter must be found on a good and evident consideration), &c. whether it be stated in the declaration to be in writing or not. A judge, on summons, without an affidavit, will make an order for the delivery of a copy to the defendant or his attorney, and that all proceedings in the action shall be stayed in the meantime. And in a case where the dispute was between the plaintiff, a factor in Smithfield, and the defendant, a grazier, the court, upon the defendant's motion, made a rule for the plaintiff to shew cause why he should not produce at the trial the several books wherein he entered the account of beasts sold and of monies received on the defendant's account, and no cause being shown, the rule was made absolute. The rule laid down by Lord Mansfield in such cases was, that whenever the defendant would be entitled to a discovery, he should have it here without going into Equity. (2 Str. 1130.) *Barry v. Alexander* (M. 25. Geo. 4).

I shall conclude my answer to this problem with requesting to know, through the medium of your valuable Guide, whether, in stating the problem, you had in view that the 20th rule, H. T. 4. W. 4. was to form any part of the answer; because if so, I will send a supplementary answer, embracing such rule and the mode of proceeding adopted under it.

And remain, yours, &c.

E. A.

## Law Reports.

## ROLLS' COURT—August 1.

HOGGART v. CUTTS AND OTHERS.

VENDOR and PURCHASER — AUCTIONEERS —  
DEPOSIT MONEY — INJUNCTION — *Interpleader*—*Specific performance*.

This case was heard on the 12th of March last, when the following appeared to be the facts as shown by the pleadings.

The plaintiff is an auctioneer in London, and was employed as such by Mr. Thos. Flight, of Bond Court, Walbrook, to sell by public auction certain freehold property at Whetstone, Middlesex, which he, on the 19th of June, 1835, put up to sale at the Auction Mart, London, and John Cutts, of Witham, in Essex, one of the defendants, was the highest bidder, and became the purchaser thereof at £670, and paid to the plaintiff £134. as a deposit. In May, 1837, the plaintiff was again employed as such auctioneer by Mr. Flight to resell the said property by public auction, on the allegation that the defendant, John Cutts, had failed to complete his said purchase, and accordingly the plaintiff on the 12th of May, 1837, again put the same up for sale by public auction at the Auction Mart, when Charles Vickers, of the Stock Exchange, London, stockbroker, another of the defendants, was the highest bidder, and became the purchaser of the said property at £640., and paid to the plaintiff £128. as a deposit upon such last-mentioned sale. It afterwards appeared that the said sales were made in fact on behalf of Winwood Thodey, of the Poultry, London, glover, another defendant, as the owner of the said property, and that Mr. Flight was and acted only as his agent, and did not claim any interest in the said property or the deposits. Disputes then arose between the defendants respecting the sales and the right to the deposits, and the defendant, Thodey, commenced an action at law against the plaintiff on the 11th of Dec. 1837, to recover both the deposits, which were so paid to the plaintiff, which the other defendants resisted, and they respectively claimed an interest therein, and held the plaintiff responsible for the same in case he should pay over the money to the said other defendant, Thodey. In Dec. 1837, the proceedings in the action were suspended by consent, in consequence of the defendant Cutts having filed a bill against the plaintiff and the defendants Thodey and Vickers, praying the completion of the sale made to the defendant Cutts, and to restrain the defendant Thodey, by injunction, from proceeding in his said action; to which bill the plaintiff put in his answer, thereby stating his readiness to act under the

direction of this court in the matter, but that the said defendant Thodey had lately again resumed proceedings in his said action, and the plaintiff had been compelled to plead thereto. The plaintiff's attorney then wrote to the solicitors for the defendant Vickers, and who he at that time supposed were also attorneys for the defendant John Cutts, that as Mr. Hoggart was merely a stakeholder, he wished to be informed if it was the desire of those defendants that the action be resisted, or what course was to be pursued; but that nothing had been done for the plaintiff's protection against the conflicting claims; when the declaration in the action was delivered, notice was given to the purchasers' attorneys, who desired that the plaintiff would not pay to the defendant Thodey the deposit which was paid by the defendant Vickers. The plaintiff then obtained a judge's summons to compel the defendants to interplead. On May 16, 1838, a plea was demanded in the action, and the plaintiff obtained an order for a week's time. Mr. Paterson, the plaintiff's attorney, gave notice of these circumstances to Messrs. Brooksbank and Farn, who then appeared as the attorneys for the defendant Cutts, by letter, in which he requested to know his intention, whether to proceed with the suit and to apply for an order for the plaintiff to pay the money into court, and to restrain further proceedings in the action, or whether to defend the action at law. No reply was given to this letter, and on the 23rd of May the plaintiff obtained a further summons for the defendants to interplead in the action, which was duly attended by their respective solicitors before Mr. Justice BOSANQUET, on the 25th of May, who in consequence of a representation made to him of the suit having been instituted by the defendant Cutts, declined to interfere or make any order; and the plaintiff on the following day instructed Mr. Sergeant Talfourd to make the application to the court, but he, on Monday the 28th of May, advised, under all the circumstances, that relief should be sought by the plaintiff in a court of equity. Mr. Paterson then wrote to the respective attorneys of the defendants the following letter:—"In the Common Pleas. *Thodey v. Hoggart*. As Mr. Hoggart has no personal interest in the disputes existing respecting the sale to Mr. Cutts in the first instance, and the resale to Mr. Vickers of the estate at Whetstone, or in the above action pending against him (Mr. Hoggart) for the recovering of the deposits paid to him on such sales, I hereby give you notice on behalf of Mr. Hoggart that unless a satisfactory arrangement be made immediately between the above plaintiff and the other parties interested respecting the action, and the trial of the questions in dispute, Mr. Hoggart being ready to pay the deposit

received by him to the parties who may be entitled thereto, or as the parties jointly interested or any court may direct, I shall, in Mr. Hoggart's behalf, unless I hear satisfactorily from you within two days from this date, file such bill or bills of interpleader against you and the parties claiming to be interested as he may be advised. I think it also proper to state, that in consequence of what passed before Mr. Justice Bosanquet on Friday last, Mr. Sergeant Talfourd was instructed by me on the following day to apply, under the interpleader act, to the Court of Common Pleas in behalf of Mr. Hoggart, to pay the said deposits into court in the said action and for relief; but Mr. Sergeant Talfourd has advised Mr. Hoggart that this is not a case in which he can with safety apply for the required relief under that act; and in consequence of that advice, Mr. Hoggart had no alternative left, unless a proper arrangement is come to by all parties for his protection, than to resort to a court of equity. I also beg to express my surprise that Mr. Cutts has not thought proper to move in his suit for an injunction, he being aware by notice from me to his solicitors that the plaintiff in this action is proceeding therein notwithstanding Mr. Cutts' suit, and is forcing Mr. Hoggart to plead thereto."—This letter brought the following answers to Mr. Paterson:—"May 29, 1838. *Cutts v. Thodey*. In Chancery. We beg to inform you in answer to your letter and notice of yesterday, that this morning's post has brought a letter from the plaintiff by which we are instructed, and which shall forthwith be done, to advise with counsel on the sufficiency of the answer of the above-named defendant, and whether merits are thereby disclosed so as to entitle the plaintiff on motion to obtain an injunction to restrain that defendant from further proceeding in his pending action against your client the defendant Hoggart. We will inform you what the advice of counsel may be the moment we shall have obtained it. *Brooksbank and Farn*."—"June 1, 1838. *Cutts v. Thodey*. The plaintiff's counsel thinks it not advisable to apply for an injunction, and adds, that if your client, Mr. Hoggart, shall think proper to pay over the deposit to the defendant Thodey, he will do so at his own peril, and he will be at the risk of having to pay it over again to the plaintiff, should the contract fail of completion from the inability of the defendant to make out a title. See *Borough v. Skinner*, 5 Burr. 2639: *Edwards v. Hodding*, 5 Taunt. 815. *Brooksbank and Farn*."—" *Thodey v. Hoggart*. In reply to your favour of the 28th inst. I beg to say, that since the plaintiff in the suit of *Cutts v. Thodey* does not venture to take any steps in that cause by motion for injunction or otherwise, to raise the question as to the right to the deposits, and since you

also inform me that you cannot undertake to pay over to Mr. Thodey the deposits in the event of the bill in *Cutts v. Thodey* being dismissed, I see no course that I can recommend except that of proceeding with the action, which I much regret. It has been my wish in every respect to bring the matter to a close as speedily as possible, and there seems no other method of doing so than that which I am compelled to proceed with. I have already offered you an indemnity, and repeat that offer, if you will pay over the deposits without any further proceedings. *Geo. Cox, Bucklersbury*. May 30, 1838."—" *Thodey v. Hoggart*. The impediment to a satisfactory arrangement of this matter does not rest with Mr. Vickers, our client; he is willing on the one hand to complete his purchase of the Finchley estate if Mr. Cutts will abandon his claim, and a good title be otherwise made; or on the other, to give up his contract on repayment of his deposits with interests and costs. *Hall, Thompson, and Sewell, Salter's Hall*, May 29, 1838."—No steps were, however, taken by the defendants or their solicitors towards determining between themselves the rights to the deposits, and the defendant Thodey gave the plaintiff notice of trial in the action. The plaintiff averred that he had always been ready and desirous to pay the deposits to the person or persons duly entitled to receive the same. The bill prayed that the said defendants might be decreed to interplead and adjust their several claims and demands in respect of the said deposits between themselves, the plaintiff offering to account for and pay the said deposits to such of the defendants as might appear to be entitled thereto, on being indemnified by the court in so doing, and that plaintiff might be at liberty to pay the same accordingly into the Bank of England, in the name and with the privity of the Accountant-General, to be disposed of as the court should direct; and that the said Winwood Thodey might be restrained by injunction from the further prosecution of the said action so commenced by him against the plaintiff; and that he and the said other defendants respectively might, in like manner, be restrained from all other proceedings at law whatever, touching the matters in question in this suit.

The defendant Thodey by his answer admitted most of the facts stated in the bill, and said, that he had also put in a full answer to the bill of the defendant Cutts on the 20th of April last, and therein set forth the manner in which the defendant Cutts had forfeited all right to his deposit, by his not having complied with the conditions of the sale under which he purchased the premises, the last of which conditions provided that if the purchaser should neglect or fail to comply with the said conditions, the deposit money

should be forfeited and become the property of the vendor, who should retain the same to his own use as *liquidated damages*, and should be at liberty to resell the property; and that the deficiency on such resale, together with the charges attending the same, should, notwithstanding the forfeiture of the deposit as aforesaid, be made good by the purchaser, he agreeing so to do. That by the third of the said conditions of sale the purchaser was to pay down immediately a deposit of £20. per cent. in part of his purchase money, and to sign an agreement for the payment of the remainder on or before the 29th day of September then next, from which time he was to be entitled to the rents and profits; but should the completion of the purchase be delayed from any cause whatsoever beyond that period, the purchaser was to pay interest on the balance of his purchase money at the rate of £5. per cent. per annum from that time up to the time of actually completing his said purchase. And that the defendant Cutts neither completed his said purchase by the 29th day of September, 1835, nor paid any interest on his said purchase-money, nor in fact took any *bond fide* steps to complete the said purchase, but that he raised many frivolous objections to the title of defendant to the premises, and also divers objections which, by the express conditions of sale, he was precluded from making; and that Mr. Cox, his solicitor, after repeatedly pressing the defendant Cutts to complete his said purchase, and repeatedly giving him notice that if he failed so to do the said premises would be resold under the last of the said conditions of sale, did finally cause the same to be resold in the month of May, 1837, when the defendant Vickers purchased the same under the like conditions of sale as the same were purchased by the defendant Cutts, and especially under the same condition as to the forfeiture of the deposit or nonperformance of the conditions of sale, and with an addition to the 4th condition of sale, that no title should be required as to a certain small portion of land allotted under an inclosure act, or the land in respect of which it was allotted; and that the defendant Vickers has also forfeited his said deposit by refusing to complete his said purchase, which remained uncompleted; and that although the said defendant Cutts by his said bill prayed for an injunction to restrain him, the defendant Thodey, from proceeding in his said action against the said plaintiff, yet he never ventured to make any application for such injunction, in which case defendant would readily have submitted to have the whole question decided by the court, and he therefore felt himself compelled to resume, and did resume proceedings in, and was, until stopped by the order and injunction of the court prosecuting his said action at law against the said plaintiff, and

that the said defendant Cutts took no proceeding in the said suit by moving for an injunction to restrain the defendant from proceeding in the said action, and did not reply to the defendant's answer until the 23rd of June last, when he filed a replication and served a subpoena to rejoin, but no witnesses had been examined; and that the said defendant Vickers had taken no steps towards determining the same question as to his deposit, and he submitted that he ought to be allowed to proceed in his said action for the recovery of the said deposits; and that if the defendants Cutts or Vickers wished to dispute the defendant's right to the said deposits, they ought to offer to be permitted to defend the said action at law in lieu of the said plaintiff; and that if they should decline so to do, then that the money in the hands of the said plaintiff ought to be paid over to the defendant forthwith, and that the said other defendants ought to be directed to pay to the defendant the costs of this suit, which has been occasioned by their claims upon the said forfeited deposits.

On the 8th of June, 1838, the plaintiff obtained the usual injunction order, and paid the deposits into court, and the amount was laid out in £3. per cent. Consols. The case now came on for hearing upon bill and answer.

Mr. Pemberton stated the case for the plaintiff.

Mr. Lee, for the defendant Cutts, contended that the sale to him was not forfeited; that he made a valid objection to the title, and denied that the plaintiff had any right to call upon him to interplead. He cited *Crawshaw v. Thornton*. (a)

Lord LANGDALE.—That cause was on demurrer.

Mr. Lee contended there must be a demand of the same thing to support a bill of interpleader; but that here that was not the case, as Cutts had no interest in Vickers's deposit, nor had Vickers any interest in Cutts's deposit, and cited *Dungey v. Angove*, 2 Ves. I. 310. 308.

Mr. Heathfield followed on the same side, and contended there could be no interpleader between Cutts and Vickers.

Mr. Tinsley, on the same side, contended that the plaintiff might have defended the action as to Vickers, because the deposit was only to be forfeited on breach in the conditions of sale—that the defendant Thodey was not in a situation to claim the deposit at law, and that the question must be whether the defendant Cutts is entitled to have his contract performed.

Mr. Rush, for the defendant Vickers, contended that the plaintiff had no right to call upon him to interplead, and cited *Moore v.*

(a) 9 Myl. & Cr. 1.

*Isher*, 7 Sim. 383.; *Pearson v. Cardon*, Russ. & My. 606.

Mr. Wood appeared for the defendant Thodey. He submitted to any order the Court should under the circumstances of the case think fit to make.

Mr. Pemberton, in reply, insisted upon the right of the plaintiff to call upon the parties to interplead, and denied that the defendants could now raise any objection, since they had consented to the money being paid into Court.

LORD LANGDALE, after stating the facts of the case to the payment of the second deposit by Mr. Vickers, observed neither of the purchasers having completed their purchase, and Mr. Thodey represented to the plaintiff that both had failed in doing so, and had consequently both forfeited their deposits, which he called upon Mr. Hoggart to pay over to him, upon refusal, he brought an action against him to recover them. Soon after this Mr. Cutts filed a bill against Mr. Thodey to compel a specific performance of the contract made with him, and Mr. Vickers gave Mr. Hoggart notice that he should hold him responsible in case the contract with him was not performed. In this conflict of interests, Mr. Hoggart filed the present bill, praying that the parties might interplead and settle the disputes between themselves, and asking leave to pay the money into Court, and for an injunction to restrain any further proceedings at law. Upon applying for the injunction, the defendants appeared, and consented that the money should be paid into Court, and that the injunction should be granted. His Lordship then observed that the right of Mr. Cutts to a specific performance must be disposed of before the claim to £134. deposit could be settled, and upon that depended the next question, whether Mr. Vickers was entitled to the deposit money of £128. with a compensation for the breach of contract. In the present state of things it did not appear that he could make any order. The plaintiff ought to have some protection. None of the answers subject to the plaintiff's right to bring his bill, did he had reason therefore to expect no opposition; it is now however alleged that the plaintiff had brought himself into the difficulty. The parties had agreed to the arrangement which had been made respecting the payment of the money to Court, and the granting the injunction, they therefore had no right to complain.

It is said the demand must be of some debt or duty, that here the defendant Cutts has no interest in the defendant Vickers's deposit, and at the latter defendant has no interest in the deposit of the former; that there is no question between Cutts and Vickers, nor between Thodey and either of them as to the whole amount, and even that till Cutts's claim is disposed of nothing can be done. Thodey insists that Cutts might

defend the action, and as to the deposit this may be so, but not as to a specific performance. The first step towards ascertaining the rights of the parties is to enquire whether Cutts is entitled to a specific performance, and I think I ought not to determine any thing in the way of interpleader until that is determined; in the mean time, the plaintiff is not to be put to hazard by this complicated litigation.

His Lordship, after citing the observation of SIR WILLIAM GRANT in *Angell v. Hadden* (b) said, that having regard to the circumstances, and considering that the rights of the parties could not be ascertained, and that the questions were not ripe for decision, he thought the injunction ought to be continued, and ordered that the plaintiff should have his costs of the action and of this suit out of the fund in Court, and that Mr. Cutts should proceed with his suit against Mr. Thodey: liberty reserved for all parties to apply as to the remainder of the fund in Court and their costs of this suit. (1)

(1) An auctioneer cannot maintain a bill of interpleader, if he insist upon retaining out of the deposit either his commission or the auction duty, for interpleader is where the plaintiff is the holder of a stake, which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants. (*Mitchell v. Hayne*, 2 Sim. & Stu. 63.;) but as to the auction duty, see *Farebrother v. Prattent*, 5 Price, 303.

If upon a bill filed for an injunction, the Court order the deposit to be paid into Court, it will, it seems, be after deducting the auctioneer's charges and expenses (*Annesley v. Muggridge*, 1 Madd. 593.). Although perhaps this deserves re-consideration; for the purchaser's deposit may not ultimately be the fund out of which those charges are to be paid, but this is done without prejudice to any question as to so much of the deposit as is retained, (*Yates v. Farebrother*, 4 Madd. 239.).

Under the interpleader Act (1 & 2 W. 4, c. 58.) by which authority is given to a court of law to make such order between such defendant and the plaintiff, as to costs and



other matters as may appear just and reasonable, the Court has gone the length of saying that in the first instance, upon application for a rule to interplead, the fund shall bear the costs, and the party in the wrong shall afterwards make up the fund (4 Bing. N. C. 723). This operates severely against the right of a purchaser entitled to a return of his deposit, see 1 Sug. Vend. & Pur. 76.

EDITOR.

### COURT OF COMMON PLEAS—July 15.

#### Sittings at Nisi Prius.

LANE V. BURGHART.

**BANKRUPT'S GUARANTEE**—*Whether a Bankrupt, after obtaining his Certificate, remains liable upon a Guarantee given before his Bankruptcy. — Whether such Guarantee is not proveable under the Fiat.*

The defendant in this case was a tailor—the plaintiffs were creditors of General Bacon. In 1839 the plaintiffs arrested General Bacon for a debt of £275. and they had released him upon his executing a warrant of attorney for the amount of the debt, payable in four half-yearly instalments, upon the defendant guaranteeing their due payment, which he accordingly did. General Bacon did not make good his instalments, and a fiat in bankruptcy issued against the defendant, who obtained his certificate, after which the present action was brought against him by the plaintiffs for the debt of General Bacon, upon his guarantee. The defendant pleaded the fiat and his certificate in bar to the action which now came on for trial. The question, therefore, was, whether or not this was a debt, proveable under the commission and barred by the certificate. This point was reserved for the opinion of the court above, subject to which, the jury returned a verdict for the plaintiff for the amount of one of the instalments and interest—viz., £74. 15s.

### COURT OF EXCHEQUER.—July 9.

#### Sittings at Nisi Prius.

Special Jury.

CASTLE V. IRVING.

**MARINE POLICY OF INSURANCE**—*Whether the term "Sea-worthy" can admit of a qualification—Whether, if a ship is called "Sea-worthy" she ought not to be considered so for all purposes, whatever her cargo or voyage might be?*

The plaintiff is a ship-owner; the defendant

is the responsible officer of the ALLIANCE MARINE ASSURANCE COMPANY. The plaintiff had effected with that Company a policy of assurance on a brig named the *Heath* and her cargo from Liverpool to London. This vessel was subsequently lost, and the present action was brought upon the policy for £1000, which the Company had refused to pay. The defendant pleaded that the vessel was *unseaworthy*, and also that the plaintiff had concealed his knowledge of material facts from the defendant, by which the policy effected would be invalidated, which latter issue was abandoned to-day, no evidence being offered thereon by the defendant, who relied upon the deficiency of the plaintiff's proof of the first issue, the burden of which was cast upon him. It appeared that the *Heath* had been built at Hibernia in 1832, and was repaired and re-coppered in 1838, after which she went to the coast of Africa on her return from that voyage she was sold to the plaintiff for £1400. at Liverpool, his intention being to get her a cargo thence to London, where she might be fully repaired. While the cargo was being shipped, which consisted of *soda ash, palm oil, and hides*, the attention of the agent for Lloyd's was called to the state of the *Heath*, in consequence of which she was surveyed and reported to be wanting repairs, but *not worthy for the voyage to London, with a cargo not liable to sea damage*; in other words, one of a different nature from that partly delivered, the soda ash being soluble on the slightest tendency to leak, the result of which would be that if she met with bad weather, her equilibrium would be destroyed, and she would become *unseaworthy and unmanageable*. Notwithstanding this report, however, the *Heath* completed her cargo, and certain repairs being performed which were recommended by the surveyor, she put to sea on the 13th of December, 1839. In a few days, however, the weather proved foul, and eventually the report of the surveyor was verified. In a heavy sea, shipped on the 16th, forced its way into the hold, the soda ash vanished through the pumps, which were kept constantly at work till the 18th, when the unfortunate vessel being gone, the crew abandoned her, and betook themselves on board another vessel, and so reached the land in safety. Other witnesses, besides the surveyor, were examined by the plaintiff to prove the state of the vessel.

Sir F. Pollock, for the defendant, at first intimated his intention of calling witnesses, but this course was afterwards abandoned, and the case went to the jury upon the evidence of the plaintiff alone. He contended that upon the case at issue, the ship must be taken to have been *inherently unseaworthy*, and not *imbecile*.

Lord ABINGER said he could not exactly understand the meaning of a *qualified seaworthy*.

ness, as spoken of by the surveyor from Lloyd's, having been his opinion that if a ship was to be called *seaworthy*, she ought to be so for all purposes generally, whatever her cargo or voyage might be. The question, however, was for the jury to say, whether upon the evidence they thought the *Heath*, at the time she left Liverpool, was in a fit state to go to sea with such a cargo, and on that particular voyage.

Verdict for the plaintiff—damages £995.

### COURT OF REVIEW—July 22.

#### IN RE BRITTEN.

ARREST.—PRACTICE.—*Whether a person in attendance upon the Court as the husband of a petitioner, is privileged from arrest.*

Mr. *Swanston* applied to the Court on behalf of Daniel Britten, the husband of Jane Britten, the petitioner, who had been arrested on a *capias disfaciendum*, within the precincts of the Court—that as the husband of the petitioner, and a party to the record, he was in attendance on the Court. The petition prayed his discharge.

Mr. *Govett*, solicitor for the applicant, and Frederick *Wallbank*, sheriff's officer, were sworn and examined as to the fact of the arrest.

Sir G. ROSE said, the applicant was entitled to his discharge from custody as under the protection of the Court, not merely as the husband of the petitioner, but also a party to the petition. Sir J. CROSS said the applicant was neither suitor nor a witness, and he knew of no case where a stranger had been discharged by the intervention of any Court. He did not say that he was inclined to oppose the application, but was not ready to concur with his colleague, and thought the party entitled to instant discharge.

Sir G. ROSE said he had no hesitation in deeming him entitled to his discharge.

Sir J. CROSS said his mind was not free from doubt; but as his learned colleague had looked at the cases, he would, under all the circumstances, acquiesce.

ORDER made as prayed.

July 23.

The sheriff's officer appeared in court and said that the prisoner was discharged within four hours from the issue of the order of the Court.

Sir J. CROSS said he had yesterday expressed doubt, and desired time for consideration; but had consented to acquiesce in the order, though the party in question had not been in attendance on the Court professionally, nor as a party litigant, nor as a witness, and though

there was no petition, no affidavit, and no notice, and it was stated to be a new case, wholly without precedent. Under such circumstances his acquiescence was reluctantly yielded. He had, since he consented, considered the point, and consulted authorities. *Blackstone* held that a party who had relation to a suit was protected from arrest (a). In "*Ex parte King*" (1), Lord Eldon had administered the oath to the officer, and ordered the party to be discharged. He felt it now his duty to say he was perfectly satisfied that the Court had acted yesterday in accordance with the cases he had cited.

Sir GEORGE ROSE expressed his satisfaction that his learned colleague had found he had acted in a right manner. He had had no doubt in the case, as Britten was decidedly a party having relation to the cause before the Court.

The Court proceeded with the argument, which related to the payment of a dividend to Mrs. Britten out of her husband's estate.

(1) 7 Ves. 312.—LORD ELDON, in that case, (which was a similar application to that here reported) shewed very clearly the law upon this subject. His Lordship said, LORD ROSSLYN's orders were, that the party shall forthwith discharge him, and that seems to be right. There is this difference. Where the application is to affect only the creditor arresting, the Court may order the defendant to be discharged forthwith; but where there are other detainers, the Court must hear those persons, in order to see whether those detainers grow out of the original arrest. Accordingly, LORD ROSSLYN's order in the case from Bristol (*ex parte Parker*, 3 Ves. jun. 554, *ex parte Hawkins*, 4 Ves. jun. 691) was, that they do forthwith discharge him; and that is according to LORD HARDWICK's recommendation to discharge the man from the arrest, intimating that if the party did not, the Court would order that he should do so; and that is the prudent course; for if the Chancellor has jurisdiction to order the discharge, and orders the discharge as the act of the party, there must be, of course,

(a) 3 Blacks. Com. 288, who says, "suitor's witnesses and other persons, necessarily attending any Courts of Record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and going." See Mr. Christian's note to this passage.—*id.*—Ed.

an end of all further questions between the party and the sheriff. The case of *Kinder v. Williams* (4 Term. Rep. 377) does not decide any thing against this application, amounting only to this, that the case was not sufficiently laid before the Court to satisfy them, that the Commissioners of Bankrupt were a court of justice, upon which they state no opinion; and they refuse to interfere, the application not being made in the right place, the court to which the application was made not being a court of which any contempt was committed. LORD NORTHINGTON (see 2 Blacks. 1142) goes a great way to intimate that the Commissioners could themselves discharge, and it deserves great consideration before it is said the creditor shall not be protected; for if the law obliges a man, or gives him an opportunity to demand his debt in bankruptcy, and prescribes the particular mode of making that demand, and that mode requires his personal attendance before the Commissioners, the same protection is necessary as he would be entitled to in attending any suit of his own in a court of justice (*Bromley v. Holland*, 5 Ves. jun. 2—*Moore v. Booth*, 3 id. 350). But in this instance, it is not necessary to consider that; for this person, attending in obedience to the summons, if a creditor, stood also in the character of a witness (*ex parte Lund*, 6 Ves. j. 781). In a case before LORD HARDWICKE (*ex parte Kerney*, 1 Atk. 54), where an assignee removed, and ordered to account before the Commissioners, and to pay over the balance, was arrested attending the execution of that duty, LORD HARDWICKE, thinking it absolutely necessary, for the purposes of public justice, that he should attend the Commissioners, took it up with a very high hand, as a contempt of his authority, and ordered an examination upon interrogatories, intimating that the party must immediately discharge him. It is clear from *Arding v. Flower*, (8 Term Rep. 534) that, whatever was the opinion of

the Court of Queen's Bench before, they then thought the bankrupt's privilege (*ex parte Donlevy*, 7 Ves. j. 317—*ex parte Parker*, 3 id. 554.—*ex parte Hawkins*, 4 id. 691) not founded only upon the act of Parliament (5 Geo. 2 c. 30, s. 5), and I concur in that principle which would require protection for the bankrupt doing those duties; and there are several cases shewing that, without the authority of the act. The question then is, whether the same principle, that would, independent of the statute, protect the bankrupt, ought to protect the witness. In *ex parte Stow*, (2 Blacks. 1142), LORD NORTHINGTON entertains no doubt, that the authority created for the assistance of the Court must have the power vested in them, and that has been followed; so that there is the authority of LORD HARDWICKE, NORTHINGTON, and ROSSLYN. In this case there being several detainers of persons, who found *King* in custody, I shall follow the order of LORD ROSSLYN in the case from *Bristol*; that the creditors having an opportunity of being heard, and being heard, or neglecting that opportunity, should not be discharged with discharge the person out of custody. The original arrest cannot stand, those detainers cannot stand. There is great good reason in that, for the Court ought to take care that the sheriff should not be left liable to an act, and under such an order it is their act, in obedience to the authority of the Court. I shall, therefore, order, that the several parties, who shall appear to have been served with notice of this motion, do forthwith discharge *King* out of custody.

The rest of the motion stood over, to give the officers an opportunity of answering the affidavits upon the circumstances of the case. They accordingly by affidavit deposed that they arrested *King* in *Guildhall*; that he had got some way from it; and they supposed his examination was finished; and they were called upon suddenly for this purpose at *Guildhall*; and the officers deposed that they would indemnify them, and they were

mind any paper *King* might shew as a protection.

LORD ELDON said—An attorney desiring an officer to do an act at all hazards is guilty of a contempt, if that person is guilty of a contempt; and no officer shall say, he is indemnified, if he advisedly acts contumaciously to the authority of any Court. Officers must understand, that it is impossible for any person to indemnify them against a contempt. Let the attorney, therefore, make an affidavit.

An affidavit by the attorney was read, admitting, that he told the officer he would indemnify him; but that he merely meant by that to assure the officer, that what he was to do was legal, and to prevent him from being intimidated.

LORD ELDON said the conduct of the attorney was rash; but he did not intend a contempt. An indemnity against the consequences of a contempt is very different from an indemnity against any thing of damage. I should pause long before I should determine, that if the creditor was attending merely to prove his debt, and not upon a summons, he should not be privileged; that being the only way, in which in the case of an bankruptcy, he can sue. Upon the affidavits it does not appear, that the officers were aware that they were acting in contempt of the Court; and the authority, under which they acted, is a considerable alleviation of their conduct. Though I have not the least doubt, that a person attending the commissioners, particularly under a summons, has this protection, and I agree entirely with Lord *Kenyon*, in *Arding v. Flower*, yet there has been doubt upon the subject; and the language in the report of *Kinder v. Williams* is loose. Therefore, letting it now be perfectly understood that this must not happen again, I will not go farther than to order that the costs out of pocket to be paid by the attorney and the two officers.—S. C. 7 Ves. un. 313.

EDITOR.

## Summer Assizes.

NOTTINGHAM.—August 3.  
Special Jury.

BROYAN v. UNWIN, ESQ. AND OTHERS.

CHALLENGING a SPECIAL JUROR for not being indifferent between the parties in the cause—When is the proper time for making the challenge—Whether a special juror can be challenged like any common juror for cause arising or becoming known to the parties after the special jury was struck—TRIAL of the JUROR—CHARTISTS—Right of a MAGISTRATE to search for, and take fire-arms from all persons of suspicious character, or not qualified to have them.

This was an action of *Trespass*. The plaintiff is a frame-work knitter, residing at *Sutton on Ashfield*, and the defendant *Unwin*, is a magistrate of the county, the other defendants are *Samuel Willey*, *Samuel Short*, and *Thomas Shippan*, constables acting under Mr. *Unwin's* directions. The trespass complained of, and for which the plaintiff sought damages, was that in the evening of the 12th of August, 1839, the defendants, accompanied by a large detachment of military, surrounded his house between seven and nine o'clock, and the defendants broke and entered the house, the military being stationed outside, disturbed and alarmed the plaintiff's family, and searched and ransacked the house without justifiable cause, and took away letters and papers belonging to the plaintiff. The case was tried here at the last assizes before Lord *Denman*, but the jury, not being able to agree, were discharged without giving a verdict, and was now brought on again.

After eight of the special jurors had answered to their names and were in the box, and the ninth was entering.

Mr. *Sergeant Adams* objected to him as not being indifferent between the parties. The ground of challenge was, that the gentleman was in a public-house in the town in the course of the morning, and, after drinking two or three glasses of Sherry there, he said, speaking with reference to this cause, that "He was to be on the jury, and he had a bottle of Sherry in his pocket, and he would sooner die than not give judgment against Mr. *Unwin*."

Mr. *Hill* objected to any challenge to the jury in that stage of the proceeding. The time for challenging special jurors was when the parties were striking the jury. A list of 48 was made out by the sheriff for every special jury. A copy of the list was furnished to each of the parties to the cause. Each of them struck off 12, and of the remaining 24, the first twelve that answered to their names, when called in court to be sworn, were the jurors to try the cause, unless some of

them did not answer, in which case either party might pray a *tales*. (a) The time to challenge the special jury was passed, and there was no instance of such challenge; indeed, there was an instance to the contrary within his own recollection, in which the defendant challenged a special jurymen as he was coming to be sworn, and, after argument, the objection was over-ruled.

Mr. Sergeant Adams referred to a case which occurred at Lincoln about 21 years ago, in which a challenge was allowed to a juror as he entered the jury-box, and triers were appointed to try whether he stood indifferent between the parties.

Mr. Humfrey referred to another case in the Court of Exchequer about a year ago, in which the challenge was allowed; and he and Mr. Sergeant Adams argued that it was competent to challenge special jurors for cause arising after the special jury was struck. Any rule to the contrary would be unreasonable and absurd.

LITTLEDALE, J. admitted the challenge.

Mr. Hilditch, the clerk of assizes, and Mr. Saxon, the under-sheriff, were then sworn to try whether the jurymen stood indifferent between the parties to the cause.

A witness stated he saw the gentleman pull a bottle of Sherry out of his pocket, and heard him make use of the words before stated.

The triers declared that the gentleman was not indifferent to the parties in the cause, and he was dismissed.

Mr. Hill, after explaining to the jury what occurred, said he was glad that there was now a decision on the point. He had always thought it absurd that a special juror could not be challenged like any other juror, for cause arising or becoming known to the parties after the special jury was struck. His only object in resisting the challenge was to come to a decision on the point. He then proceeded to state the circumstances of the plaintiff's complaint. The plaintiff was an humble and industrious man, who brought up his family in comfort, and carried on business as a framework knitter. Mr. Unwin was a magistrate. Under pretence of searching for arms in plaintiff's house, he surrounded it with soldiers on the night of the 12th of August last year, and accompanied by the three other defendants, without warrant or other lawful authority, but at Mr. Unwin's pleasure, entered the plaintiff's dwelling-house, which was commonly called an "Englishman's castle." They ransacked every room in the house. They opened and searched every drawer. They found no arms, but they found letters and papers, most of which Mr. Unwin collected together in a pocket-handkerchief, and carried away, saying, after perusing one, that "that was the very thing that he wanted." So

under the pretence of coming in search of arms his real object was, as he said, to come for the plaintiff's papers. He challenged the counsel for the defendant to point out any law that authorised this conduct of Mr. Unwin. It was impossible to produce any law to justify such conduct.

Witnesses were called to speak to these facts, but the counsel for the defendants admitted most of them.

After a short discussion between counsel on both sides, a verdict of *Not guilty* was taken for the three constables, on the ground that it was their duty to obey Mr. Unwin's directions, given personally, although without warrant.

Mr. Sergeant Adams then stated the case for Mr. Unwin, the only remaining defendant. He said the jury well remembered that great anxiety was felt by the Government on the intended sacred month proclaimed by the chartists to begin on the 12th of August last. A circular was sent by Lord John Russell, then Secretary of State for the Home Department, to the lords lieutenant of counties, and to the magistrates generally, urging them to search for and take fire-arms from all persons of suspicious character, or not qualified to have them. Mr. Unwin received such a circular. He and the other magistrates met frequently, and passed resolutions. The district of Mansfield and Sutton was over-run with chartists, and the plaintiff was an avowed chartist, in correspondence with some of the leaders; and, like some of them, he ought to have been put on his trial for sedition long ago. So suspected was the neighbourhood of Mansfield at the time, that the Secretary of State sent companies of soldiers to be at the service of the magistrates there. The learned counsel read the Secretary of State's circular, and the resolutions entered into by the magistrates; he then produced and read at great length some of the papers taken from the plaintiff's house on the 12th of August, consisting chiefly of a correspondence between him and one Pithkeithley, partly on the business of the plaintiff, but mainly on politics, in which Pithkeithley used language of the most exciting and seditious nature, urging the plaintiff to rouse the working people against their tyrants, the aristocracy, the idle monopolisers and arrogant consumers of the good things produced by the labour of the industrious classes, who were justified in taking from their oppressors whatever was necessary to supply their wants. There was also found in plaintiff's house a large printed placard, signed by the committee and leaders of the chartists, and by C. M. Pithkeithley among others, setting forth grievances, and prescribing what should be done. Witnesses proved the state of the country and the resolutions of the justices in August last.

Verdict for the plaintiff, Damages £100.

(a) See Western's Commentaries, B. 1. C. 13.

## THE REGENCY BILL.

## 4 VICT.

*An Act to provide for the Administration of the Government, in case the Crown should descend to any Issue of her Majesty whilst such Issue shall be under the Age of Eighteen Years, and for the care and guardianship of such Issue.*

Whereas your Majesty, by your Majesty's royal message to both Houses of Parliament, has been pleased to state that the uncertainty of human life, and the deep sense your Majesty feels duty to your people, rendered it incumbent on your Majesty to recommend to both Houses of Parliament to consider contingencies which may hereafter take place, and to make such provision as will, in any event, secure the exercise of the Royal Authority; and that your Majesty would be prepared to concur with the two Houses of Parliament in those measures which may appear best calculated to maintain unimpaired the power and dignity of the Crown, and thereby to strengthen the securities which protect the rights and liberties of your people: And whereas, with the most cordial sense of duty and gratitude to your Majesty for the tender concern and regard uniformly and now more especially demonstrated for the happiness of your people and the security of their rights and liberties, we have entered this most important business into our consideration, and being thoroughly convinced of the wisdom and expediency of what your Majesty has thought fit to recommend, we are firmly and resolutely determined to contribute every thing in our power to maintain unimpaired the power and dignity of the Crown, and to strengthen the securities which protect the rights and liberties of the people:

We, therefore, your Majesty's most dutiful and loyal subjects, the Lords spiritual and temporal, Commons, in Parliament assembled,

Do most humbly beseech your Majesty, that it may be enacted: And be it enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if at the demise of her present Majesty (whom God long preserve) there shall be no issue of her said Majesty who shall become and be King or Queen of this realm whilst under the age of eighteen years, his Royal Highness Prince Albert, the consort of her said Majesty, shall be guardian, and shall have the care, tuition, and education of such issue, until such issue shall attain the age of eighteen years, and shall till such time have the disposition, ordering and management of all matters and things relating thereto; and his Royal Highness Prince Albert shall, until such issue of her said Majesty shall attain the

age of eighteen years, and no longer, have full power and authority, in the name of such issue, and in his or her stead, and under the style and title of Regent of the United Kingdom of Great Britain and Ireland, to exercise and administer, according to the laws and constitution thereof, the royal power and government of this realm, and all the dominions, countries, and territories to the Crown thereof belonging, and use and exercise and perform all prerogatives, authorities, and acts of government and administration of government which belong to the King or Queen of this realm to use, execute and perform, according to the laws thereof, but in such manner and subject to such conditions, restrictions, limitations and regulations as are hereinafter for that purpose specified, mentioned, and contained.

And be it further enacted, by the authority aforesaid, that all acts of royal power, prerogative, government, and administration of government, of what nature or kind soever, which shall be done or executed during the Regency established by this act, otherwise than by and with the consent and authority of the said Regent, in the manner and according to the direction of this act set forth and prescribed, shall be absolutely null and void to all intents and purposes.

And be it further enacted, by the authority aforesaid, that the Regent, before he shall act or enter upon his said office of Regent, shall take the oaths of allegiance and supremacy, in the form prescribed and required by an act passed in the first year of the reign of King William and Queen Mary, intituled, "An Act for abrogating the oaths of supremacy and allegiance, and appointing other oaths," and shall also take the oath of abjuration, in such manner and form as is set down and prescribed in an Act passed in the sixth year of the reign of King George the Third, intituled, "An Act for altering the oath of abjuration and assurance, and for amending so much of an Act of the seventh year of her late Majesty Queen Anne, intituled, 'An Act for the improvement of the Union of the two kingdoms,' as after the time therein limited requires the delivery of certain lists and copies therein mentioned to persons indicted of high treason or misprision of treason," as also the following oath; (that is to say)

"I do solemnly promise and swear, that I will truly and faithfully execute the office of Regent of the United Kingdom of Great Britain and Ireland, according to an Act of Parliament made in the fourth year of her Majesty Queen Victoria, intituled, 'An Act to provide for the administration of the Government, in case the Crown should descend to any issue of her Majesty whilst such issue shall be under the age of eighteen years, and for the care and guardianship of such issue;' and that I will administer the government of this realm, and

of all the dominions thereunto belonging, according to the laws, customs and statutes thereof, and will in all things, to the utmost of my power and ability, consult and maintain the safety, honour and dignity of his or her [as the case shall require] Majesty, and the welfare of his or her [as the case shall require] people. "So help me God."

"I do faithfully promise and swear, that I will inviolably maintain and preserve the settlement of the true Protestant religion, with the government, discipline, rights, and privileges of the Church of Scotland, as established by law. "So help me God."

Which oaths shall be taken before the Privy Council then in being, who are hereby empowered and required to administer the same, and to enter the same in the council books.

And be it further enacted, by the authority aforesaid, that it shall not be law for the King or Queen of this realm, for whom a Regent is hereby appointed, to intermarry before his or her age of eighteen years, with any person whomsoever, without the consent, in writing, of the Regent, and the assent of both Houses of Parliament previously obtained; and every marriage without such consent, and such assent of the two Houses of Parliament, shall be null and void to all intents and purposes; and every person who shall be acting, aiding, abetting, or concerned in obtaining, procuring, or bringing about any such marriage, and the person who shall be so married to such King or Queen under the age of eighteen years, shall be guilty of high treason, and suffer and forfeit as in cases of high treason.

Provided always, and be it further enacted, by the authority aforesaid, that the Regent shall not give or have power to give the royal assent to any bill or bills in Parliament for repealing, changing, or in any respect varying from the order and course of succession to the Crown of this realm as the same stands now established by the Act of the twelfth year of the reign of King William the Third, intituled, "An Act for the further limitation of the Crown, and better securing the rights and liberties of the subject," or to any Act for repealing or altering the Act made in the thirteenth year of the reign of King Charles the Second, intituled, "An Act for the uniformity of public prayers and administration of sacraments, and other rights and ceremonies, and for establishing the form of making, ordaining, and consecrating bishops, priests and deacons, in the Church of England," or an Act of the fifth year of the reign of Queen Anne, made in Scotland, intituled, "An Act for securing the Protestant religion and Presbyterian government."

Provided always, and be it further enacted, That if his said Royal Highness Prince Albert shall, at any time after becoming such guardian and Regent, be reconciled to or shall hold com-

munion with the See or Church of Rome, or shall profess the Popish religion, or shall marry a person professing the Roman Catholic religion, or shall cease to reside in or absent himself from the United Kingdom of Great Britain and Ireland, then and in any of such cases his said Royal Highness shall no longer be guardian and Regent, and all the powers and authorities which he may have derived under and by virtue of this Act shall thenceforth cease and determine.

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ADVERTISEMENTS RECEIVED BY BARNES AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 39, FLEET STREET.

# The Legal Guide.

Vol. IV.]

SATURDAY, AUGUST 15, 1840.

[No. 16.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

#### CARRIERS BY WATER.

(Continued from page 227.)

WE have defined the exceptions from responsibility, "The Act of God and Perils of the Sea." We will now enquire what are and what are not losses by "THE KING'S ENEMIES," or by "RESTRAINTS OF PRINCES AND RULERS."

VOL. IV.

By "the King's enemies" is to be understood public enemies, with whom the nation itself is at open war; and not merely robbers, thieves, or other private depredators, however much they may be deemed in a moral sense at war with society. Losses, therefore, which are occasioned by robbery on the highway, or by the depredations and violence of mobs, rioters, and insurgents, and other felons, are not deemed losses by enemies within the meaning of the exception (a);

(a) See Jones's Bailments, 103.; *Morse v. Slue*, 1 Vent. 100, 238.



or it may be understood as *IRRESISTIBLE FORCE* by such an interposition of human agency—as is, from its nature and power, absolutely uncontrollable. “Nisi hoc esset statutum, materia daretur cum furibus adversus eos, quos recipiunt, coeundi, cum ne nunc quidem abstineant hujusmodi fraudibus” (b). But the word *fures* here means *thieves* only, and not *robbers*, who come with a superior and *irresistible force*; they are called *latrones*. A partner who has the care of the joint property is not answerable, “si id *latrocinio* aut incendio perierit,” but he is answerable, “si a *furibus* subreptum sit” (c), upon which *Gothofred* observes, “adversus *latrones* parum prodest custodia; adversus *fures* prodesse potest, si quis advigilet. *Latrocinium* fatale damnum, seu casus fortuitus est; at non *furtum*” (d). The English Law is *more strict* in the case of carriers than the civil law; but it is said to have been the same formerly, and not to have charged a carrier in the case of robbery, unless he travelled by dangerous ways, or at unseasonable hours. Robbery by force is deemed *irresistible*. Robbery (*rapina*) is, by *civil law*, defined to be the violent taking from the person of another against his will, of money, or goods, for the sake of gain (e). By the *English common law* it is defined to be a felonious and violent taking of money or goods from the person of another, putting him in fear, let the value of the thing taken be what it will, above or under one shilling (f), and a loss by robbers or pirates is considered to be a loss by *irresistible force*. “Si furtum committatur in mari per piratas et latrones, tunc inter casus fortuitos connumeratur (g).” Pirates are indeed universally treated as the common enemies of all mankind, and are subjected to punishment accordingly. Capture by pirates does not divest the property of the owner; but

capture by an enemy, in the exercise of war between two nations, does, according to the law of nations, wholly divest the property of the owner, and transfer it to the captor, or the sovereign of his state, at some period (h).

In some cases the insurance is against capture only—and here we must distinguish what is capture from the perils of the sea. This was determined in *Green and others v. Elmslie* (i), where a carrier ship, while on her voyage, was driven by a gale of wind on the coast of France, and was there captured by the enemy. She did not receive any damage from the wind, and it was attempted to be made out that this was a loss by perils of the sea, and not by capture. Lord KENYON, however, said the case was too clear to admit of argument, it was clearly a loss by capture, for had the ship been driven on any other coast but that of an enemy, she would have been in perfect safety. But suppose that she should be first stranded on the coast by the gale, and in consequence thereof should be afterwards captured by the inhabitants? In that case, it seems, that it would be deemed a loss, not by capture, but by the perils of the sea, upon the same principle, for the gale is the proximate cause of the stranding (h).

“*The Restraint of Princes and Rulers*,” commonly mentioned in charter parties as an exception or excuse for the non-performance of the contract on the part of the master, is to be understood of an actual, and not of an expected restraint, although the expectation may be reasonable and well grounded, and the master may act upon it with fair and honest intentions (l). This was decided in the following case. The British ship *Adelphi* was chartered for a voyage from London to Petersburg, or as near thereto as she could safely get, then

(b) Dig. 4, 9, 1, 1. (c) Id. 17, 2, 52, 3.  
(d) See also id. tit. *navis* *cauponae* *stabularii*, &c.  
4, 9, 3. (e) Just. Lib. 4, tit. 2.  
(f) Hist. Pl. Cro. 532. (g) Roccus de Ass. n. 41.

(h) *The Helena*, 4 Rob. A. R. 3.  
(i) Peake's N. P. C. 212.  
(k) *Hahn v. Corbett*, 2 Bing. Rep. 205.  
(l) Abbot on Shipping, 345.

to load a complete cargo of hemp, and of iron for ballast, and proceed therewith to Woolwich and London, and there deliver the same, on being paid freight at certain rates per ton (restraint of princes and rulers during the said voyage always excepted): thirty running days to be allowed the merchant for loading. Under this contract the ship sailed to Cronstadt (the port of Petersburg), and there took in iron for ballast and a certain quantity of hemp; and the master was proceeding, with all due diligence, to load his full cargo of hemp, by crewing it down in the usual way, when about the 9th day, a rumour was circulated of an embargo being about to be laid by the Russian Government on all British vessels, and the person who was agent for the British factory at Cronstadt, and agent also to the house at Petersburg, who were the agents to the merchant-charterer of this ship, in consequence of instructions received from the British consul-general at Petersburg, desired the captains of such British vessels as were ready to proceed to sea, to do so as soon as possible, as he expected an embargo might take place immediately. In consequence of this, the master gave orders to leave off screwing down hemp, and to fill the ship as fast as possible by hand; and the whole day was employed in this way, and the ship filled as far as could be done by hand. In the evening the ship sailed with something more than half the cargo that she could have carried if the hemp had been screwed down: the merchant had a sufficient quantity of hemp for a full cargo being by the ship's side in lighters. Many other British vessels sailed the same evening, or the next morning, without full cargoes; some, however, remained, and afterwards completed their lading, and were not detained by the Russian Government. No embargo was, in fact, imposed until six weeks after this time: the ship would have completed her loading within that period.

The master sailed away without any communication with the defendant's agents at Petersburg, who came to Cronstadt, as soon as they had notice of the circumstances, with intention to stop the ship, but arrived too late. The master acted *bona fide*, and as an honest man, and there was reasonable and well grounded apprehension for his acting as he did. The goods taken on board were brought to London, and there delivered to the merchant. The merchant sued the master for not bringing a complete cargo, according to his contract. It was argued that the master was excused, either by the operation of this clause in the contract, or by that general principle of law, which requires every subject, as a matter of public duty, to save the property and persons entrusted to his charge from falling into the hands of the enemies of his country. But the Court held, that neither of these grounds furnished an excuse in the particular circumstances of this case.

Lord Ellenborough said, "It has been contended that the exception contained in this contract, of restraint of princes and rulers during the voyage, excuses the not taking on board a complete cargo in this case; but, without considering whether this provision respecting *restraint of princes*, &c., be at all applicable by way of excuse for the non-performance of this part of the master's stipulated duty, viz.:—the taking on board a complete cargo, yet, at any rate, the *restraint* meant must be an actual and operative restraint, and not a merely expected and contingent one, as this at most only was. But it has been further argued by the defendant's counsel, that supposing the master, in respect of his express contract, not to be otherwise justifiable in regard to the freighter, yet that he is so at any rate on the ground of his paramount duty to the state, which required him to save the property and crew under his charge from the impending peril of an instantly expected embargo; and that in every

private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the state is materially involved. That no contract can properly be carried into effect which was originally made contrary to the provisions of law, or which being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt. Neither can it be questioned that if from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time they have become incapable of being any longer carried into effect without derogating from the clear public duty which a *British* subject owes to his sovereign and the state of which he is a member; the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty,—an obligation on the part of the subject. But in order to found this new public duty, which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place, and that the danger to result to the public interest of his own country from an observance of the contract, should be clear, immediate, and certain. In short, such a state of circumstances must be shewn to exist as that the contract is no longer capable of being performed by him without criminal compromise of his public duty. Can anything of this kind be said with truth to exist in the present case? No actual change in the political relations of Great Britain and Russia had then taken place. The danger to result from remaining at Cronstadt was neither immediate or certain; in point of fact, it attached only at the distance of many weeks afterwards; and no one can venture to suggest, even in argument, that the loading in question might not have been

completed without any criminal compromise of public duty. Indeed, to allow a man to withdraw himself from the performance of a distinct positive contract, upon the ground of some speculative inconvenience, suggested as *likely* to result from such performance to the general interests of the state, would afford great encouragement to disingenuous subtleties, and refinements upon subjects of this kind, and would render all reliance upon the solemn stipulation of parties in commercial matters precarious and insecure; and which encouragement this Court would most reluctantly lend its assistance to administer. For the reasons already given such an argument has no foundation to rest upon in the present case. Therefore, neither upon this ground, any more than upon the others already considered, is the plaintiff precluded from a right to recover." (m)

(To be continued.)

#### PROBLEM XVI.—VOL. IV.

##### COVENANTS.

PERSONAL REPRESENTATIVES. — How are EXECUTORS or ADMINISTRATORS affected by Covenants made by or in favour of their testator or intestates?

#### TO THE EDITOR OF THE LEGAL GUIDE. ANSWER TO PROBLEM 4. —VOL. 4.

##### CONTRACTS—VENDOR AND PURCHASER.

In what cases will equity permit the contracting parties to make time the essence of the contract?

Time will, in equity, be deemed of the essence of the contract in all cases where it can be collected from the terms of the contract, that the parties intended that the time for its completion should be strictly adhered to. But where, upon an agreement for the purchase of an estate, the parties entered into a stipulation, that an abstract of title should be delivered immediately, and that in case the contract was not completed by a given day, the purchaser should be released from the contract, and the abstract was not immediately delivered, but communications on the subject of the title were continued between the parties until the time limited by the contract had expired—

(m) *Atkinson v. Ritchie*, 10 Sim. 588.

held that under the circumstances the benefit of the stipulation as to time was waived by the purchaser. *Hipwell v. Knight*, 1 You. & Coll. 401.

For a long time it was considered that equity would not admit of a stipulation, making time the essence of the contract. LORD ELDON found this to be the case when he entered the Court (see 1 Jac. & Walk. 420.); but his Lordship successfully combated it (see 7 Ves. 265.); and the rule is now well established, that, even in equity, time may be made the essence of the contract. *Levi v. Lindo*, 3 Mer. 81.; *Withy v. Cottle*, 1 Turn. 79. But it is not decided that where there is no special stipulation to that effect, it can be made so by a subsequent notice that it will be so considered. *Reynolds v. Nelson*, 6 Mad. 26.

Time may be made the essence of the contract, but may be waived by conduct, *Hudson v. Bertram*, 3 Mad. 449. as the right to a strict performance may be clearly waived at law. *Carpenter v. Blandford*, 8 Barn. & Cress. 575 (1).

Time is of the essence of the contract, where the subject of contract is of a nature liable to daily fluctuations in value, as a transferable government security, *Doblet v. Rothschild* 1 Sim. & Stu. 590. or the value of which is daily diminishing, and which is liable to immediate determination, as a life annuity, *Withy v. Cottle*; or in which the purchaser's object would generally be defeated by delay, as the sale of a manufactory or commercial establishment, *Wright v. Howard*, 1 Sim. & Stu. 190.; or the good-will of a public house, *Costlake v. Till*, 1 Russ. 380. In such cases it is obvious that adequate compensation cannot be given by the application of the ordinary rule upon which the Court acts; and the laches of the vendor, therefore, discharges the purchaser. But the mere allegation of the purchaser, that he wanted the estate for a place of residence, has been held not to be sufficient to make the time stipulated for the delivery of possession essential. *Boehm v. Wood*, 1 Jac. & Walk. 419.

In all the preceding cases, the complaint of delay proceeds from the purchaser. The case of a sale of a reversion, however, presents a contrary case, (being the exact converse of an annuity). Such a sale is usually made under the pressure of embarrassment, for the purpose of obtaining immediate pecuniary aid; and the contract, therefore, could not be enforced by a pur-

chaser who was not ready with his money on the day. *Newman v. Rodgers*, 4 Bro. C. C. 391 R. J. T.

We have also an answer to this Problem by E. A., in which he says:—

The latest decided case on this subject, I believe, is that of *Taylor v. Brown*, before the Master of the Rolls, in November last, who is reported to have held, that where time is not of the essence of a contract to purchase, and the contract is to be performed within a time which is undefined, and unnecessary delay is occasioned by one party in completing his title, the other has a right to limit the time for the completion thereof—and where time is not of the essence of the contract, and no notice of a limited time for a completion of the title is given by the purchaser, but negotiations take place between the solicitors of the vendor and purchaser, with reference to the title, and then the purchaser, whilst the vendor is endeavouring to procure and adduce more satisfactory evidence of the title, suddenly by letter declares that the contract is at an end. That the purchaser was bound to complete this contract, on a good title being shewn, and he was ordered to pay the costs of the suit up to the hearing, the litigation up to the hearing having arisen out of the question, not whether a good title had been shewn, but whether the defendant's letter did or did not put an end to the contract.

#### TITHES.

##### RATING THEM TO THE RELIEF OF THE POOR.

CIRCULAR LETTER from the SECRETARY to the POOR LAW COMMISSIONERS to the Churchwardens and Overseers through the Kingdom.

“Poor Law Commission-office, Somerset-house.

“Gentlemen,—The judgment of the Court of Queen's Bench has been delivered in the case of “*The Queen v. the Hon. and Rev. William Capel, Clerk.*” The Court has decided that the tithe-owner is to be rated for his tithes, upon the same estimate of their net annual value as is provided for all other rateable hereditaments, by the 1st section of the Parochial Assessment Act (6 and 7 William IV., cap. 96) and that the tithe-owner is not entitled, under the proviso in that section, to any deduction or allowance corresponding with the profits of occupiers of lands, houses, &c.

“While the question as to the extent of the tithe-owners' responsibility was in dispute, and with a view to prevent unnecessary litigation in the multitude of appeals which were then to be apprehended, the Poor-Law Commissioners recommended, by a minute of the 8th of Septem-

(1) But where the contract is under seal, a subsequent agreement not under seal made before breach of the agreement, enlarging the time for performance of the contract, is invalid at law (*Ripplinghall v. Lloyd*, 2 New. & Man. 410.) And in *Stowell v. Robinson*, (3 Bing. N.C. 928.) where the agreement was not under seal, it was determined that a subsequent parol agreement to alter or enlarge the time is void.—Ed.

ber, 1838, that a single case should be selected in some one parish for argument, and that in all other parishes provisional arrangements should be adopted between the overseers and the tithe-owners, which would allow of an eventual settlement of the payments to be made by the tithe-owners in conformity with the principle of any decision which might be obtained upon the selected case.

"The case of 'The Queen v. Capel' was eventually selected to try the question in dispute, and in accordance with the recommendation contained in the minute of the Poor Law Commissioners, the rates were in many parishes laid on the net annual value of tithes, and a portion only of such rates was collected, an arrear being allowed to remain proportionate to the amount of the deduction which the tithe-owners claimed.

"But rates on the whole net annual value being now, by the decision in the case of 'The Queen v. Capel,' determined to be correct, it has become the duty of overseers to proceed to collect from the tithe-owners any arrears which may have been allowed to accrue; and in future rates to assess the tithe-owners on the whole net annual value, and to collect the whole rate so assessed.

"By order of the Board,

"EDWIN CHADWICK, Secretary.

"To the Churchwardens and Overseers of the Poor."

### Law Reports.

#### VICE-CHANCELLOR'S COURT—July 20.

##### WILLIAMS AND OTHERS v. THE EARL OF JERSEY.

NUISANCE.—ACQUIESCENCE.—INJUNCTION to restrain ACTION at LAW.—DEMURRER for want of Equity.

The plaintiffs in this case filed their bill against the defendant for a decree for quiet enjoyment of certain copper works, and to restrain the defendant from proceeding with an action at law.

It appeared by the bill that by a lease, dated the 25th March, 1736, made between Bussey Mansell of the one part, and Thomas Coster, Joseph Percival, Samuel Percival, and Henry Barnes, of the other part, certain lands situate in the parish of *Lamsamlet*, in the county of Glamorgan, part of the *Briton Ferry* estate, were demised to the last named parties for 51 years, subject, among other covenants on the part of the lessees, to a covenant to build one new copper smelting house for smelting, making, and refining of copper, or any other metals, and to contain 202 furnaces at the least, and another covenant to deliver up the demised premises at the end of the term in a sufficient state and condition for smelt-

ing, making, and refining of copper or other metals, by them usually made. The lessor covenanted to allow the lessees to dig on his land for clay to make bricks, required for the furnaces, or for erecting new furnaces, or other conveniences for smelting copper, and also to supply them with coal for the works. Under this lease the *White Rock Copper Works* were erected and established, and the smelting of copper ores and the manufacture of copper had been ever since carried on at the *White Rock Works* to the present time. The Earl of Jersey was seized of the *White Rock Copper Works*, as part of the *Briton Ferry* estate to 1818, when he sold it to the present owners. By another lease, bearing date the 1st day of September, 1755, and made between Louisa Barbara Mansell, of the one part and Chauncey Townsend of the other part, and which is recited in and confirmed by Act of Parliament, 8 Geo. 3, certain other hereditaments, situate on the river Tawe; also, part of the said *Briton Ferry* estate were demised to the said Chauncey Townsend for 99 years, for the purpose of erecting copper works thereon, in pursuance of which the *Middle Bank Works* were erected, and are now held under the defendant, George Earl of Jersey, who became seized or entitled to the reversion and inheritance as part of the said *Briton Ferry* estate. On the 25th March, 1828, the defendant himself executed one or more leases of the said *Middle Bank Copper Works* and of the *Upper Bank Copper Works*, with full liberty to the lessees to make and erect any new works or buildings for the smelting of copper ores and the manufacture of copper as they might see fit. The said *White Rock Copper Works*, the said *Middle Bank Copper Works*, and the said *Upper Bank Copper Works*, are respectively situate on *Kilvey Bank*, and considerable competition in the trade and manufacture of copper had existed between the works of the plaintiffs and those held by tenants of the defendant, and that for more than 100 years it had been the established custom at *Swansea* and the neighbourhood to allow the erection of copper works, and the use and practice of smelting of copper ores therein without any restriction whatever, and without any complaint on the ground of any alleged nuisance being committed thereby; and that although the said copper works of the plaintiffs had been extended, and the manufacture of copper there greatly increased of late years, yet by the erection of chimnies and other processes the quantity of smoke and vapour arising therefrom, and which was alleged by the said defendant had infected and corrupted his farms and lands, which had been prevented from increasing. It also appeared that the plaintiffs had, for several years, erected other works and manufactories for the smelting of cop-

perat *Swansea*, called the *Rose Works*, the *Landore Works*, and the *Morfa Works*. The *Rose Works* were erected in 1780, and were standing upon land formerly belonging to John Bennett Popkin, Esq., deceased, then of Charles Calland, Esq., deceased, and then of the trustees of his will; and that the *Landore Works* were erected also in 1780, and were standing upon land formerly and now belonging to the same person respectively, jointly with the Duke of Beaufort; and that the *Morfa Works* were standing upon land belonging to the Duke of Beaufort, all which copper works are situate on the right or *Swansea* bank of the river Tawe; and that they entered into the possession and occupation of the *Rose Works* in the year 1821, and the *Landore Works* in the year 1838, and that in 1830 they erected the *Morfa Works*, and have ever since been in the occupation thereof, and had carried on the process of smelting copper ores and the manufacture of copper. That the defendant, George Earl of Jersey, since 1814, had been seised of the *Briton Ferry* estate, situate on the left or *Kilvey* bank of the said river Tawe, and on the side of the river opposite to that of the plaintiffs' copper works, and claimed title to the *Briton Ferry* estate through the said Bussey Mansell, afterwards Lord Mansell, deceased; and that the smelting of copper ores or the manufacture of copper had been practised and carried on at the said works ever since the erection thereof, down to the present time, by tenants of the said Bussey Mansell, and the several persons claiming under him, including the defendant, George Earl of Jersey, and the enlargement of such works had at various times been matter of actual contract, to which the aforesaid predecessors in estate of the said defendant had been parties, and the plaintiffs and their predecessors in the said *Rose Works* and the *Landore Works* were induced by the acquiescence of the said defendant, George Earl of Jersey, and of his predecessors in title and estate, in the erection and establishment of the said last mentioned copper works, and in the smelting of copper ores, and the manufacture of copper therein, to lay out very large sums of money in the improvement and extension of the said works, and in the machinery employed therein, and such expenditure, whilst the same was in progress, was well known to the said defendant, George Earl of Jersey, and his said predecessors in title and estate. That the said copper works, called the *Morfa Works*, are erected upon land of the Duke of Beaufort, which was derived by way of exchange by virtue of indentures of lease and release from the predecessor of the defendant, and are by indenture, bearing date the 21st of May, 1810, and made between Charles Smith and Henry Smith, of the one part, and Henry Charles Duke of Beaufort, of the

other part. After reciting a lease dated the 1st of January, 1808, and made between George Lord Vernon (a predecessor of the defendant), of the one part, and Charles Smith and Henry Smith, of the other part, whereby a messuage, lands, and hereditaments were demised for 99 years, determinable upon the death of the survivor of three lives, at the yearly rent of £2.; and reciting that part of the last mentioned land and premises being a convenient spot for the purpose of erecting copper works, the said Charles Smith and Henry Smith had agreed with the said Duke to underlease the same to him *for that purpose*, and reciting that for the mutual convenience of the said Duke of Beaufort, and the said George Lord Vernon, and the Hon. William Augustus Henry Villiers Mansell, who was then entitled to the reversion of the said premises in fee simple, expectant on the death of the said George Lord Vernon, it had been agreed between them to exchange the hereditaments thereby intended to be demised for other lands and hereditaments belonging to the said Duke of Beaufort, lying intermixed with the lands of the said George Lord Vernon and William Augustus Henry Villiers Mansell, in the parish of *Lansamlet*, in the said county of *Glamorgan*, the said Charles Smith and Henry Smith demised the last mentioned piece of land unto the said Duke, his executors, administrators, and assigns, from the 29th September then last, for the term of 97 years, wanting two days, if the said lives or any of them should so long live, at the yearly rent of £112. That in lieu of the last mentioned piece of land so demised to the said Duke, it was agreed between the said Charles and Henry Smith, and the said George Lord Vernon, and William Augustus Henry Villiers Mansell, that Charles and Henry Smith should have the land taken in exchange by the said Lord Vernon. That the said Duke of Beaufort then proceeded to take measures for carrying into effect *his avowed object* in obtaining the said piece of land, which contained 26 A. 2 R. 6 P., by means of such exchange as aforesaid, and in order thereto he entered into certain agreements with John Vivian, Esq. for demising to him 18 acres, part of the said land, and with Messrs. Lockwood and Co. for demising to them the residue of the same land, consisting of 8 A. 0 R. 6 P. for the erection of copper works thereon, and that the said John Vivian did accordingly, in 1810 and 1811, erect upon the said 18 acres extensive copper works, which have ever since been used without interruption or disturbance, for the smelting of copper ores and the manufacture of copper; and by two several indentures of lease, bearing date respectively the 16th of February, 1815, the same lands were demised by the said Duke in conformity with the said agree-

ments, and by which leases full liberty was given to the respective lessees to erect copper works without any limit or restriction; but the lease to Messrs. Lockwood and Co. was afterwards surrendered to Henry, now Duke of Beaufort, they not having erected any works, and those lands were, by an indenture of lease bearing date the 5th day of December, 1831, demised by the said Henry Duke of Beaufort to the plaintiffs, with full liberty to make and erect such and so many buildings and furnaces for the smelting of copper ores and the manufacture of copper as they should find needful; and the plaintiffs did, accordingly, in 1828, erect and build upon the 8 A. 0 R. 6 P. of land, copper works and buildings for the smelting of copper ores and the manufacture of copper, being the aforesaid copper works called the *Morfa Works*, and that during the progress of such last mentioned works and buildings the said defendant well knew that the same were being erected and made, and were for the smelting and manufacture of copper, *and he was well aware of the deleterious effect on vegetation produced by such manufacture; nevertheless* the said defendant *allowed the plaintiffs* to proceed in the erection of the last mentioned works and to expend large sums of money therein, and in completing and finishing the same with the requisite machinery, and plant, without making any objection thereto, and he acquiesced in and encouraged the erection of such works and the aforesaid expenditure, and that ever since the smelting of copper ores and the manufacture of copper, had been carried on in the *Morfa Works* without any interruption, or disturbance, or without any complaint by or from the defendant. That the defendant had lately commenced an action at law against the plaintiffs in the Court of Queen's Bench, for the purpose of recovering large damages against the plaintiffs, and that the Earl filed his declaration in such action, which consisted of 14 counts, and the first of such counts is in the words following, viz.:—"For that, whereas before and during, and at the time of committing of the grievances after mentioned, certain farms, dwelling houses, messuages, and premises called Llyw, Creon, Talycoba, Uchaf, Talycoba, Ischa, Tyneest, Gwan, Llestie, Padew, Glaes, and Sir Robert Powell, in the parish of Llausamlet, were in the possession of Charles Henry Smith, as tenant for the Earl, the reversion being in the Earl, yet defendants knowing, &c., to wit, on the 1st of January, 1830, and between that day and the commencement of the suit, *kept and continued certain erections and buildings, furnaces, coppers, boilers, flues, and chimnies, before then wrongfully erected, and set up, and made for the purpose of heating, boiling, and smelting copper and other ores upon certain lands contiguous and near the said several farms, &c.,*

*and did erect and build certain other erections, &c.* for the like purpose upon the said land so contiguous, &c., and did heat, boil, melt, and smelt in and upon and with the said several erections, &c., divers large quantities of copper and other ores, by reason whereof divers large quantities of deleterious and noxious matters, and smokes, vapours, and fumes, issued, arose, and were emitted from the said erections, and spread and diffused themselves in, upon, through and over the said farms, &c., and the trees, and the grass and herbage then growing and being upon the lands, and the air upon, over, and about same, and thereby the several farms became, and were corrupted, and the said farms and the said lands, and the soil thereof, and the walls of the dwelling houses became and are impregnated, filled, and covered with arsenic and other deleterious matters, and deposits, and the trees, and grass, and herbage became and are stunted, blackened, fouled, and injured, by means of which the said Earl is injured in his reversionary estate and interest," and the said Earl lays his damages at £20,000., which action was still pending. The bill prayed that it may be declared that the plaintiffs are entitled to use and practise the smelting of copper ores and the manufacture of copper at their said several and respective copper works hereinbefore mentioned and described, without any molestation, interruption, or disturbance; from or by the said defendant, George, Earl of Jersey, or his heirs or assigns, and that the plaintiffs may be quieted in the use and enjoyment of their said works, and for an injunction perpetually to restrain the said defendant from molesting or disturbing the plaintiffs in quiet and peaceable use and enjoyment of their said copper works, and the practice of smelting copper ores, and manufacturing copper thereat, either by prosecuting the said action at law against the plaintiffs, or by commencing any other action at law against them with reference thereto; and that, in the meantime, the said defendant might also be restrained from further prosecuting the said action at law against the plaintiffs, and from commencing any other action at law against them in respect of the matters aforesaid.

To this bill the defendant filed a *DEMURRER* on the 6th July last.

That the said bill did not contain sufficient matter of equity, whereupon the Court could ground any decree in favour of the said plaintiffs, or give the said plaintiffs any relief against the defendants.

Mr. K. Bruce supported the bill.

Mr. Tennant supported the demurrer.

The VICE-CHANCELLOR said, that if he had known the contents of the two deeds referred to by the learned counsel for the plaintiffs before

had addressed the court, he would not certainly have heard any of the arguments in support of the bill. Those two deeds made a very strong case for the plaintiffs. It was there-shewen that the Duke of Beaufort obtained land in exchange, for the very purpose of carrying on the copper works upon the estate. It was thought, therefore, this demurrer could not be sustained. Supposing there had been no objection at all brought, but that simply the Earl of Jersey had given notice to the plaintiffs to abstain from carrying on the works, the plaintiffs would have been entitled to come to a court of equity under those two deeds, and ask for a decree for quiet enjoyment of the lands; or if, on the contrary, the Earl of Jersey had thought fit to file a bill in this court to restrain the plaintiffs from carrying on the copper works, and the present plaintiffs should have filed a cross bill, setting forth the same facts as the present bill did, the court could do no otherwise than dismiss the Earl's bill, and make a decree for quiet enjoyment in the cross bill. Although he admitted the authority of the case, *Edwards v. Edwards* (a), cited by the learned counsel who argued in support of the demurrer, yet he thought that case not applicable to the present, as this case not only sought to restrain an action at law, but further prayed for a decree for quiet enjoyment of the lands in question.

*Demurrer overruled.*

Mr. K. Bruce then moved for the common injunction to stay the trial of the action at law, and asked leave to give a notice of the motion to extend the common injunction.

*Order made accordingly.*

COURT OF QUEEN'S BENCH.—July 13.

*Sittings at Nisi Prius.*

RAINY v. VERNON.

*Auctioneer's charges for Commission and expenses.—Whether an Auctioneer is entitled to commission upon the sale of property that he has advertised for sale by public auction, and the Vendor's Solicitor makes a sale by private contract.*

This was an action brought by Mr. Rainy, auctioneer, of Regent-street, to recover from the defendant the amount of his commission upon certain ground rents, which the plaintiff had employed him to sell by public auction.

Sir W. Follett, for the plaintiff, stated that the defendant, who was the owner of some lands and rents, had endeavoured to effect a sale of them, but did not succeed. He then applied to the plaintiff to sell them, who advised that they

should be submitted to sale by public auction, in lots, as the mode most likely to produce the highest price, as the division would produce a greater number of purchasers, to which the defendant assented, and gave the plaintiff instructions accordingly. The plaintiff prepared particulars of sale, and advertised the sale to take place in the usual manner on the 14th of March, 1838. In the intermediate time several proposals were made to Mr. Rainy to treat by private contract; and one party made an offer to purchase a considerable portion of the ground-rents, at £8,200. which was 22 years purchase, less £72. The plaintiff communicated this offer to Mr. Vernon, who refused it, not thinking proper to abate the odd £72. Mr. Luxmore, who made the offer, then determined to wait the issue of the auction. Another offer of £20,000. was made to the plaintiff for the whole by Mr. Baker, a solicitor, whose client afterwards became the purchaser. This the plaintiff also communicated to the defendant, who also refused it. A few days before the time appointed for the sale, Mr. Baker went to the solicitor of the defendant, and they both went to the defendant, and on the 10th March, and concluded a bargain for the whole at £21,500. The auction was in consequence declared at an end, and the plaintiff claimed his commission upon this sale by private treaty, which the defendant refused to pay, by reason that he had not effected the sale; and the plaintiff brought the present action to recover the amount, and the defendant paid into Court a sum of money in the nature of compensation for the plaintiff's labour.

Evidence was given establishing the facts as stated for the plaintiff, and showing the custom and established usage of the trade, that under the circumstances the plaintiff was entitled to his regular commission as if he had sold the property.

LORD DENMAN left the case to the jury—whether there was such a custom or usage, and whether the defendant must be presumed to have known it.

Verdict for the plaintiff for the full amount of his commission.

*Sittings in Banco.*

June 14.

MORRIS v. KING.

WARRANT OF ATTORNEY.—SCIRE FACIAS.—

*Whether execution may issue upon a judgment more than one year old, with the consent of the defendant, without a scire facias to revive.*

In this case the defendant had signed a warrant of attorney, to secure an admitted debt due to the plaintiff, and on the 31st October, 1834, judgment was entered up. On the 1st May



last, execution was issued, previous to which the defendant, in the presence of the attorneys for both parties, signed the following consent, to save the expence of a *scire facias* :—

“ I admit that there is due to the plaintiff, on my warrant of attorney, £1144. 12s. 5d. for principal and interest, and I consent to his issuing execution on the judgment signed thereon, notwithstanding there may have been no execution within a year and a day.”

A fiat in bankruptcy had issued against the defendant, but the assignees did not appear, although they in fact were the moving parties.

Mr. *Butt* obtained a rule *nisi*, to set aside the writ of execution, with costs, on the ground of irregularity, it being an execution issued upon a judgment more than one year old, without a *scire facias* having previously issued to revive the judgment.

Sir *W. Follett* now showed cause against the rule, and said the question was, whether, with the defendant's written consent, the execution was not regular. The case of *Morris v. Jones* (a), determined that under such circumstances a *scire facias* is unnecessary.

Mr. *Butt* supported the rule, upon the ground that the consent was not such as is required by law. It should have been in the warrant of attorney to justify an execution upon a judgment more than a year and a day old, without a *scire facias* having previously issued, and cited *Hiscocks v. Kemp* (b).

LORD DENMAN mentioned *Heath v. Brindley* (c), and observed, that supposing the plaintiff had told the defendant he was going to issue a *scire facias*, and the defendant had requested him not to do so, as he would consent to execution, would not that be sufficient?

Mr. *Butt* submitted that it would not in this case, it being given immediately before the fiat was issued, and was done with the view to a performance.

LORD DENMAN said—I do not see why the arrangement made between these parties, to save expence, may not be carried into effect. It is a proceeding between debtor and creditor, and we have no third parties before us whose interests might be involved, as was the case in *Heath v. Brindley*. There is no fraud shewn on the part of the defendant.

The rest of the Court concurred.

Rule discharged with costs.

(a) Barn. & Adol. 573.

(b) 3 Adol. & Ellis, 676.

(c) 2 id. 365.

## COURT OF COMMON PLEAS—July 14.

*Sittings at Nisi Prius.*

Special Jury.

MOKHAY V. COLEMAN.

CHARTER PARTY.—GUARANTEE for its performance by the Captain.

This was an action on a guarantee for the performance of the covenants in a charter-party.

The plaintiff was a biscuit-baker and ship owner. The defendant was a partner in the house of Sir C. Price and Co., bankers. One Captain Gillies, a master-mariner, having agreed to freight a vessel called the *Asia*, belonging to the plaintiff, from London to the *East Indies*, the defendant, who had a share in the adventure, agreed to guarantee the performance of the charter party by Captain Gillies. The ship in question had been purchased by the plaintiff for £5,000, after which he expended a considerable sum upon repairs of her. By the terms of the charter party Captain Gillies bound himself to pay £4,000. per annum freight, to deliver up stores at the end of the voyage; to defray necessary expenses; and if the ship sustained any damage from her voyage, to repair the same at his own expense. The ship sailed in the beginning of 1828, and reached her outward destination in safety. On her homeward voyage, however, she stranded in *Table-bay*, and suffered considerable damage. Upon arriving in port of London, she was taken to the yard of Messrs. Green, Ingram, and Co., to be repaired, but it did not appear distinctly whether by direction of plaintiff or of Captain Gillies. Some repairs were done to her to the amount of £1,500., but upon a further examination of the timbers they were found to be so defective, that it was advisable to sell the vessel for what it would fetch to break up. It would have fetched from £4,000. to £5,000. to repair the damage done. The vessel having been insured both at the *Mutual Marine Indemnity* office and at a Scotch office, to the amount of £7,000, the vessel being valued at £10,000., sums were received from those offices for the average loss amounting to £2,990.; and the present action was brought to recover the amount of the difference between that sum and the sum it would have fetched to repair the damage done. The declaration originally included the amount of freight (£4,000.) and the value of some stores; but upon these points the plaintiff's claim was subsequently satisfied; and therefore the matter in dispute was confined to the claim for repairs. The defence set up was that the plaintiff had declined to have the ship repaired, because he found that she was rotten, and that he had therefore, by his conduct released Captain Gillies from this part of his contract.

Verdict for the plaintiff—Damages £1,250.

## PREROGATIVE COURT.

## WILL OF ROBERT SHERIFFE.

## NEW WILL ACT.

INTERLINEATIONS UNATTESTED, *how far admitted.*

In this case the deceased had made a codicil to his will, by which he had given a legacy of £50. to two servants. Upon the will being brought to Court for probate, an interlineation appeared in the codicil of the words "each of," which the servants were given £50. a piece, and without those words they could only claim £50. between them. This interlineation was attested, nor could it be ascertained when it was made.

Dr. Curteis moved for probate, on behalf of the executors, with the interlineation.

The residuary legatee consented to the motion. Sir H. JENNER thought the probability was, the interlineation was in the hand-writing of the deceased, that it was made before he executed the codicil, and that consequently the statute was satisfied.

Probate granted with the interlineation.

## INSOLVENT DEBTORS' COURT—Aug. 8.

## JOSEPH GARDENER'S CASE.

*VESTING ORDER.—Whether the vesting order can be dismissed without the consent of the Creditor obtaining it?—Or, whether the Court can declare it null and void?*

Mr. Nichols applied to dismiss a vesting order obtained by a person named Smith, under similar circumstances.

It appeared that Gardener had been sued in Small Debt Court at Gloucester, and had been taken in execution, and some time afterwards Smith, who was at the time the detaining debtor, obtained a vesting order under the compulsory clause. Proceedings were subsequently stopped in the Court of Queen's Bench, and execution and judgment had been set aside at his costs.

Mr. Commissioner LAW said he was as ready as any man to apply common sense to an act of Parliament, but there was a difficulty in the case. The 37th section provided that no vesting order could be vacated without the consent of the creditor who had obtained it, and it was quite clear that would give no consent in this case. It was supposed that the proceedings on vesting orders could be "immortal," and after considerable deliberation the only amendment that could be proposed was that they should be dismissed on the consent of creditors.

Mr. Nichols remarked that unless the court inferred this case was likely to be "immortal" as consent could be got from Smith. There was

now an action pending against Smith for the imprisonment Gardener had undergone, and the application was made lest the existing vesting order should be any obstacle to the trial.

Mr. Commissioner LAW declared that the only way to get rid of the vesting order was to pronounce it *ipso facto* null and void. It was quite clear the act would not assist the party, and that common sense must be consulted in granting the application. He would grant a rule nisi on an affidavit of the attorney of the law proceedings mentioned in the affidavit of Gardener.

August 11.

## JOHN GIBLETT'S CASE.

*OVERSEER committed to NEWGATE for Defalcation.—Whether upon the Insolvent applying to be heard upon his petition such defalcation shall be considered a breach of trust?*

We have before noticed the facts of this case (a). The insolvent now came up from Newgate to be heard upon his petition, and was opposed by Mr. Woodroffe, on the part of the overseers of the parish of Northolt, near Harrow.

He had applied some time ago to be discharged on sureties, but the application was refused.

Richard Henry Bowery, clerk to Messrs. Richards and Woodbridge, of Uxbridge, who were the solicitors for the present churchwardens of Northolt, stated that the insolvent was the late overseer of the parish, and had been committed to Newgate for a defalcation in his accounts. He had been a small farmer in the parish. In April last, the accounts of the insolvent were audited, and he admitted the balance against him to be £56. 5s. 3½d. In May he was summoned before the justices at Uxbridge, and the balance demanded. He then said he had made use of the money, and could not pay it. A warrant of distress was issued against his goods, but his landlord had distrained, and a warrant for his commitment to Newgate was made out, and since the 11th of June he had been confined.

The insolvent pleaded poverty.

Mr. Woodroffe contended that the insolvent had committed a breach of trust, and the excuse of poverty could not be allowed. His learned friend seemed to regret that the insolvent had been elected to the office; he had, however, been appointed in rotation. The parish had felt it their duty to oppose by way of example, and it was no excuse to plead poverty for robbing a parish of £56l., neither was it to plead a large family. He asked for a judgment for the offence committed.

Mr. Cooke addressed the court on the part of the insolvent, urging his great distress, his large family, and the misfortune he had in being ap-

(a) Ante, p. 189.

pointed the overseer. The poor man had neglected his business, had lost his wife, and had now seven children in the poor-house. He submitted that a mere deficiency did not constitute a breach of trust. The insolvent had been two months in Newgate, a period which satisfied some felonies, and he had been subject to the same regulations as the other prisoners, debarred from the visits and enjoyments of persons confined for debt.

Mr. Commissioner LAW said the only question he had to decide was, whether the insolvent had committed a breach of trust. If he knew, when he spent the money, that it was not his own, he was committing a fraud; and the circumstance of his being a poor man made it clear to him that he knew he was spending what was not his own, and he considered himself bound to say that the insolvent had broken the trust reposed in him. He adjudged the insolvent to an imprisonment of six months from the date of the petition.

The insolvent was remanded to Newgate.

Mr. Woodroffe said that he was instructed to deny the power of the court to entertain the case on the commitment, but he considered that the insolvent had a *locus standi* to be heard.

#### INSOLVENT DEBTORS' COURT—Aug. 12.

The vacation was appointed to commence on Saturday next; but there is now a great number of cases to be heard, and the sittings cannot be concluded until the latter part of next week. There has been no diminution of business since the "Abolition" of Imprisonment for Debt, and the measure which her Majesty two years ago, on the prorogation of Parliament, was made to hail with "lively satisfaction," has not realised the benefits vaunted by its promoters. Too much praise cannot be rendered to Mr. Commissioner Law, for his great exertions. His health, it is feared, will be impaired, as he has frequently sat in Court to seven, eight, and nine o'clock at night, and then only a portion of his labours have been performed. He has more than once said that the vacation will, till nearly its conclusion, be no holiday to him. The other Commissioners will shortly return from their respective circuits, and the Court will sit once a week to hear bail cases.—*Morning Herald*.

#### Summer Assizes.

#### NORFOLK CIRCUIT.

Cambridge, July 29.

SHARP V. KEED.

FALSE IMPRISONMENT.—*Power of the Commissioners of Land and Assessed Taxes over their Collectors when defaulters, under*

3 Geo. IV. c. 60.—*Whether they can arrest and imprison a defaulter who has absconded, and is living in another district.*

This was an action brought by the plaintiff against the defendant, to recover damages for alleged false imprisonment. The defendant pleaded *not guilty*.

Mr. Andrews stated the case for the plaintiff.

In 1837 the plaintiff was appointed collector of the land and assessed taxes for one of the parishes in Cambridge, and in May, 1838, he absconded with £600. of the public money accounted for. The defendant is one of the commissioners for the affairs of taxes in the Cambridge district, and he and three other commissioners, shortly after the plaintiff absconded, issued a warrant for his apprehension, and another warrant for the seizure and sale of his goods. The plaintiff not being found, the commissioners offered a reward of £50. for his apprehension. In May last, Stearn, a police officer, had discovered that Sharp was residing at Cheltenham. He forthwith saw the defendant, and asked him if he should go and take him at Cheltenham. The defendant replied he thought it very advisable, but he would not guarantee any expense at the same time he thought the £50. reward was still in force. The officer went to Cheltenham. One Mr. Porter was described to him as living in the town, and answering the account he had given of the defaulter, and this Porter of Cheltenham proved to be Sharp of Cambridge. Stearn produced his warrant, took him into custody, and brought him to Cambridge, where he lodged in Her Majesty's gaol. After the plaintiff absconding the commissioners sold his property which realized £150., thus reducing the amount of his debt to the Crown to the sum of £450.

Mr. Andrews, for the plaintiff, contended that the arrest at Cheltenham was wholly illegal. The statute under which the warrant issued, 3 Geo. IV. c. 60, only empowers commissioners "in their respective districts to imprison defaulters." The Cambridge commissioners have no jurisdiction beyond the 14 parishes of the town, the arrest was unlawful, and the subsequent detention unjustifiable. Besides, the plaintiff was imprisoned under a warrant which directed him to be detained until he paid the sum of £600., whereas only £450. was now due to him.

ALDERSON, B., was clearly of opinion that the defendant was not liable. The warrant was a good and valid warrant at the time it was executed by the defendant and the other commissioners; and with respect to the verbal instructions supposed to have been given by the defendant to the constable, it only amounted to that the defendant left the officer to act upon his own responsibility, reminding him, indeed, of the

ward, but refusing to pay any of the expenses incurred. Besides, even if he had desired a constable to arrest the plaintiff at Cheltenham, he must be understood to have meant it to be done by legal means, which would be by applying to the Cheltenham commissioners for their aid. With respect to the plaintiff having paid a portion of the £600., that afforded no ground of action, as he was not now detained for the whole term, but for the balance; and he would be entitled to his liberty as soon as he had paid the residue.

Verdict for the defendant, with liberty to the plaintiff to move to enter a verdict for him if the court above should think that, under the circumstances, it ought to be so entered.

### HOME CIRCUIT.

*Guildford, August 7.*

**PKINSON AND ANOTHER V. SNOW AND ANOTHER. IN STOCK COMPANIES.—METROPOLITAN PARCELS DELIVERY COMPANY.—LIABILITY OF DIRECTORS AND SHAREHOLDERS FOR GOODS SUPPLIED FOR THE USE OF THE COMPANY.**

This was an action brought by the plaintiffs, William Hopkinson and Thomas Burrowes, against the defendants, John Rowe Snow, Samuel Baldwin, John Chancellor, John Nunn, and Thomas Nunn, to recover £143. 14s. of goods sold and delivered by the plaintiffs to the defendants, at their request.

The defendant, John Rowe Snow, pleaded *non assumpsit*, upon which issue was joined.

The other defendants suffered judgment by default.

Mr. Petersdorff opened the pleadings, and stated that the plaintiffs were corn-factors, and the defendants were shareholders in a company, called the Metropolitan Parcels Delivery Company, that had been established in London, and the question was the amount of damages to which the parties, who had let judgment go by default, were liable, supposing the defendant Snow, could be held to be liable to the action. The defendant Snow was the principal projector of the Company—a place was taken for carrying on their business, in the Goswell-street-road, where the plaintiffs had supplied corn to the value of £43. 14s.

John Cubley deposed that he was a shareholder in the company in question, and had held himself out as a director, he gave orders to the plaintiffs for the loan.

Mr. Ogle objected that the evidence of this witness ought not to be received, inasmuch as he was interested in the cause. The effect of the evidence would tend to shift the responsibility from himself to another.

GURNEY, B. said, that at the same time the witness would fix himself. He did not think he ought to reject the evidence.

The witness then proceeded to state that corn to the amount now sought to be recovered by the plaintiff was sent to the company's station in Goswell-street.

Cross-examined—Witness had ten shares in the Metropolitan Parcels Delivery Company. It was first formed in September, 1839. Some of the proprietors of the company held a meeting at the Exeter Hall Hotel, and they considered it a good speculation, and resolved that the company should be formed forthwith. They did not commence business until January, 1840. They took a station at 331, Strand, the lower part was intended for parcels. They began on the 1st January to carry parcels, and had horses and carts. The Strand station was the central one. They had another at Whitechapel, and there were five out-stations. Witness signed the deed about November last. The house in the Strand was taken by a provisional committee of directors, Snow, Nunn, Hunt, and Adams. Witness met Snow at the meetings of this committee.

Mr. Charles Gwillim Jones deposed that he was a solicitor in Gray's Inn-square, and was concerned for the parties who sought to establish the Metropolitan Parcels Delivery Company. The defendants, Snow, Adams, Cubley, Hunt, and other gentlemen were present at the first meeting that took place upon the subject. The defendants, Baldwin and Chancellor, came in subsequently. The first meeting took place in September, 1839, at Exeter Hall, Strand. Resolutions were passed at that meeting, that the company should be formed forthwith, and Mr. Snow, Mr. Mann, Mr. Adams, and some other gentlemen, were appointed as a committee to act on behalf of the company, and to carry out its objects. It was resolved that a capital of £50,000 should be raised by 5000 shares of £10 each. Mr. Snow took an active part in the proceedings all along. He took 30 shares, and gave a check for £60 for the amount of the deposits upon them. He was also at every meeting of the committee up to the month of October, when Baldwin and Chancellor took shares. They took Sadler's repository, and kept horses there, when Snow attended and took an active part. Witness thought Snow attended the meeting in the first week of April last, but he did not attend afterwards.

Cross-examined by Mr. Ogle—The company is not now in existence. It is joined with the London Parcels Delivery Company. Should say that the company was insolvent in the month of May. In the month of October the defendant Snow resigned his appointment of trustee, and from that time he did not attend any of the

meetings. A deed of partnership was drawn up, but Mr. Snow refused to sign it; but he did not assign as a reason for not doing so that he had no interest in the company; but of the 5000 proposed shares, not more than 400 were taken up; and at a meeting of the shareholders that was held in April, the defendant wished to know how he could get rid of his shares, as he said a fresh call of £2 had been made, and he did not pay it. The resolutions for the formation of the company, and the conditions upon which it was to be established, were then read. *Baldwin* kept *Morley's Hotel*, and is a man of property. *Chancellor* is an omnibus master, and a respectable man.

Mr. *Petersdorff* said this was the case for the plaintiff.

Mr. *Ogle* then addressed the court, and said that his defence to this action was one purely of law, and he was prepared, confidently, to submit, that the defendant, Mr. Snow, was not so connected with this company as to render him liable to the payment of this debt, that had no doubt been incurred on their behalf. He submitted that, although the defendant held shares in the company, he would only have been liable, supposing the company had been established upon its original footing of 5,000 shares being issued. Instead of that, however, it appeared that only a very small number of shares had been issued, and there was no proof that the defendant was aware of this deviation from the original plan, and still consented to continue his liability; and, besides that, it appeared that the defendant had refused to sign the deed of partnership, and after the month of October he withdrew himself altogether from the management of the affairs of the company. He contended that Mr. Snow was not a partner, and unless he was a partner in May he was not liable. *For v. Clifton* (a) is in point.

GURNEY, B.—Is there a provision that the company shall not be formed till a certain amount of capital is paid, although a partnership has commenced? *Vice v. Lady Anson* (b); *Pitchford v. Davis* (c). The case is not proved.

Mr. *Ogle* said the case of *Pitchford v. Davis*, was an action of a precisely similar character against a shareholder in a projected company, and on which it had been distinctly laid down by *Lord Abinger* and *Mr. Baron Parke*, that a shareholder could not be made liable for the contracts that were entered into, unless it was shewn that the principles upon which the company was originally established had been fully carried out in every respect, or that the defendant, as a shareholder, was aware of any deviation that had been made in them.

GURNEY, B., expressed his opinion that the present one was of exactly that character. The defendant said that he consented to become partner of the company if 5,000 shares had been sold, but as 400 had been disposed of, and the company began business with a capital of 800*l.*, instead of what they would have derived from the 5,000 shares, he did not admit his liability as a shareholder.

Mr. *Petersdorff* thought that the evidence was sufficient to warrant the belief that the defendant was aware that all the original conditions had been fulfilled when the company was established, and that he was liable as a shareholder in the undertaking.

GURNEY, B., thought the evidence was sufficient. The question was, whether the directors, having carried on the company upon a totally different principle to that proposed by the resolutions for its formation, and to the prospect that had been issued, could bind the defendant to their acts.

Mr. *Petersdorff* said in that case he had been elect to be called.

GURNEY, B., then said that if he pleased to might elect to be nonsuited, but if the case was to the jury, he should feel it his duty to direct them to find for the defendant.

Mr. *Petersdorff* asked to have leave, as it was a question of law, to move the court to enter a verdict for the plaintiff.

GURNEY, B.—No, I will not do that; if you will not be nonsuited I shall direct the jury.

Mr. *Petersdorff*.—"I elect to be nonsuited."—Plaintiffs called.

### 3 & 4 Vict. Cap. 83.

*An Act to continue, until the first day of January, one thousand eight hundred and forty-three, an Act of the last Session of Parliament, for amending and extending the Provisions of an Act of the first year of Her present Majesty, for exempting certain Bills of Exchange and Promissory Notes from the operation of the Laws relating to Usury.* [7th Aug. 1840]

Whereas an Act was passed in the second and third years of Her present Majesty, intituled "An Act to amend, and extend until the first day of January, one thousand eight hundred and forty-two, the provisions of an Act of the first year of Her present Majesty, for exempting certain bills of exchange and promissory notes from the operation of the Laws relating to Usury: And whereas the duration of the said revised Act is limited to the first day of January, one thousand eight hundred and forty-two, and it is expedient that the same should be continued for a longer period:

(a) Moo. & Ry. 676. (b) 7 Barn. & Cress. 409.  
(c) 3 Mee. & Wels. 9.

Be it therefore enacted by the Queen's excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, the said recited Act shall be continued until the first of January, one thousand eight hundred and forty-three.

## PUBLIC RECORDS.

### RULES AND REGULATIONS

be by the Master of the Rolls for the management of the Public Record Office, for the admission of persons to the use of the records, calendars, and indexes, the amount of fees to be paid for the same, and for copies of records, pursuant to the statute, 1 & 2 Vict. c. 94, and intitled, "An Act for keeping safely the Public Records," the same to be observed and used in the said public office, and in the record offices of the *Tower Rolls' Chapel*, and *Chancery House*, and the repositories of the records at the *King's Bench* at the *Rolls' House*, the *Common Pleas* in the *Carlton Ride*, and the repository, No. 3, *Whitehall Yard*, and the *Exchequer of Pleas* in the said repository, No. 3, *Whitehall Yard*, and all such other record offices and repositories as shall hereafter be brought under the regulations of the said act by the said Master of the Rolls.

The public office, and all the above mentioned offices and repositories are to be opened from ten till four, excepting on Sundays and the following holidays, viz.:

May 24th, her Majesty's birthday.  
June 28th, her Majesty's Coronation.  
Good Friday and Saturday following.  
Easter Monday and Tuesday.  
Whit Monday and Whit Tuesday.  
Christmas day to New Year's day inclusive.

On such days as may be appointed for public or thanksgivings.

A book is to be kept at each of the said offices and repositories in which each person requiring the use of records is to enter the following particulars, viz.: date, name of person making the application, reference to the record, and the service which he requires, viz.: copy, extract, copy, or attendance with a witness.

Upon the inspection of a record, the party applying may take notes, extracts, or copies therefrom, in the manner as he may think fit.

Copies are to be made and delivered according to the priority of application, or as near as may be, as the nature of the copy will admit of, except in special cases, for particular reasons.

5. No assistant keeper, clerk, or other officer, is to act as a record solicitor, or as record agent, for individuals, otherwise than in the discharge of his official duties.

6. No stranger is to be allowed to have any use of a record, except in the presence and under the inspection of an assistant keeper or other officer of the establishment, and in all cases where the record may be liable to be injured or damaged, the assistant keeper is to give such directions for preventing such injury or damage as the case may require.

7. Except the fees under mentioned, no fee nor any gratuity or reward is to be received by any officer of the establishment from any person consulting or using the records; save only, that if any party should desire to obtain information respecting any records in the *Rolls' Chapel*, from the indexes heretofore belonging to the late Mr. Kipling, the assistant keeper of the records at the *Rolls' Chapel* shall (until further arrangements can be made for the relief of the public) be at liberty to receive, for the parties who may be entitled thereto, such fees as have been heretofore paid for the use of such indexes.

### TABLE OF FEES

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[If the number <i>bona fide</i> required for prosecuting any search relating to any family, place, or single object of inquiry, shall exceed five, then it shall be in the discretion of the assistant keeper to remit the fees for all above that number.]	
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(Signed) LANGDALE, M. R.	
Rolls' House, July 17, 1840.	

## NOTICE TO CORRESPONDENTS.

E. A.—Your question savours too much of our Bread and Cheese, which by answering we must sacrifice. Time with us is of no small importance, and it is too much to ask us to *give it away*. Do, pray, bear that in mind. You are a very industrious man, and for this once shall not be disappointed.

In the case of the Countess of Portland v.

*Prodgers*, which you have cited, it was decided that the will of Lady Sandys, her husband being by Act of Parliament *banished* for life, was valid: for, in *such case*, the wife might in *all things* act as a *feme sole*, and as if her husband were *dead*, and that the necessity of the case required she should have such power. Now, in such case, the wife may sue and be sued as a *feme sole*, both at law and in equity. See also *Derry v. Duchess of Mazarine*, Salk. 116. Your question, however, goes to the fact of the husband being *transported*—(where is the difference?)—and the authority of *Newsome v. Bowyer*. It really is a misfortune that talented men like you will not purchase books upon which reliance may be placed. The work you refer to, from which you gain the authority, is dated 1838, but it contains no mention of the case of *Carroll v. Blencowe*, 4 Esp. N. P. C., where it was held by LORD ALVANLEY that a married woman, whose husband had been transported for seven years for felony, might maintain an action as a *feme sole*, it appearing by the record and conviction that her husband had abjured the realm, and though the term of his transportation had expired, yet if in fact he had not returned the right of action still remained. But as to whether she can be treated as a *feme sole*, after the term of transportation has expired, see 2 Bos. & Pull. 233; see also *Sparrow v. Carruthers*, 2 Black. Rep. 1197, cited in *Wilmot's Case*, Moor, 851.

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ADVERTISEMENTS RECEIVED BY BARKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

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VOL. IV.]

SATURDAY, AUGUST 22, 1840.

[No. 17.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 244.)

WE have before noticed SIR WILLIAM JONES's objection to LORD HOLT's class of Bailments, viz. that in truth the sort is no more than a branch of the third, and that a seventh might, with equal reason, have been added, since the fifth is capable of another subdivision. (a) There can be no doubt but that it may be divided, only as Sir William Jones suggests, into *locatio operis faciendi*, where work is to be

done upon the goods, and *locatio operis mercium vehendarum*, where they are to be carried, but into as many different subdivisions, as there are different modes of employing labour upon goods: in fact the civilians in their division of hirings, enumerated another class—viz. *Locatio custodiæ*, or the hiring of care to be bestowed in guarding a thing bailed, which Sir William Jones has not noticed.

The fifth of Lord Holt's classes of bailments is as we have seen, *locatio operis faciendi*, that is to say, where goods are delivered to be carried, or something is to be done about them for reward, to be paid to the bailee. And this, cannot be reasonably treated as a branch of the third, which is *locatio rei*, that is to say, where goods are

(a) Ante, p. 34.



lent to the bailee, to be used by him for hire; for there exists between them this essential difference, viz.: that in cases falling under the *third* class, or *locatio rei*, the reward is paid by the bailee to the bailor: whereas, in cases falling under the *fifth* class, or *locatio operis faciendi*, the reward is always paid by the bailor to the bailee.

It is true that in *Latin* both classes are described by the word *locatio*, which probably gave rise to *Sir W. Jones's* opinion that both ought to be included under the same head; but then in the *third* class, *locatio rei*, the word *locatio* is used to describe a mode of bailment, viz. by the hiring of the thing bailed; whereas, in the *fifth* class, *locatio operis faciendi*, the same word *locatio* is used, not to describe any mode of bailment, but to signify the hiring of the man's labour who is to work upon the thing bailed; for as to the thing bailed, that is not hired at all, as it is in cases falling within the *third* class. If, indeed, LORD HOLT had been enumerating the different sorts of hirings, not of bailments, he would, no doubt, like the civilians, have classified both *locatio rei* and *locatio operis* under the word *hiring*, since in one case goods are hired, and in the other labour. But he was making a classification, not of hirings but of bailments; and since in cases of *locatio rei* there is a hiring of the thing bailed, and in cases of *locatio operis*, no hiring of the thing bailed, it was impossible to place, with any degree of propriety, two sorts of bailment under the same class, one of which is and the other of which is not a bailment by way of hiring. (b) We think, therefore, that LORD HOLT's classification may be taken to be the correct one.

We will now turn our attention to the class called by civilians *Locatio custodiæ*; that is to say, the hiring of care to be bestowed in guarding a thing bailed, called also *Deposits for Hire*; of this class are WARE-

HOUSEMEN, WHARFINGERS, and AGISTERS of CATTLE.

BAILLEES of this class are responsible for losses by ordinary negligence (c). LORD KENYON in *Cailiff* and another v. *Danvers* (d), said, a WAREHOUSEMAN is only obliged to exert reasonable diligence in taking care of the things deposited in his warehouse, he is not like a carrier, to be considered as an insurer, and liable for all losses happening otherwise than by the Act of GOD, or the King's Enemies. So, in *Finucane v. Small* (e), LORD KENYON held, that where goods are bailed to be kept for hire, the bailee is bound to take the same care of them as he would of his own; and, therefore, if they are stolen by the bailee's servants, without gross negligence on his part, the bailor is not liable. To support an action in such a case against the bailee, Lord Kenyon said positive negligence must be proved.

If the goods be destroyed by *Vermis*, as in the case of *Cailiff* and another v. *Danvers* where they were destroyed by *Rats*, which in custody of the warehouseman, and the latter took all possible care of keeping out to destroy the vermin, Lord Kenyon said that the warehouseman having exerted due and common diligence for the preservation of the goods, was not liable to an action for the damage which he could not prevent.

The principal points to be considered regarding warehousemen are—When their liability begins and when it ends. This was determined by LORD ELLENBOROUGH in *Thompson* and another v. *Day*, (f) in which case Lordship said the whole question turned upon the single point of, when the warehouseman's liability commenced, and the agency of the carman ended? For until the goods were delivered to the warehouseman, the carman

(c) *Broadwater v. Blot*, Holt's N. P. C. 547.

(d) *Peakes*, N. P. C. 114.

(e) 1 Esp. N. P. C. 315; see also *Macfarlane v. Watt*, 5 Bing. 212; *Shields v. Broadbent*, 10 Blacks. 158; *Mytton v. Cook*, 2 Sess. 1800; *Osborne v. Smith*, 10 Rep. 134.

(f) 4 Esp. N. P. C. 208.

(b) See 1 Smith's leading cases (*Coggs v. Bernard*), n. 98.

was to be considered as the agent of the person sending them; but when the warehouseman took them into his own hands, the moment the warehouseman applied his tackle to them, from that moment his liability commences. And it is no defence that the goods were injured by falling into the street, by the breaking of the warehouseman's tackle, though the carman who brought the goods refused the offer of slings for further security. His Lordship observed, the tackle is used by the warehouseman and he is bound to see that they are of sufficient strength and for the purpose, and he should not apply tackle unless that could be performed which he was bound to do; if the slings were necessary, the refusal of the carman or his declining the use of them, will not exempt the warehouseman: he ought to have insisted on the carman's using them; and if he refused, the warehouseman should have repacked those goods and refused to accept them. The damaged pack of linen was in the crane, and lifted from the cart; it was in the possession of the warehouseman, being so in point of law he was liable for loss. (To be continued.)

#### PROBLEM XVII.—VOL. IV.

##### COMMON LAW.

Review the line drawn by the Law between Trespasses on the Case and Actions of Tres-

#### THE EDITOR OF THE LEGAL GUIDE. SUPPLEMENTARY ANSWER TO PROBLEM I.—VOL. 4.

**OFFER OF INSTRUMENTS.**—What is the import of the term *Oyer*? In what cases, and how demandable? In what cases will an *Indorsement of Instruments* be granted to a plaintiff, and what cases to a defendant? In what cases to obtaining admission of Documents beneficial.

—Prior to the passing of the law amendment act, 3 & 4 Wm. 4, c. 42, it was a cause of complaint, and certainly very just complaint, that expenses often very considerable were incurred by parties in bringing witnesses to the court to prove hand-writing, the execution of

deeds, the sending of letters, the service of notices, the examining copies of documents, and a variety of other matters of a similar nature, which turned out not to be in dispute, and which would have been admitted by the other party, had he been called upon so to do; or, at least, which he ought to have admitted; they not being matters which his line of defence made it necessary to dispute. In order, in all cases, to give the other party the opportunity of admitting such matters as these, and in some measure to constrain him to make the admissions where it is reasonable he should do so by a kind of penalty, in case of his refusal, the twentieth rule of Hilary Term, 4 Will. 4, was promulgated by the judges of the three courts, in pursuance of the said act, 3 & 4 W. 4 (vide *Gray's Co. Att. Pract.* 91). That rule is as follows:—

“Either party after plea pleaded, and a reasonable time before trial may give notice to the other, either in town or country, in the form hereto annexed, marked A, or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement on such notice within 48 hours, to make the admission specified, the party requiring such admission may call on the party required by summons, to shew cause, before a judge, why he should not consent to such admission, or in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order, the costs of proving any document specified in the notice which shall be proved at the trial, to the satisfaction of the judge, or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided that, if the judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the judge may give such time for enquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party refusing the admission as he shall think fit.

If the party required shall consent to the admission, the judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A judge may make such order as he may think fit respecting the costs of the application, and the costs of the production and inspection, and in the absence of a specific order, the same shall be costs in the cause."

It is to be observed, that the full-court has no jurisdiction to order the admission of documents under this rule, and if a judge at chambers refer the parties to the full court, they will hear the case argued, and intimate their opinion to the judge, but will not pronounce judgment (*Smith v. Bird*, 3 Dowl. 611); and with respect to the second provision, the rule, where a judgment and other documents required to be admitted were abroad at Brussels, an order was made under this rule, on the terms that the defendant should have a fortnight's time to inspect them, and that the plaintiff should pay the costs of such inspection, to be taxed by the prothonotary (S.C. Id. 641).

As observed by Mr. Bagley in his work on the Practice at Chambers, p. 307, it is not compulsory in any case on the party intending to produce documents in evidence to adopt the course pointed out by this rule; and, therefore, when it is considered unadvisable to inform the opposite party of the nature or contents of the documents proposed to be offered at the trial, the premature disclosure may be avoided: but in that event, the costs of proving it fall inevitably on the party producing it in evidence. On the other hand, when no solid objection exists to putting the adverse party in possession of the nature of the documents proposed to be offered in evidence, and any considerable expence is likely to be incurred in proving them, it seems judicious in all cases to require their admission in the manner prescribed, for whether the judge shall decide that the required admission is reasonable or unreasonable, the party producing the document in evidence will not be entitled to the costs of proof in any event, unless he has availed himself of the rule. If a judge, upon hearing the parties, intimates his opinion that a document ought to be admitted, it is generally assented to, but if it should still be refused, the only event in which the party refusing can escape from the obligation to pay the costs incurred in proving the document, is where the party producing such document has failed in proving it to the satisfaction of the judge who presided at the trial as testified by the absence of this indorsement on the document. It is altogether in the discretion of the judge before whom the summons is made returnable to say when it is reasonable to call for the admission of the document specified; but it is presumed that it would not be considered reasonable to require the admission of any document, when it appeared from the pleadings that the validity of such document was clearly in issue; as where *non est*

*factum* is pleaded to an action on a specialty or forgery to an action on a promissory note or bill of exchange, nor does it seem reasonable in general to require an admission of the execution of a private instrument to which the party called upon to admit is in no respect privy. Even in such instances, however, although the judge should be of opinion that it is unreasonable to require the admission unless the party producing the document applies for its admission under this rule, he cannot recover the costs of proof, although the issue should be determined in his favour. The judge cannot, it seems, order an admission of documents against a party's consent (See *Smith v. Bird*, 3 Dowl. 641; 1 Hodges, 96. S.C.; *Stracy v. Blake*, 7 C. & P. 404).

The following observations are made with the view that this rule may be better understood.

In the first place, the rule does not apply to any documents which are not in the possession or power of the party, and of which he consequently cannot give the inspection contemplated by the rule; the production of these must be compelled by *subpoena duces tecum* in the usual manner; and the costs of proving them will be allowed, although no notice to admit has been given. But if the party in whose possession they are will give them up to the party who intends to adduce them in evidence, or will permit the other party to inspect them in pursuance of a notice, it will be advisable to give the notice, as the admission may possibly be made required.

Secondly, It is to be observed, that the rule contemplates the doing of two things; first, the giving of notice, and affording the opportunity of inspection; and, secondly, if the admission called for be not given, the application to the judge to compel the party to pay the costs of proof which may be the result of the cause; and it is necessary to point out that each of these things has its separate object and effect, and that an advantage is obtained by the notice, even though the summons be not taken out, and a difference made by the summons; and, therefore, it will be advisable to give the notice though there may not be time to take out the summons, for if the notice be not given, the party producing the documents in evidence can have no costs of proof though he succeed in the cause; but if the notice be given, though it be not followed up by a summons, the party will be entitled to the costs of proof if he succeed in the cause. The object of the summons is different; it is, that if the party adducing the documents in evidence may, if he fail in the cause, have the costs of proof out of the pocket of the unsuccessful party who unreasonably refused to admit them. As was before observed, in no case can a judge compel a party to admit a document, should

when he is hearing the application, he merely judges whether or not the refusal of the party called upon be unreasonable. If he thinks the admission ought to be made, and that the refusal is unreasonable, he does not order the admission to be made, he merely orders the party refusing to pay the costs of proof even though he succeed in the cause. If he think that the refusal of the admission is reasonable, he merely indorses the summons to that effect, and then the costs of proof abide the result of the cause like the costs of any other evidence. It must, however, be also observed, that the judge's order that the party refusing do pay the costs of the proof is not final, for where such an order is obtained, the party who obtained the order, if he fail in the action (and in that case only is it material), must obtain a certificate from the judge who tried the cause, that the documents, &c. were proved to his satisfaction; this certificate is given on the back of each document, if he do not obtain this certificate, the order is of no avail, but if he do obtain it, he will then be entitled on the taxation of the costs to have the costs of the proof deducted from the costs of his successful opponent.

Where the witness who is to prove a document, is a material witness to prove another part of the case, and must be called, even though the admission of the document were made, it is apprehended that it is not necessary to give the notice or call for the admission, for the object of the rule being to save expence, it would seem to follow that it is not applicable where no expence could be saved, and this is countenanced by the language of the former rule (Hil. 2, W. 4, R. 7), which is not expressly revoked, and with which the present rule is not inconsistent, being merely an extension of it. The language of that rule is, that the expence of any witness called *only* to prove the handwriting, &c., shall not be allowed unless, &c." In cases where there is an objection to allow the inspection of a document of an adverse party, this observation is worth attention. In country causes, the notice to in-

spect and admit is usually given by the agent in town (who has the document sent to him for the purpose of the inspection) to the agent of the opposite party, who, if he consents to the required admission, indorses the notice accordingly, if otherwise, the summons is usually resorted to, and from what has been stated, a party called upon to make admissions will know how he ought to act, being aware of the consequences of a refusal; and it will always be advisable when the notice to admit is met with a refusal to take the opinion of a judge on its reasonableness or unreasonableness. (See Gray's Co. Att. Pr. 93, *et seq.*)

Having said thus much on the admission or refusal by the party required, I now arrive at the proceedings at the trial after such admission. If on a summons, to admit the handwriting of the defendant, his attorney refuse to admit it, and the usual order is made, the judge at the trial will certify for the costs of a witness, who is called to prove such handwriting; if the witness on his examination in chief depose to no other fact (*Stracy v. Blake, ub. sup.*) Where a plaintiff was non-suited in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence, which had been agreed to be admitted by the defendant's attorney's agent, the court granted a new trial with costs, to be paid by defendant (*Doe Tindal v. Roe, 5 Dow. 420*). A variance in the date of a note declared on, and of one admitted by a judge's order, is immaterial, where it does not appear that the defendant had been misled (*Field v. Henning, Dowling, 450; 1 M. & H. 21, s. c.*) Where defendant had, by judge's order, admitted a document, described as a counterpart of a lease, and at the trial, the instrument turned out to be a lease with only a counterpart stamp; he was held to be precluded by his admission from taking the objection (*Doe Wright v. Smith, 3 New. & P. 335*); *vide Archb. Prac. 7 Ed. by Chitty, p. 214.* E. A.

The following is the form of the notice referred to in the above rule.

In the Queen's Bench, (or Common Pleas, or Exchequer).

A. B. v. C. D.

Take notice that the { plaintiff } in this cause proposes to adduce in evidence the several

documents hereunder specified, and that the same may be inspected by the { defendant } his attorney or agent at — on — between the hours of — and — and that the { plaintiff }

will be required to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been, that such as are specified as copies are true copies, and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

To E. F., attorney or agent for { defendant } G. H., attorney for { plaintiff }

(Here describe the Documents, the manner of doing which may be as follows:—)

## ORIGINALS.

Description of the Documents.	Date.
Deed of Covenant between A.B. and C.D. 1st pt. and E.F. second part,	1st Jan. 1828.
Indenture of Lease from A.B. to C.D.	1st Feb. 1828.
Indenture of Release between A.B. and C.D., first part, &c.	2d Feb. 1828.
Letter, Defendant to Plaintiff,	1st March, 1828.
Policy of Insurance on Goods by ship <i>Isabella</i> , on voyage from Oporto to London,	3d Dec. 1827.
Memorandum of Agreement between C.D., Captain of said ship, and E.F.	1st Jan. 1828.
Bill of Exchange for £100, at three months, drawn by A.B., on and accepted by C.D., indorsed by E.F. and G.H.	1st May, 1829.

## COPIES.

Description of Documents.	Date.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of Baptism of A.B. in the parish of X	1st Jan. 1828.	{ Sent by General Post 2nd Feb. 1828. { Served 2nd March, 1828, on Defendant's Attorney, by E.F. of —
Letter, Plaintiff to Defendant,	1st Feb. 1828.	
Notice to produce Papers,	1st March, 1828.	
Record of a Judgment of the Court of King's Bench in an action, J. S. v. J. N.	Trinity Term, 10 Geo. 4.	
Letters Patent of King Charles 2d, in the Rolls Chapel,	1st Jan. 1680.	

## Law Reports.

## VICE CHANCELLOR'S COURT.

## IN RE MRS. TAYLOR.

CUSTODY of INFANTS ACT, 2 &amp; 3 Vict. c. 54.

(a) *Right of a married Woman who has absented herself from her Husband's house to have access to her children under this Statute.*

We have in a former volume reported this case when the application was made in November last by Mr. K. Bruce, on behalf of Mrs. Taylor, (b) for an order of access to her children under the provisions of the recent Statute, 2 and 3 Vict. c. 54. The application was the first made under that statute.

Mr. K. Bruce now appeared to support the petition of Mrs. Elizabeth Henrietta Taylor, praying that the court, under the provisions of the act, would make an order, directing that she may have the custody of such of her infant children as are under the age of seven, and that she might be permitted access to those who were above that age; her husband, Mr. John Don-nithan Taylor, having for some time past denied

her all intercourse with her children. It appears that Mr. and Mrs. Taylor were married in 1830, when the former was 33 years of age, and Mr. Taylor 19. There was issue of the marriage six children, five of whom were now living, two of them being under the age of seven, and the other three being in advance of that age. The circumstances which led to the separation which unfortunately took place between the parties, as related by Mrs. Taylor, appear to be these:—During the month of October, 1837, and shortly subsequent to her confinement of her last child, a Miss Holah, the governess of her children, both when they were residing at St. Leonard's and subsequently at the family residence, a Southgate, Middlesex, hinted to, and gave Mrs. Taylor reason to believe that an intimacy of an improper nature had taken place between Mr. Taylor and one Hannah Morris, who was then living in the family as nurse; Mrs. Taylor being in great distress of mind in consequence of the communication, she imparted the knowledge thereof to Mr. Christopher Arthur Harris, a married man, who had arrived at her house at Southgate, on a visit, on the 19th October, 1837, and who it appears was the first cousin of Mr. Taylor, and with whom it was stated both Mr. and her husband were on terms of the greatest intimacy and friendship, and who was in the

(a) See the Statute, ante vol. 3, p. 28.

(b) See vol. 3, p. 22. 103.

constant habit of visiting the family at their house at Woodlands. Upon the information being given to Mr. Harris, it was alleged that Miss Holah reiterated her former statements to Mr. Harris, who then advised Mrs. Taylor to meet him the next day at the house of Mr. and Mrs. Farquharson, mutual friends of Mr. and Mrs. Taylor, residing in Grafton Street, Fitzroy Square. At this period, Mrs. Taylor had written a letter to the trustees of her marriage settlement, stating the criminal charge which was brought against her husband, and requesting them immediately to interfere on her behalf. That letter was subsequently on the same day forwarded to Mr. Harford, one of her trustees. On the course of that day, the 20th October, 1837, the meeting took place at Mr. Farquharson's house, at Grafton Street, when it was stated that Miss Holah again re-asserted the charges against Mr. Taylor. Mr. Harris, upon that occasion, proposed to Mrs. Taylor that she should take the advice of a friend of his (Mr. Harris's) upon the subject, and a Mr. Andrews was accordingly introduced to Mrs. Taylor for that purpose. Upon Mr. Andrews being consulted as to what could be done in the matter, he suggested that she could obtain a divorce, but that if she returned again to her husband's house, knowing and believing her husband to be guilty of the criminal conduct imputed to him, she never could do anything afterwards, let the conduct of her husband be what it might, as her turning home under such circumstances would constitute condonation on her part. Mrs. Taylor, as she stated, believing and confiding in the advice of Mr. Andrews, and under the idea that she were then to return home she never could take any means to alleviate her situation, and being in a very afflicted and excited state of mind, without any previous preparation, determined to send the letter she had written to the trustees, and not to return home again to her husband's house; and on the same day she went, accompanied by Mr. Harris, and took up her residence at the house of a Mr. and Mrs. Schneider, living in Beaver Hall, Southgate, and who were on terms of intimacy with Mr. Taylor's family, residing home in her carriage Miss Holah, with two of her children, who had accompanied her to town that morning. During this transaction, Mrs. Taylor appears to have been absent from her home, in Northamptonshire, and returned to Southgate on the afternoon on the 20th of October. Mrs. Taylor's abandonment of her home led to a correspondence between Mr. Harris and Mr. Schneider, on the part of Mrs. Taylor, and her friends on the behalf of Mr. Taylor, wherein it would seem Mrs. Taylor's friends claimed for her a total separation from her husband, and a separate maintenance of £1,500 a year. Mr.

Taylor indignantly denied the truth of the charges brought against him, and even made an offer through one of his friends to Mrs. Taylor's advisers to have a reconciliation with his wife, without any conditions, to receive her back again to his home, and to the comfort of being with her children, but that offer was rejected; but it would appear that the fact of that offer was not then communicated to her. It would seem that Mrs. Taylor's advisers did not make any difficulty about her relinquishing access to her children in their proposals for a separation, but as soon as Mrs. Taylor understood, that, if a separation was to be effected, it was the determination of Mr. Taylor to deny her all access to her children, she immediately wrote him a letter, in which she solemnly asserted she never entertained the slightest intention of giving them up, and offered for their sakes to consign to oblivion all that had taken place. That letter it would appear was returned unopened, matters having now taken by far too serious an aspect. A formal offer was then made by Mrs. Taylor, through her solicitor, to return home to her husband, but he now refused to receive her without a total retraction of the charges with which she had accused him, but which Mrs. Taylor considered she could not conscientiously perform, as she had then no ground to gainsay the truth of what Miss Holah had imparted to her. Mrs. Taylor finding that her husband would not receive her back, or allow her access to the children, in July, 1838, instituted a suit in the Consistory Court against her husband for a restitution of conjugal rights, to which Mr. Taylor put in what was termed a defensive allegation, alleging that Mrs. Taylor had alienated herself from him voluntarily, and that she had set up a false and groundless charge of adultery against him, having for its object the obtaining of a separation, and a large separate maintenance. Dr. Lushington, the judge of the Consistory Court, rejected the allegation, as no legal defence to the suit, and pronounced a sentence in favour of Mrs. Taylor for a restitution of conjugal rights. Mr. Taylor thereupon appealed to the Court of Arches, but Sir Herbert Jenner confirmed the sentence of the Court below. Mr. Taylor being, nevertheless, dissatisfied with the decision of the Court of Arches, had since appealed to the Judicial Committee of the Privy Council, and that appeal was now pending. During the whole of this time Mrs. Taylor alleged that she had been denied all access to her children, with the exception only that she had seen them once at the house of her sister-in-law, Mrs. Walker, at Southgate. It was then stated, it would appear, that subsequently Miss Holah denied the greater part of what it had been alleged she had communicated to Mrs. Taylor, and wholly admitted that Mr. Taylor:

was altogether guiltless of any improper familiarity with the nurse Morris. Mrs. Taylor, upon learning this, avowed she could no longer place any confidence on what Miss Holah had stated to her, and feeling that she had been grossly deceived by the misrepresentations of Miss Holah, she at once withdrew the charge against her husband altogether. Matters were in this position when, in October, 1839, this petition was presented to this Court. It appears that Mrs. Taylor had expressed to her husband in the most ample and humble manner her sorrow for having imputed the criminal charges to her husband, she being thoroughly persuaded that Miss Holah had practised the most gross deception upon her. It further appears that Mr. Taylor, since the separation, and long previously to the institution of the suit in the Ecclesiastical Court had given up his house at Southgate, and had retired to France, taking his children with him, in which country they are now resident, being committed to the care of Miss Holah, who still continues their governess. This is a brief outline of the facts contained in the affidavits first made by Mrs. Taylor in support of the petition. To these Mr. Taylor filed affidavits in reply, which contained the most solemn denials on the part of Mr. Taylor and Hannah Morris that there was the slightest shadow of truth in the criminal accusation which had been brought against them, and they also contained the positive denials of Miss Holah, of the statements it had been alleged she had made to Mrs. Taylor. But Miss Holah, in order to explain what really did occur, stated that she had told Mrs. Taylor of the impertinence of Hannah Morris, in saying, one day, whilst the infant was crying in the absence of its mother, "That if she had known Mrs. Taylor was to meet Harris, she could not have been surprised, as she cared more for Harris than her child." Miss Holah also stated in her affidavit that it was Mrs. Taylor who first mentioned to her about the criminal conduct imputed to Mr. Taylor, and that Mrs. Taylor told her Harris said he could prove it. In confirmation of this, it did appear that Harris had on several occasions said he could prove it, and had even stated a particular occurrence in Mr. Taylor's bed-room which he said he had seen by reflection in a looking glass. One thing was quite apparent upon the evidence—namely, that Hannah Morris had been always treated by the family with much familiarity. It also appeared from the affidavits, that Mr. Taylor had made every effort to bring about an unconditional reconciliation with his wife, and had even sent a friend of his, a Mr. Gray, with his carriage, to induce her to return home, but that all those attempts were frustrated by Mrs. Taylor's advisers. Mr.

Taylor, in his first affidavit in reply, stated, that he found in his wife's escritoire an open box, containing letters written in the Italian language relating to intrigues with women, in which Harris had been engaged, when he was residing in his earlier days in Italy. Mr. Taylor further stated, that his mind had been much irritated by reports which he had heard of Harris constantly walking with Mrs. Taylor in a wood, from which the children were excluded; but, at the same time Mr. Taylor expressed his complete conviction that Mrs. Taylor had not been guilty of any improper conduct of that sort. Affidavits were then filed in reply to Mr. Taylor's affidavit, in which Harris took a prominent part. It seems Harris had dared Mr. Taylor to prove that any impropriety of conduct had ever existed between him and Mrs. Taylor, and had written a letter to Mr. Taylor in which he designated him as a scoundrel and a coward. Harris solemnly denied every thing that had been stated with regard to him and Mrs. Taylor, and retaliated on Mr. Taylor, by charging him with irreligion, and the giving utterance to blasphemous expressions in their private conversations; and, as regarding the Italian letters, he said they had been given to Mrs. Taylor to put up by her husband's directions, and that Mrs. Taylor did not know their contents—Mrs. Taylor never read them, and did not understand the Italian language. Others of these affidavits in reply, contained charges imputing to Mr. Taylor great and uncontrollable hastiness and violence of temper, acts of cruelty and violence towards his wife, and also towards his domestic animals. Four instances only were mentioned. The first was that he threw books about the room when in a fit of passion, another by frightening his wife by driving on some occasion an unbroken horse in his carriage; a third was that of ill treatment to a favourite horse of Mrs. Taylor's, in order to annoy her; and lastly cruelty towards a horse of his own, although he was a great sportsman, fond of hunting and horses. It was also charged against him that he had interdicted all intercourse between his wife and her family, in consequence of his having lost nearly £10,000. by the bankruptcy of his father; and it was, moreover averred that Mr. Taylor and Miss Holah were teaching the children to disrespect their mother, and to exclude her name from their prayers. Affidavits were filed in reply to these on behalf of Mr. Taylor positively denying the truth of all these charges, and the clergyman of the Church which Mr. Taylor was in the habit of attending, by his affidavit stated, that Mr. Taylor was steadily and uniformly attentive to his religious duties, as the matter, with regard to the children's prayers was thus explained, that it was thought best to exclude the names of both father and mother.

from the prayers, in order to prevent their asking questions, which would be painful to answer with regard to their mother. It further appeared that although Mr. Taylor was, at times, of rather a hasty temper, yet that generally he was a most kind-hearted, generous man, most doatingly fond of his children, and that he had been throughout a kind and affectionate husband and father. It seems also that Harris had since these unfortunate differences arose between the parties, become bankrupt, that there were large debts, that no dividend had been as yet paid, or was likely to be paid, and that he had not obtained his certificate. The learned counsel who supported the petition contended that it was admitted on all sides that Mrs. Taylor's whole conduct was unimpeachable in every respect, and that the error he had committed by being induced, at one time, to believe that her husband had been guilty of improper intimacy with Morris, which charge he afterwards, when she was convinced she had been deceived as to the truth of it, most willingly and submissively withdrew, and expressed her deep and poignant sorrow at what had taken place, was not an offence for which she should forever be punished by denying her all access to her children. The Ecclesiastical Courts had already twice decided that she was entitled to be restored to her husband and to her children. They submitted, that under all the circumstances of this case, Mrs. Taylor was entitled, as a matter of right, to have access to her children; and it was therefore hoped the court would make an order to that effect, which order might be enforced either personally against the father, or by sequestration of his property.

(To be continued.)

## COURT OF QUEEN'S BENCH—June 20.

*Sittings in Banco.*

KING v. BURRELL.

MUNICIPAL CORPORATION ACT, s. s. 15, 48.

—LIABILITIES of Overseers to Penalties for not making out and signing proper alphabetical lists of the Burgesses.

This was an action of debt to recover a penalty of £50. from the defendant, one of the overseers of the parish of St. Margaret, in the borough of King's Lynn, for not making and signing a proper burgess list for that parish, which was tried before Lord Chief Justice TINDALL, when a verdict was found for the plaintiff, with leave for the defendant to move to enter a nonsuit or to arrest the judgment. A rule *Nisi* had been granted, and now came on for argument. It appeared that the parish of

St. Margaret's by a local Act of Parliament was divided into nine wards, and there was an overseer of the poor for each ward. By the *Municipal Corporation Act*, sec. 15, the overseers were directed to make out a burgess list in the manner in the act mentioned, and to sign such burgess list, and deliver the same to the town clerk on the 5th of September. Then by the 48th sec. it was enacted that, if any overseer should neglect or refuse to make out and sign such list, he should be liable to a penalty of £50. It appeared that in this parish each overseer had made out a list for his own ward, so that there were nine lists, to eight of which was affixed only the name of the overseer whose list it was, but the defendant had wholly omitted to sign the list which he had delivered to the town-clerk. The plaintiff charged this as a wilful omission, but the defendant said it was accidental.

Mr. Kelly shewed cause against the rule, and contended that, whether the omission was wilful, or arose from negligence, still the defendant was equally liable to the penalty, and that such was the intention of the legislature, in order to compel overseers to do their duty.

The *Attorney-General* for the rule contended that, if it was to be considered that overseers were liable to this penalty for every act of omission which arose purely from negligence or inadvertence, it would be a most hard case upon a man who might be perfectly innocent of any design in the matter. The legislature could only have intended to visit a party with so heavy a penalty for a wilful act. But that here there was no omission, for that the signatures of eight of the overseers (that forming a majority of the entire number) made one entire list, and, therefore, the Act of Parliament had been complied with.

Lord DENMAN said this was an action brought, under the *Municipal Corporation Act*, by the plaintiff against the defendant, one of the overseers of the poor of the parish of St. Margaret's, Lynn, to recover a penalty of £50., for not making out and signing an alphabetical list of the burgesses of the said parish. This declaration was founded on the 15th section of the *Municipal Reform Act*, which provided for the manner in which overseers were to make out lists in their respective parishes. It required that the overseers should make out and sign such burgess lists, and deliver them to the town clerk. The 48th section created the penalty, and enacted that, if any overseer of any parish should neglect or refuse to make out, sign, and deliver such list, he should forfeit £50. It was upon these sections this action was founded. It was important to observe that these two sections were the only security for carrying this act into



There was nothing but the provisions of these two sections to provide a punishment for an individual who refused or neglected to perform his duty. The whole was left unprovided for but for these two sections. He then came to the question of the meaning of these provisions. The declaration properly stated that the defendant had neglected and refused to make out and sign the list of his parish. This was an infraction of the provisions of the 15th section, and an offence within the meaning of the act. Then it was said that the defendant was entitled to a nonsuit, because there was no neglect, or, if there was any neglect, that it was not wilful, and then a further argument was raised, that the declaration was bad on other grounds. In the first place it was said that he had in truth made out and signed the lists, and upon this subject the facts were, that this parish was divided into nine wards, and there was one overseer for each ward, and each of the overseers acted for his particular ward; and it appeared that eight of these overseers had signed a list for his ward, but that the defendant, who acted for the ninth ward, did not sign the list in question. This was said to bring the case within the words of the 48th section, and certainly they appeared to him to apply directly to a person so acting. It was said, in answer, that inasmuch as they all gave in their lists, and he made his name appear in the lists, although he did not sign it, that might be taken as a signature by him, by analogy to the cases on the statute of fraud. He must own that it appeared to him that nothing could be more clear than the words of the Act of Parliament, that signing could not but be understood as placing the name at the bottom of the list, and that placing it in any other part was not a compliance with the Act of Parliament, but constituted a breach of its provisions. It was then contended that they could not be said to be wilfully done, and the fact that there was no such allegation on the record had been put forward as a ground for the motion in arrest of judgment. It appeared to him that it was unnecessary to state or prove any such thing. The intention of the law was, that parties entrusted with a duty of this kind must know what were the provisions of a statute relating to that duty, and that if they neglected to comply with those provisions, they must be punished for their neglect. It was a wise and prudent precaution on the part of the legislature, for if in every such case there must be an inquiry as to whether the act was done from corrupt motives, there would be no end to such inquiries, and juries from a feeling of good nature, which often tended to defeat justice, would say no one should suffer a penalty of £50. for an act of negligence of this sort; but it seemed to him that the neglect to do a particular act was meant by

the legislature to be so punished. Then it was said it might be pushed to an inconvenience; but he must say he did not think this could be borne out. It was said, supposing a party desirous of doing the act, but prevented by a superior force, he did not wilfully omit it, but he apprehended that a party who could prove that fact would show he had not contravened the Act of Parliament. Then it was said, that a strict construction of the act would make him liable to a penalty, if the list was not alphabetical. He did not think that the true construction of the act; it did not mean the perfect collocation of every letter of every word, so as to be alphabetical according to the meaning of that phrase when used by a dictionary compiler, but a list so framed as to be capable of easy reference by the means of an ordinary alphabetical arrangement. The declaration was then said to be bad, for though it charged the defendant with not making out and signing a list, it did not say that in fact the list was not made out, each of the other overseers having made out and signed his portion, and all the portions together being said to constitute one list. He thought that no objection to the declaration—it seemed to him that each party was to answer for his own act, and the act of all the rest could not make one individual more or less guilty than he was by his own act. Supposing it had been signed by the majority of the overseers, yet if the defendant had neglected his own duty in respect of it he would be punishable for that neglect, and it was unnecessary to aver that the other overseer had or had not signed the list. It was possible that the majority of the overseers might have signed the list, and so not have contravened the Act of Parliament; and as the act of the majority was in every case the act of all, it was insisted that this was a sufficient answer to the action. If that was really a good defence in point of fact, it must be assumed now that that defence was negatived, for otherwise the act of this particular defendant would be excused, and yet on the facts the jury had found a verdict against him. On these grounds he was of opinion, first, that it was the duty of all the overseers to sign the burgess list of their parish; and secondly, that if any one of them was proved to the satisfaction of a jury to have neglected that duty, he would have incurred the penalty imposed by the act. Thirdly, that the fact of other persons having signed particular portions of the list, while he had in truth not signed his part, such part being necessary to make the list complete, would not excuse him from the penalty imposed on him by the act for such neglect of duty.

Rule discharged.

COURT OF COMMON PLEAS—July 7.

Sittings at Nisi Prius.

DAVIES v. CHAPMAN.

**PRISONER for DEBT and GAOLER—ESCAPE from PRISON RULES—Liabilities of Gaolers where the Prisoner is found beyond the prescribed limits.**

This was an action against the Marshal of the Queen's Bench Prison for the alleged escape of Lewis Joseph James Noel, brought by the plaintiff, *Phenias Davies*, to recover £185. 16s. the amount of debt for which the Marshal held Noel in custody at the suit of the plaintiff.

Mr. Sergeant *Andrews* stated the case for the plaintiff, from which it appeared that Noel was charged in execution, and confined within the walls of the Queen's Bench at the suit of the plaintiff for this debt. On the 16th of April, 1838 (Easter Monday), at 11 o'clock at night, a son of the plaintiff left London to go to Greenwich. He there saw Noel standing outside one of the booths, and that absence out of the rules of the King's Bench constituted the escape. The complaint now was that Noel, between the hour of eight in the evening of Monday the 16th, and five o'clock of the next morning, was out of the rules, being then at Greenwich. He returned within the rules in the morning. He was occasionally seen at the rehearsals at the Victoria Theatre, and he was also stated to be in the habit of visiting a female in the Blackfriars Road; but also appeared that he used to obtain day rules term time; and, with the exception of the 16th of April, the evidence did not specifically apply any particular day.

The defendant pleaded that the prisoner escaped without the knowledge or consent of the Marshal; and that Noel returned into custody the next day, before the defendant was aware of his escape. There was a further defence, that after that period the prisoner had been in safe custody up to the time when the action was brought. Since the transaction in question, Noel had taken the benefit of the Insolvent Act, and died soon afterwards.

ERSKINE, J., said, that the material question was whether the defendant had proved that after the return of the prisoner, subsequently to his escape, he had continued in the custody of the Marshal until the action was commenced. If that had been established, the verdict must be for the defendant; otherwise the decision must be in favour of the plaintiff.

Verdict for the defendant.

COURT OF EXCHEQUER.—June 26.

Sittings in Banco.

**Dec. dem. DUNNING v. The EARL of CRANSTON.**  
SPECIAL CASE.

**DEVISE of Testator's FREEHOLD lands in cer-**

**tain parishes, which were held for a considerable time by his Father's Ancestors in the male line, whether it can be construed to pass LEASEHOLDS in the same parishes that had been held in such manner.**

This was a special case, drawn up for the purpose of obtaining the opinion of the court on the construction to be placed upon certain clauses of the last will and testament of the Earl of Ashburton; the question being whether certain leasehold property would pass to his Lordship's collateral male heir under a devise of freehold property to him, if such a claimant should appear within three years after the death of the testator. The lessor of the plaintiff (the male heir) had brought an ejectment to recover these leasehold lands, which were situate in the parishes of *Walkhampton* and *Buckland Monachorum*, in the county of *Devon*. The action was tried before COLERIDGE, J., when the plaintiff had a verdict, subject to the opinion of the court on the following special case:—On the 21st of January, 1820, Lord *Ashburton*, by will, duly attested to pass real estate, devised as follows:—"I give, bequeath, and devise all my freehold lands, manors, estates, and real property whatever, situate in the county of *Devon*, to my wife, Lady *Ashburton*, to hold and enjoy the same for the term of her life: and whereas it appears to me that one part of my said freehold lands, namely, those lands which I hold in the parishes of *Walkhampton*, of *Buckland Monachorum*, and of *Meary*, were held for a considerable period of time by my father's ancestors in the male line, bearing the name and arms of *Dunning*, as hereditary proprietors of the same; I therefore consider it just and equitable that those lands should continue to be held, if possible, by persons of the same name and family; and although I have no son or brother, nor other heir male known to me, yet whereas it is possible that some distant heir male may exist, although unknown to me; I therefore give, bequeath, and devise the freehold lands which I hold in the above parishes of *Walkhampton*, to that person who may, at the moment of my wife's death, in case of her surviving me, or at the moment of my own death, in case of my surviving her, be my nearest relation and heir male of the name of *Dunning*. In case the same be found, and the heirs male of my said wife, her son, or if no person can be found, I give, bequeath, and devise by this devise within three years, &c., in that case I hereby reserve that special devise, as a proviso, that the said lands shall in no case be included in the general devise of my said lands in *Devon*." The testator then bequeathed his freehold lands, manors, estates, and real property whatever, situate in *Devon* to his son, after the death of his wife. The *Cranston* is life, &c. &c. &c. and the remainder of the same

will then contained a bequest of all the testator's leasehold estates in *Devon* to his wife, till the expiration of his interest therein in 1845, with a provision in case of her death before that period, and appointed her his executrix. The testator died 23rd of March, 1823, leaving *Lady Ashburton* surviving him. At the time of his death the testator was possessed of the leasehold lands in question, which were situated in the parish of *Walkhampton* and *Buckland Monachorum*, and which were held by him for the residue of a term of one thousand years, created in 1650, and neither at the time of his death, nor of making his will, had he any other lands, either freehold or leasehold, in either of those two parishes. He had certain freehold lands in the parish of *Meary* as well as in other parts of the county of *Devon*, for none of which, however, was any defence taken in this ejectment. There was also certain leasehold estates in other parts of *Devonshire*, held under a term that would expire in 1845. *Lady Ashburton*, on the decease of her husband, took possession of the leaseholds in question, and held them till her death in July, 1835, previous to which she devised them to the defendant *Lord Cranstoun*. In the mean time one *John Dunning* made out his claim to the property devised in favour of the next collateral heir male to the testator, and died in May, 1839, leaving *Richard Dunning*, his eldest son, and heir-at-law. The present ejectment was brought by this *Richard Dunning* as such heir-at-law, and the other two plaintiffs as executors and residuary legatees of *John Dunning*, to recover the leasehold lands in question, on the ground that after the death of *Lady Ashburton* they had by force of the devise in the will of *Lord Ashburton* passed to *John Dunning*, as next collateral heir male.

Mr. *Fitzherbert* appeared for the lessor of the plaintiff, but he was stayed by the court, which called upon the defendant to support his defence.

Mr. *Butt* appeared for the defendant, who claimed under the devise made by *Lady Ashburton*, and disputed the right of the collateral male heir to take any thing but the freeholds in the parishes specified by the testator, *Lord Ashburton*, in his will. He cited *Davis v. Gibbs* (a), *Hobson v. Blackburn* (b), *Thompson v. Lady Lawley* (c).

*PARKE, B.*, gave the opinion of the COURT, and said, the question seemed to have been settled in *Day v. Trig* (d), where a devise was made of all the testator's freehold houses in a specific place, and after his death it appeared that all his property there was leasehold, yet the leaseholds were held to pass by the devise. The

Court was unanimously of opinion that the case was beyond all doubt. The simple question was, did the testator mean to devise any particular lands which might be accurately ascertained? If any such could be identified, then, even though they might be inaccurately described in the will, such as in this instance was the case in respect of the tenure, the rule of law was clear, and gave effect to the devise. It had always been held, that *falsa demonstratio non nocet*. Now, here was simply a *falsa demonstratio*, by applying the term "freehold" instead of "leasehold" to this property, which having been held by those who bore the name and arms of *Dunning* in the male line for more than two centuries, the testator, as an act of justice, devised them all to his collateral male heir of that name, if any such should appear within three years after his demise. Such a person did appear, and it was clear that he was entitled to all the lands, as well leasehold as freehold, in those parishes, though the devise specified them to be freehold. In *Comyns' Digest* (e) it is said, "If the thing described is sufficiently averred it is sufficient, though all the particulars are not true; as if a man conveys his house in D which was *R. Cotton's*, when it was *Thomas Cotton's*."

*Judgment for the plaintiff.*

#### COURT OF REVIEW.—July 25.

FIAT v. MATTHEW WOTHERSPOON.  
Ex parte JAMES BATESON, Assignee of the Bankrupt.

COMPOSITION — STATUTE OF LIMITATIONS — *Whether a Composition made more than six years since, and the whole not paid before the Bankruptcy, the ORIGINAL DEBT is revived, and can be proved under the Fiat.*

This petition involved a question of very high importance to commercial men. It stated that on the 1st of January, 1829, the bankrupt *Henry Donaldson* entered into partnership with merchants in Liverpool for seven years, which was carried on under the firm of *Donaldson and Wotherspoon* up to the death of the said *Henry Donaldson*, which took place on the 8th of March, 1830, and subsequent thereto by the bankrupt under the same firm, Messrs. *Donaldson and Wotherspoon*, opened a banking account with Messrs. *Fletcher, Roscoe, & Co.*, bankers of Liverpool; and at the time of the death of the said *Henry Donaldson*, there was a balance of £307. owing from *Donaldson and Wotherspoon* to *Fletcher, Roscoe, & Co.* Shortly after the death of *Donaldson* the balance due from the firm of *Donaldson and Wotherspoon* to *Fletcher, Roscoe, & Co.* was increased to £1655; and in 1831, the bankrupt being then cashier,

(a) 3 P. Wms. 26.

(c) 2 Bos. & Pull, 303.

(b) 1 Mylne & K. 571.

(d) 1 P. Wms. 286.

(e) Fiat, E. 4.





amount of the *balance* due on the *composition*. The affidavit of Mr. *Lace* was to the effect that all his letters to the bankrupt had reference to the full debt owing by the bankrupt to *Fletcher, Roscoe, & Co.*, and not to the balance of the composition.

Mr. *Dixon* supported the petition, and contended that the assignees of *Fletcher, Roscoe, & Co.* could only be admitted to prove for the balance of the composition, upon the principle that an acknowledgment of a debt without a promise to pay a particular sum would only carry nominal damages.

*Rose, J.* said, the question is what *assumpsit* is to be raised.

Mr. *Swanston*, for the respondents, contended that as the composition had not been paid the original debt still existed—that the composition was not binding—there was only one debt—and the payments had been made on account of the original debt upon which a composition had been proposed, but never carried into operation.

*Cross, J.*—You may take it that *the whole debt* is distinctly admitted; the question is, whether the promise to be implied is a promise to pay.

Mr. *Anderdon*, for the petitioner, said this was a very important question, and the recent decisions in the courts at Westminster had established the principle under Lord Tenterden's Act, that a party must, in addition to acknowledging the debt in writing, state the sum he would pay, and the bankrupt's letters had reference to the composition.

*Rose, J.* was of opinion that the letters of the bankrupt must be taken to refer to the original debt, which was consequently revived, and the Commissioners were correct in admitting the proof.

*Cross, J.* said, the bankrupt's letter of the 18th of Feb. 1832, which appears upon the petition, says, "the balance shall be arranged;" this is a distinct and unqualified acknowledgment of the original debt. The receipt referred to the composition, yet as that had not been paid, there was but one debt, and that was the original sum due.

Petition dismissed with costs. The costs of all parties to come out of the estate.

#### HOME CIRCUIT:

*Maidstone, July 27.*

BUDD AND ANOTHER, EXECUTORS OF C. R. BROUGHTON, ESQ. v. EDWARDS.

COMPETENCY of a WITNESS—HUSBAND and WIFE.

This was an action brought to recover the amount of two checks, and also a bill of exchange, alleged to be given by the defendant in

1824. The defendant pleaded the Statute of Limitations, and several other pleas. The principal question in the cause was as to an alleged part payment in goods, so as to take the case out of the statute.

Mr. Luddy, the only witness for the plaintiffs to prove the facts, was called. He was objected to as incompetent, and was examined as to his interest. It appeared that the testator by his will had bequeathed to Eliza Ann Morton, the wife of the witness, all the property, furniture, goods, silver, and credits which should appertain to him at his decease. The witness produced a release which he had executed to the plaintiffs.

Mr. *Thesiger*, for the plaintiffs, argued that the release made him a competent witness.

*Platt and James—contra.*

LORD ABINGER.—The wife's interest has not been reduced into possession, and she has not joined in the release. The witness cannot be examined.—Plaintiff nonsuited

#### 3 & 4 VICT. cap. 94.

*An Act for facilitating the Administration of Justice in the Court of Chancery.*

[10th August, 1840.]

Whereas it would greatly contribute to the diminishing of expense and delay in suits in the Court of Chancery if the process, pleadings, and course of proceeding therein were in some respects altered, but this cannot be conveniently done otherwise than by rules or orders of the judges of the said court from time to time to be made, and doubts may arise as to the power of the said judges to make such alterations as may be expedient without the authority of Parliament: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the Lord Chancellor, with the advice and consent of the Master of the Rolls and the Vice Chancellor, or one of them, may and he is hereby required, by any rules and orders to be from time to time by him made with such advice and consent as aforesaid, at any time within five years from the passing of this act, to make such alterations as may seem expedient in the form of writs and commissions, and the mode of sealing, issuing, executing, and returning the same, and also in the form of and mode of filing bills, answers, depositions, affidavits, and other proceedings, and in the form and mode of obtaining discovery by answer in writing or otherwise, and in the form and mode of pleading, and in the form and mode of taking or obtaining evidence, and generally in the form and mode of proceeding to obtain relief, and in the general practice of the court with relation thereto, and also in the form and mode of

proceeding before the Masters, and in the form and mode of drawing up, entering, and enrolling orders and decrees, and of making and delivering copies of pleadings and other proceedings, and to make such regulations as to the taxation, allowance, and payment of costs, and for altering, superintending, controlling, and regulating the business of the several offices of the court, and also of collecting the fees payable to the suitors fee fund, and for directing the payment into the suitors fee fund of the copy money now received by any of the officers to their own use, and otherwise for carrying into effect the said alterations, as to them may seem proper; and all such rules, orders, and regulations shall be laid before both Houses of Parliament, if Parliament be then sitting, immediately upon the making and issuing of the same, or if Parliament be not sitting, then within five days after the next meeting thereof; and no such rule, order, or regulation shall have effect until each House of Parliament shall have actually sat thirty-six days after the same shall have been laid before each House of Parliament as aforesaid; and every rule, order, or regulation so made shall from and after the time aforesaid be binding and obligatory on the said court, and be of like force and effect, as if the provisions contained therein had been expressly enacted by Parliament, unless the same shall, by vote of either House of Parliament, be objected to.

II. And be it enacted, that from and after the passing of this act such additional officers, clerks, and messengers, in any of the present or future offices of the court, as the Lord Chancellor, with the advice and consent of the Master of the Rolls and the Vice Chancellor, or one of them, shall determine to be necessary and proper, shall and may be from time to time appointed.

III. And be it enacted, that the officers, clerks, and messengers who shall be appointed as herein-before directed, and the present officers, clerks, and messengers of the said court, shall receive by way of salary or additional salary for the performance of their several duties such annual sums as the Lord Chancellor and the commissioners of her Majesty's Treasury shall from time to time fix and determine; and that the same, and the expense of copying and writing for the said court or any of the officers thereof, shall be paid and payable under an order of the said Court of Chancery out of the interest and dividends of the Government or Parliamentary securities which may at any time be standing in the name of the accountant-general of the High Court of Chancery to an account entitled "account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery," and to an account entitled, "account of securities purchased with surplus interest arising from securities carried to an ac-

count of monies placed out for the benefit and better security of the suitors of the High Court of Chancery," or either of them (but subject and without prejudice to the payment of any salaries and other sums of money by any Act or Acts of Parliament now in force directed or authorised to be paid thereout); provided that nothing herein contained shall authorise the diminution of any of the several salaries to which the present officers, clerks, and messengers are now entitled.

IV. And whereas the emoluments of some of the officers of the said court may be diminished by the operation of this act, or by the rules and orders to be made thereunder, for which they may claim to have compensation made; be it therefore enacted, that it shall be lawful for the commissioners of her Majesty's Treasury for the time being, or any three or more of them, and they are hereby required, within the space of six calendar months after any such claim shall arise and be made, by examination on oath or otherwise, (which oath they and each of them are and is hereby authorised to administer), to inquire whether any, and if any what, compensation ought to be made by any officer or person claiming such compensation, the said commissioner-having regard to the conditions on which the appointment of any such officer was made, or to any notice which at the time of such appointment may have been given to such officer that such officer was to be holden subject to any provision by Parliament for the abolition or regulation thereof, but with full power for the said commissioners to investigate and determine whether, from the nature of the said offices or the mode of accession thereto, any such conditions or notice could have been properly made or given and also having regard to the holding of any office, place, or situation by such officer under this act; and that in all cases in which it shall appear to the said commissioners that compensation ought to be granted it shall be lawful for the said commissioners, or any three or more of them, by warrant under their hands, to order and direct that such annual or other compensation shall be made to the persons so claiming such compensation as aforesaid, or any of them, as to the said commissioners in their discretion shall seem just reasonable; and all such compensations, whether annual or in gross, shall be issued and paid and payable by the said accountant general of the said Court of Chancery, by virtue of an order or orders for that purpose to be made by the said Court of Chancery, out of the interest and dividends that have arisen or may hereafter arise from the Government or Parliamentary securities now or hereafter to be placed to the said two accounts in the Bank of *England* standing in the name of the said accountant general of the said Court of Chancery, and entitled "account of monies placed out for the benefit and better security of

the suitors of the High Court of Chancery," and "account of securities purchased with surplus interest arising from securities carried to an account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery," (but subject and without prejudice to the payment of all salaries and sums of money by which any act or acts now in force are authorized to be paid thereout): provided always, that an account of all such compensations shall, within fourteen days next after the same shall be so granted, be laid upon the table of the House of Commons, if Parliament shall be then assembled, or if Parliament shall not be then assembled, then within fourteen days after the meeting of Parliament then next assembled.

V. And be it enacted, that in the construction of this act the expression "Lord Chancellor" shall mean also and include the Lord Chancellor, Lord Keeper and Lords Commissioners for the custody of the great seal of the United Kingdom for the time being.

VI. And be it enacted, that this act may be altered, amended, or repealed during the present session of Parliament.

#### POSTAGE RETURNS.

Returns showing the effect of the late reductions in the rates of postage have just been printed by the order of the House of Commons. The steady progressive increase of the number of letters is highly satisfactory, especially under the present dull and depressed state of trade. Even with the short and limited experience of the working of the penny postage, we may surmise that the phenomena of the number of letters standing still or retrograding, with an increasing population and increasing trade, are passed away.

One return shows the number of chargeable letters passing through the General Post in London since the first reduction was made: and those for the corresponding period of 1839. The result stands thus:

1839.	1840.
FOUR WEEKS ENDING.	FOUR WEEKS ENDING.
Total No. of Letters.	Total No. of Letters.
5th Jan. 1,500,916	4th Jan. 2,102,281
2d Feb. 1,543,375	1st Feb. 3,004,266
2d March 1,557,880	29th Feb. 3,338,074
30th March 1,604,356	28th March 3,372,667
27th April 1,656,316	25th April 3,404,900
25th May 1,619,765	23d May 3,461,278
22d June 1,649,020	20th June 3,665,193

The second return relates to the London district post. It appears that in the first four weeks after the reduction from 2d. and 3d. to 1d. 1,302,555 letters passed through this post. In the four weeks ending June 20, these numbers

had increased to 1,702,344, or above 30 per cent. Before any change whatever, the average weekly number of letters was 254,225. The weekly average at the present time is 423,086, so that the metropolitan local letters have increased upwards of 60 per cent. It is a safe prophecy to say that if this ratio of increase continues, not many months will elapse before the reduction in this post will be actually profitable to the revenue.

The third return shows the progress of the weekly numbers for the whole of the kingdom, in monthly intervals:—

Week ending	Number of Letters.
24th Nov. 1839, (before any change)	1,585,973
22d Dec. 1839 (4d. rate)	2,008,687
23d Feb. 1840 (1d. rate)	3,199,637
22d March, 1840	3,069,492
26th April, 1840	2,954,866
22d May, 1840	3,138,035
21st June, 1840	3,221,205

The week ending 26th April being Easter week, and consequently an universal holiday week, accounts for the slight falling off in that week. Excepting this week, and the first week after the reduction to 1d., it will be seen that the numbers have been increasing for the last three months. It may be as well to remind our readers that the fourpenny rate came into operation on the 5th December, the penny rate on the 10th January, and the stamps on the 6th May.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Cornhill, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstan-in-the-West in the City of London.—Saturday, Aug. 23, 1840.

ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

PUBLISHED IN DUBLIN AND EDINBURGH EVERY MONDAY.

# The Legal Guide.

Vol. IV.]

SATURDAY, AUGUST 29, 1840.

[No. 18.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 259.)

#### LOCATIO CUSTODIE. WAREHOUSEMEN.

THE late Lord TENTERDEN, in his admirable work upon shipping, observes (a) that goods are frequently sold upon credit while they remain in the custody of a warehouseman, who is to deliver them to the buyer, upon receiving an order for that pur-

(a) P. 469.

Vol. IV.

## COURT OF REVIEW.

Fiat against WM. MUNROE the younger and THOMAS MUNROE — Petition of JONATHAN ACKROYD and EDWARD ACKROYD — Fiat issued by the Act of the Bankrupt to prevent a Creditor having Execution — Whether the Court will annul it . . .

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Notice to Correspondents . . .

pose from the seller. In such cases the custody of the warehouseman has been sometimes considered as in the nature of a transit; and questions have arisen as to the power of the seller to countermand an order that may have been received by the warehouseman upon discovering the insolvency of the buyer (b). Upon such a question it is important to ascertain whether, according to the nature and subject-matter of the contract, any other act on the part of the seller is to precede the actual delivery of the goods. If nothing is to precede it, and the order has been handed by the buyer to the warehouseman, and he has made the usual entry in

(b) Dixon v. Yates, 5 Barn. & Adol. 313.

T



his books, changing the name of the proprietor (c), or even if he has not made such entry (d), the handing of the order to the warehouseman is a constructive taking possession by the buyer, and the order cannot be countermanded. A *fortiori* it cannot be countermanded if the buyer has actually removed from the warehouse a part of an entire quantity of goods sold at one fixed and entire price (e). But if any thing is to be previously done on the part of the seller to ascertain the amount of the price, or to ascertain and perfect the specific subject of the sale—such, for instance, as weighing the goods (f)—an order for delivery may be countermanded before such previous act has been done. Thus where a person contracted to sell all his starch then lying at the warehouse of another, at a certain price per hundred weight, to be paid for by a bill of exchange, and a certain number of days was allowed for the delivery, and the seller wrote an order to the warehouseman to weigh and deliver all his starch to the buyer, and the buyer handed the order to the warehouseman, who weighed a part which the buyer removed, and then the buyer failed before the residue was weighed, it was held that the seller might lawfully countermand the delivery of the residue (g). So where a quantity of oil in casks was sold, and according to the course of trade the casks were to be searched by the seller's cooper, the quantity of impure matter to be ascertained by a person attending on behalf of both parties, and the casks to be filled up at the seller's expense, it was held that the order which had been delivered to the warehouseman, might be countermanded (h) before these things were

done. On the other hand, upon a sale of ten tons of oil, being part of forty tons contained in one cistern, where nothing remained to be done except to draw off the ten from the forty, it was determined that the seller could not countermand the order after it had been placed in the hands of the warehouseman (i). But although something may remain to be done so that the delivery be not complete, yet if the buyer sell the goods to a third person, and the wharfinger certify to such third person that he has transferred the goods to his account, who thereupon pay the price, the wharfinger thereby makes himself responsible to the third person, and cannot defend himself against his claim under the right of the first seller to stop the goods (k).

But a second vendee, who neglects to take actual or constructive possession, is in the same situation as the first vendee towards whom he claims. His title is defeated on non-payment of the price by the first vendee (l), unless, indeed, he take up a *bond fide* indorsement to him of a bill of lading, for valuable consideration. It very frequently happens that common carriers are also warehousemen, so that it requires great nicety to decide in what character the party is chargeable, for the responsibilities of the two characters are very different, he may in one character be liable for a loss, from which he would be exempt in the other: as for instance a common carrier is liable for losses by fire without any negligence of him or his servants, or as LORD HOLT describes a *carrier* is that kind of bailee who is answerable, though there be no actual negligence, but a *warehouseman* is not liable for loss by fire, unless he has been guilty of ordinary negligence. This was determined in *Garside v. the proprietors of the Truro*

(c) *Harman and others v. Anderson and others*, 2 Camp. 243, per Lord ELLENBOROUGH.

(d) In the same case afterwards by the Court, *id.*

(e) *Hammond and others v. Anderson*, 1 Bos. & Pull. N. R. 69.

(f) *Withers and others v. Lyp and another*, Holts' N. P. C. 18.

(g) *Hanson and another v. Meyer*, 6 East, 614.

(h) *Wallace and others v. Breeds and another*, 13 East. Rep. 522.

(i) *Whitehouse and others v. Frost and others*, 12 Id. 614.

(k) *Hawes v. Watson*, 2 Barn. & Cress. 340.

(l) *Craven v. Ryder*, 6 Taunt. 630; *Dixon v. Mante*; *Small v. Moates*, 9 Blag. 534.

*Mersey Navigation*,<sup>(m)</sup> where a common carrier, from *Stourport* to *Manchester*, undertook to carry goods from the former to the latter place, and to forward them from thence to *Stockport*. Upon arrival at *Manchester* the goods were deposited in his warehouse, to await an opportunity of sending them on to *Stockport* by the *Stockport* carrier, there being none there at that time, to whom they could be sent on. Before he had an opportunity of forwarding them, they were destroyed by an accidental fire.

It also appeared, that, according to the course of business, when goods were sent from *Stourport*, to go beyond *Manchester*, any carrier to the place of their destination be at *Manchester* ready to receive them, they are immediately delivered upon payment of the carriage from *Stourport* to *Manchester*, and if not, the defendants kept them in their warehouse till a carrier arrived, to whom they might be delivered, making the above payment, the defendants not charging any thing for lodging and keeping the goods in their warehouse. Some time before the goods in question were delivered to the defendants, their agent told the plaintiff, that if he would send all his goods by them, they would forward them to *Stockport* by the first carrier that should come there, without insisting on being paid the carriage before they delivered them, and would settle with him when they met. MR KENYON said—"If the defendants were considered merely as warehousemen, there could be no pretence to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds; he is held responsible as insurer; and the reason given in the books (whether well or ill founded was immaterial) is, to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, which last the defendants are not liable

here, they not having been guilty of laches." And BULLER, J. observed, that the keeping of the goods in the warehouse was not for the convenience of the carrier, but of the owner of the goods, for when the voyage to *Manchester* was performed, it was the interest of the carrier to get rid of them directly, and it was only because there was no person ready at *Manchester* to receive these goods, that the defendants were obliged to keep them. And THE COURT held that the defendants were not liable, because their duty as carriers had terminated, and their duty as warehousemen had commenced before the loss, and it made no difference that they received no distinct compensation as warehousemen.

But if at the time of the fire and consequent loss, the carrier's duty had not been completed, as in *Forward v. Pittard*,<sup>(n)</sup> where the deposit was made in a warehouse at an intermediate place, in the course of his own route, or as in *Hyde v. the Trent Navigation Company*,<sup>(o)</sup> where the carrier, after the arrival of the goods at their place of destination, was still bound to deliver them to the owner, and before such delivery, he had put them into his own warehouse for safe custody, where they were consumed by fire, in such and the like cases he would be liable, because his duty as carrier was not completed; and although he is acting as a warehouseman, and makes a distinct charge for warehouse-room, and also for the cartage of the goods from the warehouse to their destination, he is nevertheless considered as a carrier, the delivery of the goods to the owner being always by usage considered the proper duty of a carrier.

There are also cases where goods are sent to be left at the warehouse of the carrier, till called for by the owner: in these cases the duty of the carrier ends when the goods arrive at his warehouse, and his duty as

<sup>(m)</sup> 4 Term Rep. 581—see 1 Stark. 72.

<sup>(n)</sup> 1 Term Rep. 27.

<sup>(o)</sup> 5 id. 389.

warehouseman begins, (p) and if he deliver the goods to a wrong party by mistake, he will be liable as upon a wrongful conversion. (q)

(To be continued.)

## PROBLEM XVIII.—VOL. IV.

### BANKRUPTCY.

CREDITORS' ASSIGNEES—What are their rights, duties, and liabilities?

TO THE EDITOR OF THE LEGAL GUIDE.

## ANSWER TO PROBLEM 11.—VOL. 4.

### INTERESSE TERMINI—What is it?

Interesse Termini is the *interest in a term*, which a lessee has before entry (Co. Litt. 46 b. 270 b.) A bare lease without entry does not vest any estate in the lessee; but only gives him a right of entry upon the tenement, which right is called his interest in the term (2 Blacks. Com. 144). What this interest is will best be shewn by pointing out in what respects it falls short of the estate vested in the lessee upon entry.

Before doing this, it is to be remarked that the right under consideration is not affected by the death of either the lessor or the lessee; but that, if the lessee dies before entry, his executor or administrator may enter: or the lessee or his executor may enter though the lessor dies before. If the lease is made to several persons, and one of them dies, his interest survives (Com. Dig. Est. G.) It is grantable to another (Co. Litt. 46 b.)

As above observed, the lessee before entry has only his right of entry: but when he has actually entered, and so accepted the grant, the estate is then vested in him, and he is possessed of the term of years (2 Blacks. Com. 144). Now, since a release, which enures by enlargement, cannot work without a possession,—either an actual estate in possession or a vested interest in the release,—it is evident that one who has only an *interesse termini* cannot receive a release of the reversion; after entry he can, for then he has possession by force of the lease, and the release made to him by the lessor, or by his heir, “is sufficient to him by reason of the privity which by force of the lease is between them, &c.” (Litt. § 459). But such release will operate to extinguish the rent. Lord Coke, in his commen-

tary on the above passage of Littleton, puts this case, “If a man make a lease for years, to begin presently, reserving a rent, if before the lessee doth enter, the lessor releaseth all the right that he hath in the land; albeit, this release cannot enlarge his estate; yet, it shall, in respect of the privity, extinguish the rent. And so it is, if a lease be made to begin at Michaelmas, reserving a rent, and before the day, the lessor release all the right that he hath in the land, this cannot enure to enlarge the estate, but to extinguish the rent in respect of the privity.” (Co. Litt. 270 b.)

An *interesse termini* cannot be the subject of a surrender; for a surrender is, properly, a yielding up of a *less estate* to him who has an immediate estate in reversion or remainder; but as this is a mere right, and not an *estate*, as there is no reversion wherein it may drop. By a surrender in law, however, it may be drowned as by accepting a new lease (Co. Litt. 338 a.). For the reason just before expressed, viz. because it is not an *estate*, it cannot be the subject of a confirmation (Co. Litt. 296 b.). Lastly, it may be observed, that he who has only an *interesse termini* cannot maintain any action of trespass (1).  
GULIELMUS.

(1) Our correspondent has not applied his talents to the solution of this Problem with that assiduity he should have done.

An *interesse termini* is merely an executory interest; and the right to enter under it except when depending on an *estate* cannot be barred or affected before the time when an entry would be authorized by the lease, grant, or limitation, conferring the interest. When that period is arrived, and the actual right to the possession is accrued, it may be barred like any other right of entry; but although it may then be barred, it cannot, until it is executed in possession by the entry of the person entitled under it, be so vested so as to prevent it from being transferred to a stranger, 4 Bac. Ab. Tit. Lease 195. And though such an interest cannot before entry be enlarged by a release from the lessor, on account of there being merely an interest and no actual estate in the lessee; yet a release to the lessee before entry from the lessor, of all right that he has in the land, will, in respect of the privity betwixt

(p) In re Webb, 8 Taunt. 443.

(q) Lubbock v. Ingalls, 1 Stark, 104.

them, extinguish the rent. *Co. Litt.* 270 b, and the lessor may, for the same reason, expressly release the rent to the lessee before entry. *Id.* 46, b. On the same principles, it should seem that a release to the lessor by the lessee before entry would be held to extinguish his *interesse termini*. And it has been decided that an assignment of it by him to the lessor will have that operation; *Salmon v. Swann*, Cro. Jac. 619. But it was determined in the recent case of *Doe v. Walker*, 5 Barn. & Cress. 111. that it will not merge in the freehold subsequently acquired. In 1788, a lease for 21 years was granted to J. W., which would expire at Michaelmas, 1809. In 1799, T. W., the lessor, granted another lease to J. W. of the same premises for a term of 60 years, to commence at Michaelmas, 1809; in the year 1800 T. W. died, having devised the same premises to J. W. for life; in 1806, J. W., by lease and release, conveyed away the legal estate of his life interest in the premises to a trustee in trust for him. J. W., therefore, had the legal estate for his own life from the testator's death in 1800 until 1806, when the legal estate was conveyed to his trustee; and it became a question, whether the term of 60 years was merged in the life estate; in other words, whether the term to commence *in futuro* in 1809, merged in the existing life estate. It was holden in the Court of King's Bench, that the reversionary term was not merged; for that being only an *interesse termini*, it did not acquire the character of an *estate* till after J. W. had conveyed away the legal interest for life; the two estates were not in him at the same time; there was, therefore, no merger of the *interesse termini*; but there was a merger of his lease for twenty-one years in the life estate; the Court observing that J. W. had nothing but his life estate until Michaelmas, 1809, and nothing but the term of 60 years after that period.

EDITOR.

TO THE EDITOR OF THE LEGAL GUIDE.

A DISCUSSION OF THE SMALL TENEMENTS ACT,  
1 & 2 VICT. c. 74.

SIR,—As you have presented your readers with a copy of this useful act of Parliament (a). I take the liberty of offering the following remarks on such parts of it as have called for discussion in the practical working of its provisions.

Although the first sec. does not require that rent should have been actually paid to bring a case within its provisions, yet, I apprehend that it will always be necessary to obtain some acknowledgment of tenancy, an occupation as a servant will not, it is generally considered, bring a case within the act, and some doubt exists whether it applies so as to bring a mortgagor within its provisions, the inclination of opinion is, however, that it does: as the act being of a remedial and salutary nature, must be liberally construed. And in cases where a clear tenancy at will is established in a satisfactory manner (see *Jones v. Jones*, and *Nicholl v. McKea*, 10 B. & C. 718, 721), possession may be certainly recovered under it. But in cases where the only evidence to prove the tenancy is an agreement in writing, such writing must of course be stamped before it can be received in evidence, but whenever a tenancy can be sufficiently proved without reference to an unstamped agreement, a *prima facie* case is made out against the tenant; and if, in rebutting the complainant's case, the defendant relies on such written contract, the onus of producing it in evidence will be cast upon him.

As the words used in the statute are, "any person by whom the same shall be then actually occupied," it of course extends to empower justices to eject under-tenants.

The proof of the holding and the determination of the tenancy must show an undoubted right to recover possession, and will generally be the same as is required in ordinary cases; but from the wording of the statute, it appears that the tenant is put to the proof of that not being the case, in case he appears to the notice; in case of his default in appearing, the landlord must enter into such proof.

The 1st section of the statute authorizes the execution of the warrant of possession within a period to be therein named not less than 21 nor more than 30 clear days from the date of such warrant, between this and the form of the warrant, a discrepancy is perceptible, the latter running "on any day within — days," &c., now, I apprehend, that in all cases, it will be proper to pursue the directions contained in the body of the act, and not those of the form in the sche-

(a) Ante p. 180.

dule. Clear days here mentioned mean twenty-one days exclusive both of the day of issuing the warrant and the day of entry.

In section 2 the words, "summons" and "notice" are indiscriminately used to describe the same instrument, but no difficulty under all the circumstances can, I presume, result from this.

The bond mentioned in section 3 requires stamping before it will be admissible in evidence.

A question frequently arises as to the evidence which a landlord ought to produce; in some instances the justices allow him to give evidence, in others not; but as the act allows, nay requires, that the complaint should be made by him on oath, I do not exactly see how they are, generally speaking, to avoid examining him upon the complaint as in other cases.

The form of the summons, which is anything but well-worded, must be strictly followed. I have seen many instances where the veriest alteration imaginable has had the effect of quashing the whole proceedings: as an instance, the summons states, "I shall on — next," &c.: now it is very evident, that as seven clear days' notice is required, the word "next" after the day of the week is superfluous; but in the case alluded to, the complainant had inserted the day of the week, viz. Monday, leaving out the word "next," which occasioned the defendant's solicitor to object, and that successfully, against the case proceeding. I may add that on a subsequent occasion the same party was defeated in a similar manner for not following the form, inasmuch as the word "next" was left out. The difficulty, however, is now overcome by stating that "on Monday week next," &c.

The notice or summons may be served by the landlord if his evidence is admitted by the justices, but in general a disinterested party (probably the constable, who will have occasion to execute a warrant if granted) would be preferable. There is no fear of litigation under the 6th section. In conclusion, perhaps, I may be allowed to advert to the omission of a limited scale of fees to be taken by clerks to justices and others under the act. In many cases a party is certain of losing his rent, and to add to this grievance he is generally found to be saddled with a sum which would swallow up a half year's rent, in case he did receive it, for fees, which in many instances are demanded to a most unreasonable extent.

E. A.

### Law Reports.

#### ROLLS' COURT—August 8.

##### FRANKS v. PRICE.

DEVISE.—L. MITATIONS.—REMAINDERS OVER.

DEVISE of lands to testator's daughters, J. L. and R. A. for life; remainder to his sis-

ter for life; remainder to M. H. and N. H. for their respective lives, and if either of the two should die without leaving issue male, the whole to the survivor for life. If M. H. should die after testator's daughters and sisters, before N. H. leaving issue male, a moiety of the estate was to go to the first and other sons of M. H. in tail male; and in default of such issue, to N. H. for life; remainder to the use of the first and other sons of N. H. in tail male; and in default of such issue, to testator's right heirs. If N. H. after the death of testator's daughters and sisters, should die before M. H. leaving issue male, a moiety of the estate was to go to the first and other sons of N. H. in tail male; and in default of such issue to M. H. for life; remainder to the use of the first and other sons of M. H. in tail male; and in default of such issue, to the testator's right heir. In case M. H. and N. H. should both die without issue male, or such issue male should die without issue male, the estate to go to the use of such person as, at the death of the survivor, should be testator's right heir. Testator's daughter, R. A., his sisters, and M. H. all died without issue in the lifetime of J. L. Upon her death, held, that N. H. took an estate tail in the whole of the property.

This suit, which has been some years before the Court, was at length disposed of.

The bill was filed by the heirs at law of Moses Hart, to recover an estate at Topsfield in Essex, the facts will more satisfactorily appear by the following case, ordered by the Master of the Rolls, for the opinion of the Court of Common Pleas.

Moses Hart, being seised in fee of certain messuages, lands, and hereditaments, at Topsfield, in the county of Essex, by his will, dated the 20th of April, 1756, and duly executed and attested, gave, devised and bequeathed his said messuages, lands, and hereditaments at Topsfield, in Essex, to trustees and their heirs, in trust, as to one moiety of the premises, for his daughter, Judith Levy, for life; and as to the other moiety for his daughter, Rachael Adolphus, for life, with divers remainders and cross remainders to the issue of Rachael Adolphus; and for default of such issue to testator's three sisters for their lives, and the life of the survivor, and from and after the decease of his daughters, and of the issue of his daughter, Rachael Adolphus, and the decease of his three sisters, to the use of Moses Hart and Nathaniel Hart, the sons of his brother-in-law, Solomon Hart, for and during the term of their respective natural lives, share and share alike; and in case either

of them, the said Moses Hart and Naphthali Hart should depart this life without leaving issue male of his body lawfully begotten, then as to the whole of his said estate to the use of the survivor of them during the term of his natural life; and if Moses Hart should (after the death of Judith Levy and Rachael Adolphus, and of the children of the said Rachael Adolphus, if any, and the decease of testator's three sisters), depart this life before Naphthali Hart, leaving issue male of his body, then and in such case, the testator devised one moiety of his estate to the use of the first and every other son and sons of Moses Hart, severally and successively in tail male; and in default of such issue to the use of Naphthali Hart for the term of his natural life; and after his decease, to the use of the first and other sons of Naphthali Hart, severally and successively in tail male; and in default of such issue, to the use of testator's right heirs: And Naphthali Hart should (after the death of Judith Levy and Rachael Adolphus, and the children of the said Rachael Adolphus, if any, and the decease of the testator's three sisters), depart this life before Moses Hart, leaving issue male of his body, lawfully begotten, then and in such case the testator devised one moiety of his said estate to the use of the first and every other son and sons of Naphthali Hart, severally and successively in tail male; and in default of such issue, to the use of Moses Hart, for the term of his natural life, and after his decease, to the use of his first and other sons, severally and successively in tail male; and in default of such issue, to the use of testator's right heirs; and in case Moses Hart and Naphthali Hart should both die without leaving any issue male, or such issue male should die without leaving any issue male, then in such case, the testator devised his said estate to the use of such person or persons as should at the death of the survivor of them, the said Moses Hart and Naphthali Hart be his, the testator's right heir or heirs.

The testator, Moses Hart, died without having revoked or altered his said will.

The heirs at law of the testator living at the time of his death, were his said two daughters, Judith Levy and Rachael Adolphus, his grandson, Henry Isaac Franks, and his two granddaughters, Philah Franks and Priscilla Franks; Henry Isaac Franks being the only son of Frances Franks, a deceased daughter of the testator, who married Isaac Franks; and Philah Franks and Priscilla Franks, being the only children of Philah Franks, the wife of Aaron Franks, another daughter of the testator, who also died in his lifetime.

On the death of the testator, Moses Hart, Judith Levy and Rachael Adolphus, by virtue of the will, entered into possession of the said messuages, lands, hereditaments, and premises,

at Topsfield, and received the rents thereof in equal moieties, until the death of the said Rachael Adolphus, in the year 1773, without issue, whereupon Judith Levy took possession of Rachael Adolphus's said moiety of the estate, and received the rents of the whole of the estate from that time to the time of her death.

The devisee, Moses Hart, and the testator's said three sisters, survived the testator, and all died in the life time of Judith Levy; and the devisee, Moses Hart, died without having any issue.

The said Judith Levy died in the month of January, 1803; and thereupon, Naphthali Hart entered into possession of the said estate; and in Hilary Term, 1821, suffered a common recovery thereof to the use of Stratford Price, his heirs and assigns, and the estate was held, and the rents thereof were taken accordingly, until about the month of March, 1830, when a receiver was appointed of the same by the Court of Chancery, who is now in possession of the estate.

The said Henry Isaac Franks died in the lifetime of Naphthali Hart without having been married, leaving Jacob Henry Franks, the only son of Philah Franks, the wife of Aaron Franks, his heir-at-law.

Philah Franks, sister of the said Priscilla Franks, married Moses Franks, and also died in the lifetime of Naphthali Hart, leaving Dame Isabella Bell Cooper, the widow of Sir William Henry Cooper, Baronet, her only child and heir-at-law.

On the 28th of December, 1828, Naphthali Hart died without having had any issue; and the heirs-at-law of the testator living at the time of the death of Naphthali Hart, were the said Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper.

The questions for the opinion of the Court were, first, Whether Naphthali Hart took any, and what estate in the messuages, lands, and hereditaments at Topsfield, under the testator's will.

Secondly, Whether Jacob Henry Franks, Priscilla Franks, and Dame Isabella Bell Cooper, the heirs-at-law of the testator living at the time of the death of Naphthali Hart, took any, and what estate, in the messuages, lands, and hereditaments, at Topsfield, under the said will.

Thirdly, Whether Judith Levy, Rachael Adolphus, Henry Isaac Franks, Philah Franks, and Priscilla Franks, the heirs-at-law of the testator, living at the time of his death, took any and what estate in the said messuages, lands, and hereditaments, at Topsfield.

This case was argued in the Court of Common Pleas, on the 13th May, 1838 (a), when the Judges gave the following certificate:—

(a) See 5 Bing. N. C. 37, where all the cases are shown.

We are of opinion, that upon the death of Moses Hart, without issue, Napthali Hart became, and was seised under and by virtue of the testator's will, of a vested estate in tail male in remainder (expectant on the determination of the estates limited to Judith Levy, Rachael Adolphus, and her children, and the testator's three sisters) in all the messuages, lands, and hereditaments, at Topsfield.

It having been intimated to us by the counsel on both sides, that in the event of our opinion on the first question being such as is above stated, they do not desire to have our opinion on the matters referred to in the second and third questions, we forbear to say any thing in answer to them.

N. C. TINDALL.

J. A. PARK.

J. VAUGHAN.

T. COLTMAN.

Lord LANGDALE now gave judgment. His Lordship said, that by the rules of law, where an estate for life was given to a party, and after failure of his issue to the right heirs of the testator, then the law would give to the father such an estate as the issue would have taken, and prevent the gift ever taking effect by implication. The words of the will did not import contingency, the remainders over were not to take effect till the other gifts were spent; but it was said that there were other words which did import contingency; the first was the gift to Moses Hart and Napthali Hart during their joint lives; the second, the death of either without issue; the third was the death of either in the lifetime of the other leaving issue; this was provided for; and the fourth was the death of both, without leaving issue, in which event the trustees were to convey the estate to the heirs of the testator. It was not, however, intended that this ultimate limitation should take effect till the failure of issue of both Moses and Napthali Hart, and this had been done in such a way that the remainder over had been defeated. If such was the case with respect to one moiety, it was said it did not apply to the other. He thought, however, that the same question governed the whole. It had also been argued that the limitations were executory, and that they ought to be carried into effect by the trustees according to the intention of the testator, since some of the trusts were executory; they were, however, to take place upon condition, and it did not appear that the Court had the power to direct any conveyance by way of settlement. Upon the whole, therefore, he concurred with the opinion of the Court of Common Pleas, and he did not consider that he ought to send it to any other court. The bill, therefore, must be dismissed, but without costs.

COURT OF COMMON PLEAS—July 16.  
Sittings in Banco.

DOE DEM HICKMAN v. HICKMAN.

ATTORNEYS.—*Upon changing the attorney in a cause, whether upon tender and payment of his Costs as taxed by the Master by a third person, he is bound to deliver up the deeds and papers belonging to the client to such third person upon his simple demand, unaccompanied by a letter of attorney.—RULE in such cases.*

In this case a rule had been obtained to shew cause why an attachment should not issue against an attorney for not delivering up certain deeds and papers to Mr. Hickman, the plaintiff, for whom he had been concerned in the cause, and why he should not pay the costs of the application.

Mr. Sergeant Acherley now showed cause against the rule. It appeared that Mr. Hickman, the lessor of the plaintiff, had some dispute with his attorney in the cause, and had resolved to employ another. For this purpose he had obtained the bill of costs of the former, which the master taxed at £46. 4s.; and he obtained a judges order, that upon payment of that sum the attorney should deliver up the deeds, papers, and writings, in his possession, belonging to Mr. Hickman.

Mr. Hickman then sent a Mr. Tilling to the attorney, who paid the £46. 4s., and served him with a copy of the judge's order, at the same time, and demanded all deeds, papers, and writings, belonging to Mr. Hickman, which the attorney refused to deliver to Mr. Tilling. The learned serjeant contended that a sufficient demand had not been made, as Mr. Tilling had no distinct authority from Mr. Hickman to make it.

TINDAL, C. J.—The rule is, that the demand may be made by a third person upon the authority of a letter of attorney only, a copy of which must be served with the demand, and the original produced.

Mr. Sergeant Storks, in support of the rule, contended that this case did not fall within that rule as the order of the judge served upon the attorney was, in effect, of equal authority, with a letter of attorney.

TINDAL, C. J. said—an attorney cannot be brought into contempt upon such slight grounds—the demand is certainly not sufficient.

Rule discharged with costs.

COURT OF EXCHEQUER.—June.

Sittings in Banco.

MORTIMER v. McALLAN.

STOCK BROKERS and JOBBERS.—*Liability of Principal for Stock transferred to him.*

*his Broker (a Stock Jobber), who not being in possession of any Stock of his own, procured another person, under false pretences, to obtain such transfer from a third party*—Construction of the Statute 7 Geo. 2. c. 8.

We have before very fully reported this case in its several stages (a). We need now, therefore, only say, that the action was brought by the plaintiff to recover from the defendant £4531. 5s. as the value of £5000. stock which the plaintiff had sold and caused to be transferred to the defendant, and for which he, the plaintiff, had not received value from the broker.

The defendant pleaded that the stock had been so caused to be transferred under and by virtue of a contract for the sale thereof to the defendant since the passing of the Stock Jobbing Act, 7 Geo. II. c. 8. (b); viz. on the 7th of October, 1839, by the plaintiff, in consideration of £4531. 5s. to be paid to the plaintiff, and that at the time of making such contract the plaintiff was not actually possessed of or entitled unto in his own right, or in his own name, or in the name or names of trustees, to his use of the stock so contracted to be sold, or any share in the same stock, by means whereof the contract became null and void.

To this plea the plaintiff put in a general demurrer.

The case was argued on the 14th of May 1841.

Mr. Cresswell supported the demurrer, and contended that the question in the case turned entirely upon the construction to be placed upon the statute 7 Geo. 2, c. 8, s. 8, but the Court relied upon the counsel of the defendant to support the plea.

Sir William Follett appeared to support the plea, and detailed the facts of the case (which we have before shewn), and contended that the statute made such a contract void in all cases. Taylor, the defendant's broker, had failed to pay for this stock, and, dying, shortly after, the present action was brought to ascertain the nice question, who should be the loser by his fraud, he having been long long since furnished by the defendant with the necessary funds to make the required investment. In the first place, the contract for the transfer was void and illegal, under the 7th Geo. II. c. 8, s. 8; and secondly, that though the transfer had actually taken place, still

the plaintiff could not recover the value of the stock so transferred, inasmuch as the action was bottomed on the original contract, which the legislature had prohibited by the above act. For the plaintiff it had been urged that the act was only meant to check what are now termed "time bargains," and that this, which was a *bond fide* transaction, as far as the sale from the plaintiff to the defendant went, was not one of a class prohibited by the legislature. This, however, could not be so, for the first sections of the act related to "time bargains," while the eighth section had a special operation upon those contracts for the sale of stock by parties who are not actually possessed of stock at the time. Such contracts are expressly and pointedly prohibited, and declared void to all intents and purposes; and it is difficult, therefore, to see how the case can be altered by a subsequent transfer. It was nothing very absurd to suppose that the legislature meant to put an end to speculation and jobbing transactions; and this was a case where the plaintiff might have gained or lost to a great extent in one day by a sudden rise or fall in the funds.

PARKE, B. said, the great doubt in the case is, whether the legislature meant to prohibit the transfer.

Sir W. Follett—Upon that depends the second point upon which the defendant relies; and it is not easy to perceive how that fact can make any distinction, if the original contract out of which the transfer arises was void under the act. There are various Acts of Parliament prohibiting certain matters, on which cases have occurred, all of which go to the extent of holding that the execution of the contract, by delivery of the prohibited goods for instance, does not entitle the party infringing the law to recover. The manufacture of bricks is limited by Act of Parliament to certain moulds, and in the case of *Law v. Hodgson*, (c) shows that a brickmaker cannot recover the price of bricks, even after delivery, if made contrary to the Act of Parliament. So also in the case of a printer, *Beasley v. Bignold*, (d) where an action was brought for the price of a book, which did not bear the name of the plaintiff as printer, it was there held that he could not recover. Then, again, a publican cannot recover from a candidate the amount of his bill for goods supplied to voters in contravention of the enactment against treating. In all these cases the plaintiffs were defeated, simply because it appeared that their claims were founded on contracts rendered void and illegal by the legislature. The Court had moreover decided in *Cope v. Roland*, (e) that an unlicensed broker cannot recover for work and labour; and why should the

(a) Ante vol. 3, pp. 249—311.

(b) Which enacts that all contracts and agreements for the sale or transfer of stock, whereof the persons selling or transferring shall not at the time of making the contract be actually possessed or entitled unto in their own right or name, or in that of a trustee or trustees, to their use, shall be void to all intents and purposes, and further imposes a penalty of £500. upon any person so selling stock, of which at the time of sale he was not actually possessed.

(c) 11 East. Rep. 300.

(d) 5 Barn. & A. 264.

(e) 3 Mee & Wels. 149.



transfer of the stock here enable the plaintiff to recover the value of stock, the contract for the sale of which is almost admitted to have been illegal. If it were to be so held now, the Court would be stepping out of its province, for it would virtually repeal a statute, the utility of which was beyond all question, as ought its proper construction to be. He also cited *Hitchins v. Lander*,<sup>(f)</sup> and observed that Lord Tenterden had held, that even at the common law no valid contract of sale could be made for goods, which the vendor was not possessed of or entitled to at the time of sale.<sup>(g)</sup>

Mr. Cresswell replied, and contended that it did not necessarily follow that the Legislature meant to do more than prohibit all executory contracts, for it would have gone on to specify the transfer of stock; and that, even supposing the contract to be void by the 8th section of the statute, still when the stock was transferred and accepted, a new contract to pay the price for it was raised by implication of law as the statute only declares the contract shall be void, and does not extend to every transfer made in pursuance of such contract.

LORD ABINGER said, he never had any doubt that the case was not within the statute, but that the Court would take time to consider.

PARKE, B.—This day gave the judgment of the Court, and said as the Court had already decided the question on the motion made for a new trial<sup>(h)</sup>, they were bound to abide by that decision.

Judgment for the plaintiff.

#### COURT OF REVIEW.—Aug. 6.

*Fiat against Wm. MUNROE the younger and THOMAS MUNROE—Petition of JONATHAN ACKROYD and EDWARD ACKROYD—Fiat issued by the Act of the Bankrupt to prevent a Creditor having Execution—Whether the Court will annul it.*

This case occupied the Court four days. The application petitioners are Jonathan Ackroyd and Edward Ackroyd, of Halifax, in the county of York, trading under the style or firm of "James Ackroyd and Son." The petition stated, that on the 1st of July last a fiat in bankruptcy issued against Wm. Munroe the younger, and Thomas Munroe, of Milk Street, London, merchants, trading under the firm of Munroe and Brother,

upon the petition of Wm. Fawcett, and it alleged that such fiat was fraudulently issued. That the petitioners were creditors of Messrs. Munroe upon a bill of exchange for £709. 5s. for goods sold which became due on the 10th of April last, and was dishonoured. On the 30th of March, Messrs. Munroe applied by letter to the petitioners to renew the bill, and the petitioners referred to their attorney, and expressed their willingness to give time upon having security, which Messrs. Munroe refused to give. The bill became due and was dishonoured, and on the 10th of April Messrs. Munroe applied by letter to the petitioners to renew the bill for half the amount at six months, offering payment of the other half. The petitioners again referred to their solicitor, who still refused to give time but upon security, and unless it was given an affidavit would be made under the statute for the abolition for arrest for debt on mesne process, so as to force Messrs. Munroe into bankruptcy; and on the 21st of April last the petitioners did make an affidavit in the Court of Bankruptcy, and on the same day caused a copy of such affidavit, with a notice requiring immediate payment of the debt, to be served upon Messrs. Munroe, and on the 14th of May, Messrs. Munroe and Mr. Fawcett, the petitioning creditor, gave the bond required by the statute.

On the 16th of May the petitioners commenced an action in the Common Pleas against Messrs. Munroe for this debt, and after various vexatious proceedings of great length and intricacy, the action was tried on the 17th of June last, and the petitioners had a verdict for £715. 5s. and costs—execution to issue on the 2nd of July. An error was subsequently discovered in the writ of *Distingas Juratores*, and a writ of error was sued out by the attorneys for Messrs. Munroe. The attorney for the petitioners, however, obtained a judge's order to amend the *distingas* and the jury pannel by the venire upon payment of costs. The petitioners tendered £6. for their costs of amendment, which was refused, and they taxed their costs of the action at £49. 15s.

The petition then alleged that on the day of such taxation, and before the Master had determined to detain the *allocatur* (by reason of the taxation and payment of costs of the amendment not having been made), the attorneys for Messrs. Munroe induced Mr. Fawcett to strike the docket, but that such docket was not struck with the *bond fide* intention of issuing and prosecuting a fiat in bankruptcy thereon, for the just and fair distribution of the estate and effects equally and fairly among the creditors; but on the contrary it was struck for the purpose of counteracting the judgment which had been obtained by the petitioners, and for the purpose of giving time to Messrs. Munroe unduly to pursue their

(f) Coop. 34.

(g) *Bryan v. Lewis*, Ry. & Moo. 326.; *Lorymer v. Smith*, 1 Barn. & Cress. 1, overruled by *Hibblewhite v. M'Morine*, 5 Mee & Wels. 482.

(h) Ante, p. 311; see 6 Mee. & Wels. 58.

lives of a large quantity of goods, and likewise £1020., and for the purpose of enabling them to defeat and defraud their *bond fide* creditors.

The petition also alleged that a large quantity of goods had been obtained by Messrs. *Munroe* from Mr. *Liggins*, of Wood Street, warehouseman, who claimed to be a creditor for £1000. in respect of such goods. Mr. *Liggins* did on the 17th of January last lodge a foreign attachment at the Lord Mayor's Court on a large quantity of goods, in value £4000., which Messrs. *Munroe* had procured on credit from various persons, and at Messrs. *Munroe*, with the view to obtain possession of the goods and to litigate their liability for the debt of £1000., which they insisted was due from other persons, obtained a writ of *Certiorari*, and removed Mr. *Liggins*'s petition into the Court of Queen's Bench, and Messrs. *Munroe* obtained an order of that court for the payment of £1020. into court in lieu of it; Messrs. *Munroe* then brought an action of trover for the goods against the packer in whose custody they were, but who refused to deliver them up under notice from Mr. *Liggins*.

Mr. *Liggins* subsequently received his £1000. from other parties, the writ of *certiorari* was quashed, &c., writ of proceedings issued, the proceedings in the action of trover were stayed, and, as alleged by the petition, after the docket was struck, the goods, in value £4000., were released, as well as the £1020. in court, to Messrs. *Munroe*, upon certain conditions that were complied with. This £1020. it appeared Messrs. *Munroe* had borrowed from Messrs. Raleigh and Co. of Manchester, and that they had also advanced £3125. on account of the goods released; and that immediately after the settlement last mentioned, the goods, in value £4000., and the £1020., were assigned to Messrs. Raleigh and Co., who obtained the latter out of court, and a decree thereof was given to the petitioners, and on the 8th of May, Messrs. *Munroe* wrote the petitioners that they had committed various acts of bankruptcy.

On the 30th of June, Messrs. *Munroe* made an offer to the petitioners of a composition of 6d. in the pound, which was declined. On the 1st of July the fiat was issued, but had not been opened, nor had Messrs. *Munroe* been declared bankrupts, and the petitioner alleged that *bond fide* creditors had been delayed by the pre-mentioned proceedings from suing out a writ, and that the petitioners had signed final judgment in their action, and had obtained a writ of *sequestration* for payment of debt and costs, or that Messrs. *Munroe* should surrender themselves. The petitioner prayed that the fiat might be annulled with costs, and for an order affecting the attornies for abuse of process of the court.

The affidavits in support of this petition were very voluminous.

Mr. *Fawcett* deposed that he was a *bond fide* creditor for goods sold in January last to the amount of £327. 10s. 6d., for which Messrs. *Munroe* gave him a bill of exchange that was afterwards dishonoured and remained unpaid.

The affidavits of Messrs. *Munroe* and their solicitors denied fraud or collusion in issuing the fiat, or that it was issued to defeat the rights of the creditors, but that it was issued in a due course with a *bond fide* intention of prosecuting the same, and to cause an equal distribution of the estate of Messrs. *Munroe*, and that with regard to the allegations made against Messrs. *Munroe* and their solicitors in support of the petition made by the petitioner's solicitor, the only portion of truth therein was that Messrs. *Munroe*'s solicitors issued the fiat before the petitioner's solicitor could do so, which was the reason for the unfounded and vexatious allegations made by the petitioner's solicitor.

The petition also alleged that in the month of February last certain goods, said to be of the value of £4000. were sent to Messrs. Pellatt and Watts by the bankrupts to be packed and transmitted to Messrs. Raleigh; and while the goods were in the warehouse of the packers an attachment was lodged at the instance of Mr. *Liggins*, of Wood Street, Cheapside, for £1000. This process was removed by writ of *certiorari* into the Court of Queen's Bench, and after a great number of applications to that court and to one of the learned judges, and after an action of trover had been brought by the bankrupts, they were delivered to Messrs. *Turner* and *Hensman* as solicitors for Raleigh and Co., on an order of Mr. Justice *Patteson* that a sum of £300. should be paid into court, to be withdrawn on bail being put in, and all proceedings to be stayed. In the interim, Messrs. Leaf and Co., who were creditors of the bankrupts, had also served a notice similar to the one before served by Messrs. *Ackroyd*, but the proceedings on it were stopped by Mr. *Raleigh*, in conjunction with another person entering into the requisite bond, and the docket, at the instance of that firm, which would have been due on the 28th of June, was not struck. On the 30th of June, Mr. *Turner*, in company with one of the bankrupts, waited on Messrs. *Ackroyd* at Halifax, to whom they made a representation of the bankrupts' affairs, shewing debts due by them to about £9000., and costs to £2400., and offered to pay them (Messrs. *Ackroyd*) a composition of 5s. in the pound, which offer was, however, declined.

Mr. *Swanston*, for the petitioners, stated the facts, and contended that the issuing of the fiat was a concerted and fraudulent plot between the

bankrupts and the petitioning creditor, to prevent the execution of the petitioners from taking effect, and prayed that the fiat should be annulled, on the ground that it was unduly issued, and that the petitioning creditor, or his solicitors, should pay the costs. He cited the case of *Mr. Hammond*, the late lessee of *Drury Lane Theatre*, in which the court had annulled the fiat, on the ground that it was issued to prevent a creditor enforcing his execution, which was, he submitted, an analogous case to the present.

Sir *F. Pollock*, for *Mr. Fawcett*, the petitioning creditor, said, that that gentleman was a highly respectable person, who had carried on business in the city of London for upwards of ten years, and he felt acutely the charges contained in the petition and affidavits read in the matter, the latter of which were all founded on the belief of the petitioner's solicitor. The charges contained in the affidavit were of a serious character against *Mr. Fawcett* and his solicitors, who were highly respectable men. They put him in mind of an attorney, who was requested to write a letter to a person, acquainting him with the death of a friend, who excused himself by saying, "I don't like writing, but I'll make an affidavit of the fact."

*Cross, J.* observed, there was a great spirit of vituperation displayed on both sides, which was unnecessary and improper.

Sir *F. Pollock* said, the administration of the bankrupt laws was a matter of great importance, he might be permitted to take some interest in the matter, which would be an apology for what might be considered over-zeal. Almost the first measure in which he took an active part in Parliament, was the subject of these very laws. He thought the only reason why the case of *Hammond* was cited was, because the solicitor for this petitioner had annulled that fiat, and was flushed with the success he had obtained. He denied that the fiat was issued to aid the bankrupt or any other party, it was not opened till the day mentioned, as *Mr. Fawcett* was about to proceed on a commercial journey, and he had struck the docket in order that the property of the debtors should be divided among all the creditors, and not taken under the execution of one firm. He contended that by the 1st & 2nd Wm. 4, c. 56, s. 42, no fiat should be annulled, on the ground of concert between the petitioning creditor and the bankrupt, and in this case nothing could be shewn to the prejudice of his client, who was quite ready to submit to any investigation, either *viva voce* before the Court, a Commissioner, or a jury of his country, and he trusted the Court would not on mere conjecture grant the present application, but that the petition would be dismissed with costs.

*Mr. Bethell* addressed the Court on the part of Messrs. *Turner* and *Hensman*, the solicitors to the fiat, and contended that there was nothing against their character; they had acted in a professional manner, and were known to be respectable solicitors.

*Mr. Swanston* rose to reply.

*Cross, J.* said he thought the learned counsel need not trouble himself; a great deal of personal conflict seemed to exist between the solicitors, but he should dismiss from his mind a great part of the statements made. Nothing had, in his opinion, transpired to affect the character of the petitioning creditor to the fiat, nor had the professional honour of Messrs. *Turner* and *Hensman* a right to be questioned; they had been engaged in conflicting and anomalous duties. It was the expressed opinion of *Lord Eldon*,<sup>(1)</sup> that if the direct object in taking out a commission of bankruptcy is to prevent the execution of a creditor, that is no objection to the commission, provided it is the commission of a creditor, and not that of the bankrupt, which is always vitious, this proposition had been subsequently maintained in many cases in law and equity. In this case a bitter conflict had been carried on between the attorneys, and he could find nothing in the conduct of *Mr. Van Sandau*, the petitioner's solicitor, which would merit any strong animadversion. It was worthy of remark that no acts of bankruptcy had been proved to the Court during the discussion, and he thought the acts of bankruptcy were concerted. It appeared to him that the fiat had been issued to defeat Messrs. *Achroyd's* execution at the instance of the bankrupts, and it must therefore be annulled, with costs by *Mr. Fawcett* and Messrs. *Turner* and *Hensman*.

#### INSOLVENT DEBTORS' COURT—Aug. 22.

##### SITTINGS IN VACATION.

The Chief Commissioner concluded the sittings on Friday, and the Court at its rising adjourned for the hearing of cases to the 22nd of September, when they will be resumed until the 9th of October, and an adjournment will then take place to the 27th of the same month. The commissioners do not intend, in consideration of the imprisonment of parties, to avail themselves of the full vacation allowed by the act. A court will be held once a week, and the days already appointed are Friday and the 5th of September.

(a) *Espartero Bonoes*, 11 Ves. 1, 540.

## PREROGATIVE COURT—July 14.

ALLEN v M'PHERSON AND OTHERS.

**ATTORNEYS—PRACTICE—***Whether an Attorney who employs a proctor, and is liable to him for costs, may be examined as a witness in the cause—Whether a Solicitor retaining a proctor for a party in the cause becomes of necessity liable to him for the costs.*

The question raised in this case was, as to the validity of a codicil to the will of Mr. John Allen, who died on the 28th of November, 1837, at the age of 78, leaving property sworn to be under £80,000. The codicil in question was propounded with the will and other codicils by the executors, Messrs. M'Pherson, Tomkins, and W. Allen, a son of the deceased, and it was opposed by Mr. Robert Allen, a great nephew (who sued *in forma pauperis*), whose benefit under the will was diminished by the codicil, the bulk of the property being given to the deceased's daughter, Mrs. Evans, and other relations. The ground of opposition was incapacity of the testator and improper influence and misrepresentation.

The only point of importance raised was as to the competency of the Solicitor for the executors who had employed the proctors in the cause, and was as alleged liable to them for costs being examined as a witness.

Dr. Harding, for the pauper, contended the solicitor had admitted *he*, and not the executors had retained the proctor, he had therefore made himself liable for the costs, and not having been discharged of that liability, he was not a competent witness.

Sir H. JENNER said, the objection was a good and valid objection to the competency of a witness; the question is, whether a responsibility equally attaches to the party by what he has done. He admits he retained the proctors, but he says he does not know whether such retainer makes him responsible for costs; for knowing the responsibility of his parties, he never considered whether he was liable or not. Now the 1st question is whether a solicitor, by retaining a proctor, becomes of necessity legally responsible for all the costs. No case has been mentioned in which there has been a decision in any court that the mere circumstances of a solicitor retaining a proctor for his party, makes him (the solicitor) legally responsible for the costs. If the witness considered himself liable for costs, then he is incompetent to be examined as a witness, unless released by the proctor for the costs. Under the circumstances it is not established satisfactorily that the solicitor is responsible for the costs, and therefore he is a competent witness.

Evidence of the solicitor admitted.

## MIDDLESEX SESSIONS.—August 12.

## APPEALS.

PARISH OF ST. CLEMENT DANES v. PARISH OF ST. GILES IN THE FIELDS.

**BOUNDARIES of PARISHES.—PAUPER Settlement.**—*To which of two parishes a Pauper belongs, where the boundary line between the parishes runs across the room in which the Pauper had slept.*

This was an appeal against the removal of John Henry, a pauper, from the parish of St. Giles in the Fields to the parish of St. Clement Danes.

Mr. Bodkin appeared for the respondents, and stated that the pauper had gained a settlement in the latter parish by virtue of having rented a tenement therein at the yearly rental of £30. This tenement consisted of two rooms, which were over a stable in Portsmouth-street, belonging to and in the rear of one of the houses in Lincoln's-inn-fields. In the course of the evidence it was stated that the boundary line between the parishes of St. Clement Danes and St. Giles's runs across the room in which the pauper slept.

Mr. Adolphus, for the appellants, in reference to this fact, said there had been a decision in a somewhat similar case, which had gone to determine that the parish in which the bed of the pauper had been placed was the parish which was bound to maintain the party.

Mr. Bodkin remarked, it was impossible that that decision could be maintained in all cases where such point was in dispute between contending parishes, for he well recollected an instance where the bed of the pauper had usually stood across the boundary line separating the two parishes, and it turned out that the pauper had been accustomed to lay with his head in the one and his feet in the other parish. In that case the Court had held that the parish in which the head of the pauper had reclined was bound to support the body.

Mr. Prendergast begged to remind the Court that there was also another case—one in which the pauper's bed had been placed in such a position as that the dividing line of the two parishes had run as it were from the head to the heels, that was, lengthways of the bed. There it had been held that the parish on which the left hand side of the bed had been situated was liable to the maintenance of the pauper, on the ground that the pauper's heart, which was conceived to be the most important portion of the contents of the frame of a human being, as well as the most

vital part of man, was usually on that side. Such was the decision in that particular case, but he could not say what the judgment of the Court would be in a case where a party was what was denominated a "restless sleeper," and rolled from one side of the bed to another; probably it might be that the *settlement* would follow the removal of the heart from the right hand to the left hand parish.

Mr. *Adolphus* would call the attention of the Court to another case, wherein the bed of the pauper had been so placed, as that the boundary line had run directly up its centre. In that case the pauper was a married man, and the common course of matters would be, that the wife had lain on one side of the line, and the pauper on the other. It was there decided and held, that the parish in which the pauper had been in the habit of sleeping was bound to bear the expense of their maintenance as paupers, on the ground, that from time immemorial the prevailing custom had been, for the husband to lie on the right hand side of his wife.

The CHAIRMAN suggested whether, notwithstanding all these cases, the more regular as well as the more convenient course would not be, to hear the evidence in the present instance, and so to let this particular case be determined upon its own merits.

Evidence was then produced on the part of the respondents, which went to prove, that the whole of the pauper's bed had stood in the parish of *St. Clement Danes*.

On the other hand, witnesses were called by the counsel for the appellant, who stated, that they had made a most careful survey of the rooms in question, and that there were not more than 15 inches width of the pauper's bed in the parish of *St. Giles*.

Mr. *Bodkin* said that it was impossible to squeeze a man's body into the narrow space of 15 inches. However, after so many cases had been cited on the subject of the reposing of heads in one parish, and the kicking of heels in another, he would leave it to his learned opponent to hoist the present pauper into any position he might think proper. It was sufficient for him to have proved that the whole of the bed had been in the appellant's parish.

After considerable discussion, it was arranged that a *special case* should be submitted for the opinion of the *Court of Queen's Bench*.

The COURT in the mean time directed the order of removal to be confirmed.

## Summer Assizes.

### MIDLAND CIRCUIT.

Warwick, August 14.

PARROTT v. OAKES.

*DISTRESS for Rent.—Whether BUTCHER'S MEAT in a Butcher's Shop can be made the subject of a distress for Rent.*

This was an action for an illegal distress. The plaintiff is a butcher at Birmingham, and had supplied the defendant with meat. The defendant, who was his landlord, distrained for rent on a Saturday night in July, 1839, and, amongst other things, seized a quantity of butcher's meat. There was at this time an account between them. He had previously distrained and sold the plaintiff's goods about six weeks before. For the defendant it was insisted that he was justified in distraining, as the plaintiff was a weekly tenant. For the latter, however, it was contended that he was a yearly tenant, and also that butcher's meat could not be legally distrained.

TINDAL, C. J. left it to the jury to say, upon the evidence, whether the plaintiff was a yearly or a weekly tenant. With respect to butcher's meat, he informed them that it could not be made the subject of a distress for rent, because, as the landlord was bound to keep the goods seized merely as a pledge for a certain number of days, and then deliver them up, upon being redeemed, in the same condition they were in when he seized them, he could not do so in the case of fresh meat, which would be spoiled in the interim, especially when, in this instance, it was seized in the month of July.

Verdict for the plaintiff on both points—Damages, £50.

### NORFOLK CIRCUIT.

Cambridge, July 30.

SMITH v. GREY AND OTHERS.

*COURT OF REQUESTS.—Whether it is competent for a Plaintiff in these Courts to reduce the amount of his actual debt under 40s., and whether the Court, with knowledge of such fact, has jurisdiction to adjudge upon it.*

The defendants in this case are Commissioners of the Court of Requests for the Isle of Ely, and the present action was brought to recover damages for an alleged assault and false imprisonment.

Mr. *Pryme* stated the plaintiff's case. The plaintiff in September in the last year was sum-

moned by the defendants to appear and answer to a claim made in the Court of Requests for the *Isle of Ely*, by one *Markby*, for a debt of £1. 19s. 11½d. The now plaintiff appeared in due form, and objected to the jurisdiction of the Court of Requests on two grounds; the first, that their power was limited to debts under 40s., and that the debt really due, if any was, amounted to more than that sum; the second, that the debt was more than six years old, and that it was therefore barred by the Statute of Limitations. To the first objection *Markby*, the then plaintiff, replied that he waived the whole of his claim except £1. 19s. 11½d.; and in answer to the second, he proved a verbal promise within six years by the now plaintiff to pay the debt. The Commissioners overruled both objections, and issued a precept, under which the plaintiff was arrested for the amount of debt and costs. It was now contended by the counsel for the plaintiff that the objections taken at the trial were fatal to the jurisdiction of the Commissioners of the Court of Requests, and that they had therefore acted wholly without authority, and were, as a consequence, liable in trespass for causing the plaintiff to be arrested.

ALDERSON, B. was of opinion that the action could not be supported. It might be admitted, that if the court below had acted wholly without authority, and had caused the plaintiff to be arrested in respect of a matter over which they had no jurisdiction, the defendants would have been trespassers. But it was competent for the plaintiff to reduce his demand in that court below 40s., and upon his doing so they had power to adjudge upon it. With respect to the admission of parol evidence of a promise to pay a debt barred by the Statute of Limitations, the defendants might have been wrong in so doing; but it was not the law that a judge, who admits evidence on the trial of a cause, which is in point of law inadmissible, can be sued as a trespasser by the party against whom the evidence is so received. The action is certainly not maintainable.

Plaintiff nonsuited.

### 3 & 4 VICT. c. lxxxii.

*An Act for further amending the Act for abolishing Arrest on Mesne Process in Civil Actions.*—[7th August, 1840.]

Whereas by an Act passed in the second year of the reign of her Majesty, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases; for extending the remedies of Creditors against the property of Debtors; and for amending the Laws for the

Relief of Insolvent Debtors in England," it was amongst other things enacted, that if any person against whom any judgment should have been entered up in any of her Majesty's Superior Courts at *Westminster* should have any Government stock, funds, or annuities, or any stock or shares of or in any public company in *England* (whether incorporated or not), standing in his name or in his own right, or in the name of any person in trust for him, it should be lawful for a judge of one of the superior courts on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively, as he should think fit, should stand charged with the payment of the amount for which judgment should have been so recovered, and interest thereon, and such order should entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings should be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order: and whereas doubts have been entertained whether the said provisions extend to the cases herein-after mentioned: now therefore be it declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent as well in any such stocks, funds, annuities, or shares as aforesaid as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities, or shares as aforesaid which now are or shall hereafter be standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the accountant-general of the Court of Chancery, or the accountant-general of the Court of Exchequer, or as to the interest, dividends, or annual produce

thereof, shall prevent the governor and company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

II. And whereas it was by the said act further enacted, that no judgment of any of the superior courts of common law at *Westminster*, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, should by virtue of the said act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until such memorandum or minute as therein mentioned should be left with the senior Master of the Court of Common Pleas at *Westminster*: and whereas doubts have been entertained whether a purchaser, mortgagee, or creditor, having notice of any such judgment, decree, order, or rule as aforesaid, would not in equity be affected thereby, notwithstanding such a memorandum or minute of the same as in the said act is mentioned may not have been left with the senior Master of the said Court of Common Pleas; be it therefore further declared and enacted, that no such judgment, decree, order, or rule as aforesaid shall by virtue of the said act affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the senior Master of the said Court of Common Pleas at *Westminster*; any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in anywise notwithstanding.

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ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

PUBLISHED IN DUBLIN AND EDINBURGH EVERY MONDAY.

# The Legal Guide.

[Vol. IV.]

SATURDAY, SEPTEMBER 5, 1840.

[No. 19.]

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 276.)

#### LOCATIO CUSTODIÆ. WHARFINGERS.

WHARFINGERS are responsible only for ordinary diligence,<sup>(a)</sup> precisely in the same manner as warehousemen. It is said that Lords MANSFIELD and ELLENBOROUGH were both in opposition to this doctrine; but if the cases alluded to be carefully considered in their points, it will be found that such an opinion is very erroneous. Lord MANSFIELD, it is said, extended the liability of a wharfinger to that of a common carrier in *Ross v. Johnson*,<sup>(b)</sup> in which

case his Lordship observed, that "it is impossible to make a distinction between a wharfinger and a common carrier; they both receive goods upon a contract: every case against a carrier is like the same case against a wharfinger." Now, without looking at the point before the Court, and to which these observations were directed, they would appear to be in direct opposition to the universally received doctrine. The only point before the Court was, whether *trover* would lie against a carrier, when the goods had been lost or stolen by his negligence, and not converted by him; and it was argued that *case* and not *trover*, under such circumstances, was the proper form of action. His Lordship's observations were therefore perfectly correct, for there can be no distinction in the form of action between a wharfinger and a common carrier.

Lord ELLENBOROUGH, it is said, also extended the liability of a wharfinger to that

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<sup>(a)</sup> Jones's Bailm. 49. 96. 97, <sup>(b)</sup> 5 Burr. 2827.



of a common carrier, in *Maving v. Todd*, (c) on which his Lordship observed, that "the liability of a wharfinger, while he has possession of the goods, was similar to that of a carrier." The defendants in that case were wharfingers and lightermen, and the action was brought against them for not safely keeping a quantity of goods entrusted to them in London, to be shipped to the vendees of the plaintiff at *Newcastle*, and which had been accidentally destroyed by fire, while on the defendants' premises; and the question was, whether the defendants, whose duty it was to convey the goods from the wharf, in their own lighter, to the vessel in the river, were liable for the loss. *Lord Ellenborough* is reported to have made the observations before noticed. *Dr. Story*, (d) in quoting this case says, Now it does not appear at what time the goods were destroyed by fire; whether, when they were in the warehouse, or on the wharf of the defendants, or in their progress to be put on board of the lighter. If the goods were on the wharf in their transit to go on board of the lighter, the remark of *Lord Ellenborough*, though not accurate in expression, would in substance have been justifiable in the particular case, for his duty as lighterman would then have commenced. But if his Lordship meant to say (according to the dictum in *Starkie*) that the liability of a wharfinger and carrier were universally the same, he was certainly incorrect. Indeed, the case is perfectly explicable on another ground; and that is, that the goods were in the hands of the defendants, as lightermen (who are deemed common carriers) for carriage, and not as mere wharfingers. And the only point worthy of consideration is, whether, as the defendants united both characters, they were, in point of fact, acting in one character or the other at the time of the loss by the fire. In another report of the same case, (e) the action is said to

have been brought against the defendants "as wharfingers," and the goods were burnt while on the wharf, before any opportunity of shipping them. But in this report no notice is taken of the above dictum of *Lord Ellenborough*, which may therefore justly raise a doubt as to the accuracy of the other report.

More or less is to be done by a wharfinger according to the usage which governs the question as to his responsibility, when he acquires and when he ceases to have the custody of goods. If the master receive goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt; (f) but a mere delivery of goods at a wharf is not necessarily a delivery of them to the wharfinger; there must be some act or assent on his part to the custody, before his responsibility commences. (g) When goods are in his custody to be sent on board of a vessel for a voyage, as soon as he delivers the possession and care of them to the proper officers of the vessel, although they are not actually removed, he is, by the usage of trade, deemed exonerated from any further responsibility; and the goods are deemed in the constructive possession of the officers of the ship. (h) In the port of *London*, when goods were intended to be sent coastwise, it was held that the responsibility of the wharfinger ceased with the delivery of them to the mate of the vessel upon the wharf. (i)

(To be continued.)

#### PROBLEM XIX.—VOL. IV.

##### What is an EXECUTORY DEVISE?

TO THE EDITOR OF THE LEGAL GUIDE.

#### ANSWER TO PROBLEM 6.—VOL. 4.

**FIXTURES**—What constitutes a fixture—Show the right to fixtures as between landlord and

(f) *Molloy*, B. 2, c. 2, s. 2.

(g) *Buckman v. Levi*, 3 Camp. 614. *Green v. Inglis*, 4 Id. 72.

(h) *Corban & another v. Dumas*, 4 M. & C. 24.

(i) *Id.*

(c) 1 Stark. 72. (d) Bailm. 294.

(e) 4 Camp. 235.

tenant—An outgoing and an incoming tenant—Trade fixtures, and ornamental fixtures—What effect has the bankruptcy of the tenant on the tenant right.

Sir,—My Answer to this Problem will naturally fall into the five divisions adopted by you; and although a great deal might be said of matters which are naturally considered as incidental to the various rules on the subject, yet I shall endeavour as far as possible to confine myself within the prescribed limits of the Problem, answering it only; and, first, I am to ascertain what constitutes a fixture. The general rule of law on this subject, with relation to the connexion of landlord and tenant, is stated to be “that whatever is fixed to the freehold becomes a part of it, and is subjected to the same *jus proprietate* as the land itself; and the term fixtures comprehends such personal chattels as are let into and annexed to the soil, or affixed to the freehold.” This is the approved definition, so far as regards the decision of questions between landlord and tenant, where disputes arise as to the power of moving them when once fixed. Chattels which do not constitute a fixture, I hold to be such as are not let into the soil at all; these therefore may be removed at the will of a tenant (be it ever so capricious), like any other species of personal property.

To constitute such an annexation or letting to the freehold, as to make the thing affixed a real fixture, the rule is, that when the chattel is perfectly connected with the freehold, either by being let into the earth itself, or by being cemented or otherwise united to some erection previously attached to the ground, it becomes a fixture within the intendment of law; and this leads me to consider—

Secondly, the right to fixtures between landlord and tenant: previous to doing which I however think it will not be altogether unnecessary to remind those who may peruse this, that there is an exception in favour of trade, &c. which will be hereafter noticed.

The general rule as to annexations made by a tenant during the continuance of the term, is the following. Whenever anything has been let to the demised premises by the tenant, during the continuance of his term, it cannot be removed again by him without the consent of his landlord. This I take to result from that ancient rule of law—whatever is fixed to the freehold becomes freehold, and the very act of annexing it to the land transfers to it all the qualities of realty, and thus it immediately belongs to the landlord; the law presuming, (with what consistency I will not take upon me to express,) that the tenant, by making the thing affixed part of the freehold, does by that very act denote an intention of abandoning all future right to the thing

affixed, whereby it becomes a species of waste in him if he afterwards remove it. Thus we have seen that the fixture falls within the term, and goes to the reversioner as part of the land.

Having now shewn, (I hope to your satisfaction) this rule on the subject, the next part of my Answer will be to notice the exceptions thereto; remarking, in the first place, that erections, &c. by a tenant may be so constructed as to prevent their becoming affixed to the freehold: with this in view, the tenant is demonstrated to be entitled to erect even buildings, as barns, granaries, sheds and mills, in a manner so to have a right of removing them, and this by erecting them upon blocks, rollers, pattens, pillars, or plates resting on brickwork; because, unless such things be affixed to the freehold by being let into it, or are united to it by means of nails, mortar, or the like, they remain mere moveable chattels. The remaining exceptions I shall notice fuller in a future division.

As between an outgoing and an incoming tenant, I have only to state that in some—nay, in most instances, it is usual for these parties to decide on a valuation of such fixtures as the latter might otherwise remove; which leads me to ascertain what articles should be included in this valuation. Those things only are to be valued which are removeable by the outgoing tenant, whether the restriction be in consequence of the general law relative to the removal of fixtures, or of express stipulation by the parties. The rights of the parties however regarding particular articles, are much regulated by custom; wherefore it has been lately held, that a custom to value a particular article, as between outgoing and incoming tenant, is a proper criterion for determining the nature of the property, and whether it be a fixture or not. (See *Woodfall*, by *Harrison*, 457.)

I have previously stated that exceptions to the general rules prevail with regard to fixtures for the purposes of trade; and I have stated the general rule on this subject, in effect, to be, that where a lessee, having annexed anything to the freehold during his term, afterwards takes it away, it is waste. But this rule, at a very early period, had several exceptions attempted to be engrafted upon it, and which were at last effectually engrafted upon it in favour of trade, and of those vessels and utensils which are immediately subservient to the purposes of trade. In the Year Book, 42nd Ed. III. 6, the right of the tenant to remove a furnace erected by him during his term, is doubted and adjourned. In the Year Book of the 20th Henry VII. 13 a and b, which was the case of trespass against executors for removing a furnace fixed with mortar by their testator, and annexed to the freehold, and which was holden to be wrongfully done, it is laid down, that “if a lessee for years make a furnace for his

advantage, or a dyer make his vats or vessels to occupy his occupation during his term, he may remove them; but if he suffer them to be fixed to the earth after the term, then they belong to the lessor: and so of a baker." This rule, after some further variation, in process of time became fully established; and accordingly, we find Lord Holt, in Poole's case, *Salk.* 368, laying down, (in the instance of a soap boiler, an under tenant, whose vats, coppers, &c. fixed, had been taken in execution, and on which account the first lessee had brought an action against the sheriff) that during the term the soap boiler might well remove the vats he set up in relation to trade, and that he might do it by the common law, and not by virtue of any special custom in favour of trade and to encourage industry; but that after the term, they became a gift to him in reversion. But no adjudged case has yet gone the length of establishing, that buildings subservient to the purposes of agriculture, as distinguished from those of trade, have been removeable by an executor of tenant for life, nor by the tenant himself who built them during his term. (*Western's Conv.* vol. 4, p. 16.)

As to ornamental fixtures.—Articles put up for ornament or convenience during the term, have been long allowed to be taken away by the tenant at the expiration of his lease. Instances are to be found as far back as the Year Books (8 Henry VII. 12; 21 Henry VII. 26; Day v. Austin, Owen, 70 Cro. Eliz. 374); but the relaxation of the general rule in these instances is held to be a privilege of a more limited nature than that in respect to trade fixtures, although such distinction does not appear to have been taken in many of the early cases. Fixtures for ornament or convenience cannot be removed where the erections may be deemed a permanent improvement: thus, a conservatory erected on a brick foundation, affixed to and communicating with rooms in a dwelling house by windows and doors, cannot be removed by a tenant for years, who had erected it during his tenancy, although he had a reversion in fee after the death of his lessor; and upon the same principle, it has been held that ranges, ovens, and set pots, affixed to a house built by the person against whom an execution has issued, cannot be taken by the sheriff under a *fi. fa.*; but window sashes, which are neither hung nor beaded into the frames, but merely fastened by laths nailed across the frames to prevent their falling out, are not fixed to the freehold; so a pump, erected by a tenant during his term, and very slightly affixed to the freehold, is removeable as a tenant's fixture.

The articles for ornament and convenience which have been held to be removeable, are hangings, tapestry, and pier glasses, whether nailed to the walls or panels; or put up in lieu of

panels; marble or other ornamental chimney pieces, marble slabs, window blinds, wainscots fixed to the walls by screws, grates, ranges and stoves, although fixed in brickwork; iron beds to chimneys, beds fastened to the wall or ceiling, fixed tables, furnaces and coppers, mash tubs and fixed water tubs, coffee and malt mills, cupboards fixed with hold-fasts, clock cases, iron ovens, and the like. It must however be remarked, that things can be removed only when the separation will occasion but little or no damage. *Woodfall*, by *Harrison*, last ed. 447, 448. See also *Ames and Ferard on Fixt.* 276. E. A.

(To be continued.)

### Law Reports.

#### VICE-CHANCELLORS' COURT.

IN RE MRS. TAYLOR.

CUSTODY of INFANTS' ACT, 2 & 3 Vict. c. 54.  
(Continued from page 265.)

Sir *W. Follett* appeared for Mr. Taylor. He said, that before he made any comments on the mass of evidence which had been imported into this case, he should call the attention of the Court to the act of Parliament, as this case involved a question of great importance as to the right of married women to see and have the custody of their children. Mr. *K. Bruce* had said that there was a right in the mother, which this Court would enforce, a legal right, which the Court would give effect to. He denied both these propositions; the mother had no legal right to the custody of her children. But to determine the question they must look at the act itself. He felt sure that it never had been the intention of the legislature in passing this act to give the court power to make such a sweeping alteration in the common law of the land as that contended for on the other side. He apprehended that the act only gave the court a discretionary power to interfere in very strong and extreme cases only. It was quite clear, that from the commencement of these unfortunate proceedings, Mrs. Taylor was labouring under some unfortunate and baneful influence, which caused her to abandon her husband, her children, and her home; and it was also equally evident, from the mode and manner in which the petition had been presented to the court, and from the contents of the affidavits filed in support of it, that Mrs. Taylor was still labouring under that baneful interest; and whatever the result of this application might be, it was impossible but to think that this position of the affidavits filed by Mrs. Taylor had unhappily exasperated every feeling existing between the parties, and had rendered all reconciliation hopeless.

some of the ill effects which had been predicted in Parliament when the act in question was under discussion there. The answers given to the objections raised against the measure by those who advocated it was, that the Court of Chancery would only interfere in great and extreme cases. It was quite apparent that the effect of the present application to the court was most disastrous to the happiness of both parties. At the common law, the exclusive right to the custody of the children was in the father; the mother had no such right; and the father and mother were supposed to live together, the mother thereby enjoying, not only the society of her husband, but also the comfort of being with her children, aiding and assisting in their nurture and education. That was the common law of the land. There might be, and there had been, cases of great oppression and hardship, where the mother was a most blameless and unoffending person, and where the husband had brutally torn the children, who most required a mother's care, away from her; yet formerly, under the common law, she had no remedy against the rights of the husband to maintain the custody of his children. Now, it was with reference to these strong and extreme cases of hardship and oppression only on the part of the husband that this act was passed. The act was never intended to apply to every case of idle dispute which might arise in families between husband and wife; nor to cases where the wife, without cause, voluntarily abandoned her husband, her children, and her home, and who had made false accusations against her husband; and who, notwithstanding every effort at a reconciliation had been attempted on the part of the husband, had rejected them all, and had refused to return to her husband and children. The act was never meant to apply to such cases, or where the husband had not been guilty of cruelty, adultery, or oppression, for in this case his learned friend had conceded, he might say, that those charges did not really exist here. The intention of the common law in giving the husband the exclusive right to the custody of the children was to prevent the numberless petty disputes which were likely to occur in families. The common law right of the father cannot be disputed; and the cases in which the court will interfere to abate the rigour of the common law must be extreme and particular cases of hardship, and under very particular circumstances. This act of Parliament was never intended to overrule the common law, and give to the parties rights inconsistent with it; it only vested in the judges of the Court of Chancery a judicial discretion to act, not in contravention of the common law, but only in cases which to the court should seem convenient and just to mitigate in the favour of the mother the strictness of the rule of law. Then

it was left to the court to decide what were those convenient and just grounds upon which alone the court could interfere by granting an order under this act. This case had already been before the ecclesiastical courts, and was still pending in appeal before the Privy Council, which were the most proper and legal tribunals of the country for the adjudication of such matters; why did Mrs. Taylor come to this Court upon petition, when, if she succeeded before the Privy Council, she would obtain in the restitution of conjugal rights all she wanted, access to her children? He thought that this was, *pendente lite*, a singular application for this lady to make to this Court, asking the court to interfere with the husband's common law right. Sir Edward Sugden, in a speech which he made in the House of Commons, in opposition to this act, when it was under discussion there, had almost identically predicted the present case. Sir Edward said, "Let the House consider what will be the consequence of giving this jurisdiction to any one of the judges at common law, or to any one of the judges in equity. The bill proposes that any one of these judges shall have the power to vary or repeal the order or decree of any other of their number. What will be the consequence? A wife leaves the house of her husband after a sharp quarrel, on what she deems a justifiable cause. She goes at once to an attorney, and says, 'I want and must have access to my children, whom I left in the care of my husband.' He replies to her, 'Then you must make out a case.' She rejoins, 'I can do that readily.' He then tells her, 'You must put your facts into the shape of an affidavit.' She does so by the help of this disinterested adviser, and what will the affidavit contain? It will describe the wretchedness of her married life;—not one incident which has occurred since her marriage to the disadvantage of her husband will be forgotten, and every accidental slight and unkindness will be magnified into oppression and cruelty. A look of scorn, a word of anger, will be brought forward as a real grievance, and, after all, there will be no proper issue, as the lawyers say, for any court to decide, for it will never happen that a woman under such circumstances will rest her claim for access to her children upon any particular instance of cruelty. No woman will admit that she left her husband's home on account of a short quarrel of five minutes duration. No; she will show that she has endured patiently a long course of ill usage and cruelty, and that she did not leave her home until endurance was no longer possible. The husband, exasperated by such an affidavit, will then give the explanation of everything that has occurred in his married life, and will meet her statement of grievances with a statement of

her provocations, and, it may be, misconduct. He will endeavour to throw the blame on his wife, just as she has endeavoured to throw it upon her husband. It is proverbially dangerous to interfere in the quarrels of man and wife, as they both generally turn against those who interfere; and I should be loth to incur that responsibility, although armed with judicial authority. There will be no end to the litigation over which the judge will have to preside. Facts will be asserted on one side, and denied on the other. Then the friends of the two parties will take share in their quarrels, and will, as usual, embitter them more and more. Mr. A., who has dined at the house with the parties, will speak to the use of some unkind word at dinner, and Mrs. B., who has her eyes always about her, will describe the withering effect of some scornful glance. The servants will be brought forward, and one half of them will swear one way and the other half the other way. Incontinence will be charged on one side, and adultery on the other, and all this on affidavit, without any personal examination or cross examination of the parties; and upon all the *res gestæ* thus brought before him the judge will have to decide one way or the other." If this act of Parliament was to be made applicable by the court to every trivial and trifling dispute which might happen to arise between man and wife, nothing would be more injurious to the peace and happiness of society. Such a construction of the act would hold out encouragement to wives to separate from their husbands on the slightest grounds, the foundation of the marriage contract would be entirely sapped, and this Court would be inundated with innumerable applications like the present. But he felt sure the Court of Chancery would only interfere in strong and extreme cases, and therefore, it now became most important for the public to know what was the construction which the court would give to this act. The Court, he therefore thought, would pause before it put a construction on the act, which would have the effect of destroying all the law of the country relating to the common law right of the father to the custody of his children. He contended that Mr. Taylor having gone with his children to reside abroad in a foreign country some time before this act passed, and the present petition was presented, there was no foundation in this Court to affect him with the provisions of this act, which only extended to England and Ireland, and which was only applicable to the cases of parties residing within the jurisdiction. Mrs. Taylor must, therefore, seek redress in the courts in France, if the courts of that country, as he should suppose they did, took cognisance of such matters. Upon both those grounds of construction, in the first place, independently of the

facts of the case, the learned counsel contended Mrs. Taylor was not entitled to the interference of the court, under the provisions of the act of Parliament.

The VICE-CHANCELLOR said, this was one of the most painful cases that had ever come under his consideration. It appeared that on the 20th of October, 1837, Mrs. Taylor, under what he should always consider the most unfortunate advice which a woman could receive, thought proper to absent herself from her husband's house, and whether there was more or less disclosure made to her of what the real circumstances of the case were or not, it did not appear to his honour to be very material, because she commenced the separation. Now, it appeared that, in consequence of this separation, the husband, naturally feeling extremely galled and cut to the heart by what had been so done by his wife, took measures for leaving this country; and it appeared, as he understood it, in the course of the year 1838, he left England, and had substantially lived abroad since that time. On the 27th of July, 1838, Mrs. Taylor commenced her suit in the Ecclesiastical Court for the restitution of conjugal rights; the husband put in what was termed a defensive allegation, and it appears that allegation was rejected by the sentence of the Consistory Court on the 5th of February, 1839, and then there being an appeal from that decree, the decree below was affirmed by a sentence of the Arches Court, of the 20th June, 1839. Then it appears, that in the course of the summer of last year a certain letter of retraction was sent; and the husband, his honour should observe, appealed from that sentence; and then, on the 29th of October last, the present petition was presented to this court. Now he was not informed at present of what would have been the effect, if the sentence of affirmation had never been appealed from; but inasmuch as there was an appeal, one thing was quite certain, that that suit was by no means as yet determined; and he thought it would be highly improper for him to give any opinion on the question whether the affirmation of the Court of Arches of the sentence of the Consistory Court was right or wrong, because in the first place this court, at least the jurisdiction which the Lord Chancellor exercised, had nothing of an appellat jurisdiction over the proceedings of the Ecclesiastical Court, and as a further reason it occurred to his mind that it was very possible he might have himself to sit as one of the appellant judges in the Privy Council judging of that appeal, and therefore he should refrain from pronouncing any opinion at all on the matter, but certain it was, that, at present, the wife having commenced the suit for restitution of conjugal rights, the issue of that suit, the final issue, was uncertain; and it appearing that

ate of things in the Ecclesiastical Court that his lady has presented the petition which was now under consideration, and which, it should be observed, asked for a portion of that which she certainly would have entirely if she should succeed in the sentence for the restitution of conjugal rights; she would have access to her children if restitution of conjugal rights was decreed; that inferred of itself that she would have access to her children.

**Mr. K. Bruce.**—The husband might keep them apart.

The VICE-CHANCELLOR said he was acting on the supposition that the decree of the court would be enforced; at any rate it would then be established by the law of the land, which had jurisdiction over these questions, that she had an unqualified right to the access to her children. Now struck his honour that the jurisdiction which the act had given, being to be exercised solely at the discretion of the court, that it would be hardly a right thing for this court to say that the lady was entitled to have access to her children pending the question in the Ecclesiastical Court which she had thought proper to raise. It appeared, as he understood it, that the conduct of the husband had been *bond fide* throughout. The husband went to France, and began his foreign residence prior to the institution of the trial in the Ecclesiastical Court, and then it did appear to his honour that if the court was to direct access, at its discretion, at such times and subject to such regulations as the court should deem convenient and just, the court ought to be reasonably assured, before it did interfere at all, that it could carry the sentence into execution. It might be true that if the children were here, the court could then see its way with some facility as to the mode of executing its order. He doubted very much himself whether this act of Parliament was meant to be applicable to a case where the husband *bond fide*, before the presentation of any petition by the wife, had actually removed his children to a foreign country, and that this court would interfere. It seemed to him rather to be inferred from the act that as far as the husband and the children were concerned, their residence is to remain the same, and the act never meant that that should be altered; and his honour confessed he did not himself foresee how, consistently with the fact of Mr. Taylor's persevering in his residence abroad, which, as far as the law at present stood, he might lawfully do,—how far his honour could ever succeed in making any order which would be capable of being carried into effect, under the circumstances; that at present it appeared to him that there ought to be no jurisdiction exercised under this act of Parliament pending the question in the Ecclesiastical Court, which, combined with the difficulty of

making any order which would be effectual, appeared to him to be a reason for not interfering under the act. There were no particular directions given, but that "it should be lawful for the Lord Chancellor," and so on, "on the hearing the petition of the mother, if he shall see fit, to make an order for the access of the petitioner to such infant or infants at such times, and subject to such regulations, as he shall deem convenient and just;" and independently of that, the very fact that this lady did herself, as it now appears, without cause, remove herself from her husband—that appeared to him to be a reason why this court ought not to exercise the jurisdiction of ordering any access. Now his honour's opinion, therefore, was, that no order should be made upon the petition for the present; and what he was inclined to do was this, simply to make no order on this petition, but to give leave to the parties to apply, because *non constat* that there might be such a termination of the proceedings in the Ecclesiastical Court as that it might make it right, coupled with other circumstances which might happen, for the court to interfere on the ground of the facts presented in this petition. But (continued his honour) before he finally disposed of this case he could not help saying, that inasmuch as there had been a great deal of contest about character in this petition, that, in the first place, it appeared to him that there was nothing whatever to sully the character of Mrs. Taylor in the least. He thought she had been placed in an unfortunate position, because she had unluckily taken the advice of those who had not integrity enough, or wisdom enough, to give her proper advice; and the advice which she appears to have received from Mr. and Mrs. Schneider, on the affidavits, though he dared say it was very honestly given, appeared to his Honour to have been given too much under the influence of feeling to be considered as the soundest and best advice. With respect to another person who figured in this transaction, he must say he did entertain a most evil opinion of all that he had said and done—he meant Mr. Harris; and it appeared to his Honour to be one of the mutual misfortunes of both Mr. and Mrs. Taylor, that Mr. Taylor, in the fulness of that generous spirit which, notwithstanding his hasty temper, he thought was manifest, not merely because it was sworn to in abstract terms, but because it is made to appear as plain as daylight from the enumeration of a great number of minute circumstances,—his Honour did look upon him as a man of generous temper, but who certainly was hasty, and certainly did, like most men, laudably wish to preserve his authority;—it did seem to his Honour that it was a great misfortune, both to Mr. and Mrs. Taylor, that he (Mr. Taylor) encour-

raged as he had the perpetual intercourse between himself and his wife and Mr. Harris, because the facts spoke for themselves, about which there was no dispute. All that was known of the early part of Mr. Harris's life was, that when he was in Italy he was engaged in intrigues with a variety of women; and when he came to this country he appears to have been in a very great degree assisted by the liberal manner in which he had been treated by Mr. Taylor; and his Honour would allude more particularly to those facts which were stated, and about which there was no dispute, that when he went into the country and so on, Mr. Taylor was at the expense of his staying at the inn and keeping his horses, and so on; but it appeared that for certain circumstances, and for some reasons which are not explained, those letters, of which so much had been said, were placed in the house of Mr. and Mrs. Taylor. His honour firmly believed what was stated by Mrs. Taylor to be true, that she never read the letters, and indeed she states that she could not have understood them, which was very likely; and one of the reasons why his Honour himself asked the question whether he could see the letters was that he might be able, by just looking at them, to determine for himself, by the inspection, merely how far that was likely to be true. However, he did not see them, and therefore he must take it to be true; but it was quite obvious from what was stated about those letters, that they were most improper letters to be introduced into the house of any person, and his Honour had been unable to conceive why Mr. Harris should have wished those letters preserved during his life, and not to be destroyed until after his death, which is the representation that was made. Then there was this fact about Mr. Harris, that when the circumstances took place which were stated, about the 20th of October, that he having been treated as a friend by his benefactor and friend, Mr. Taylor, never bethought himself of taking the only course which, as between man and man, it appeared to him it was right for him (Mr. Harris) to take—that is to say, he never even met Mr. Taylor face to face on the subject, but certainly in a manner that could by no means be applauded, connived at the keeping of Mrs. Taylor separate from her husband. Well, then, it appeared, and his Honour was much struck with the circumstance when he read that in one of the very last discussions that took place between Mr. Harford, Mr. Storry, and Mr. M'Caughee, and Mr. Schneider, and Mr. Harris, that Mr. Harris made use of this expression, which in his Honour's mind, threw a considerable light on the whole transaction; for it is stated; first of all, that Mr. Schneider made use of a very strange expression, "and that the said Christopher

Harris declared on the same occasion that he would rather Mrs. Taylor walked the streets than return home." And his Honour could not help thinking that a wish which, in his mind, might ultimately have terminated in such a circumstance, was the thing that actuated him throughout; but, however, whether it was so or not, this was found about him, that he (Harris) became bankrupt in April, 1839, and debts to the amount of £10,500. had been proved against him. It was stated that he had not paid any dividend, and that no dividend was likely to be paid, and that he had not obtained his certificate; and his Honour mentioned these circumstances because he (Harris) had thought proper, in one of his affidavits, to impute to Mr. Taylor a set of expressions at once most blasphemous, but, at the same time, so utterly foolish, that his Honour could not induce himself to believe that there was one word of truth in that statement; and with respect to Mr. Taylor, it did appear to him, that though he appears to have been busy in some things, yet that he had acted with very great kindness and generosity, not merely to his horses, on which there was abundant testimony, but also to his wife, his friends, and dependants, and to a variety of persons with whom he was accidentally connected; and his Honour could only himself hope that, inasmuch as Mr. Taylor had such a generous temper, he would allow his generous temper to be exerted to the full extent of generosity; and that, although he had suffered deeply, and had received injuries which might be thought in point of prudence might make it right for him to keep his wife from home and children, and which it might be very natural for persons to think would be right, that he would, acting on his generous feeling and his religious principles, recollect this, that, however wise in one sense, and natural in another to treat his wife as he was now disposed to do, it was godlike to forgive; and his Honour did think that, under all the circumstances, he must leave the parties at present to deal with the circumstances in which they were placed, and to make any order on this petition until he has further what would be the result of the proceedings in the Ecclesiastical Court. The petition should, therefore, stand over, with liberty to apply.

#### ROLLS' COURT—June 7.

##### CARTER v. BENTALL.

*LIMITATIONS in a WILL—Dying with Issue unexplained when TOO REMOTE, and consequently void.*

This suit was instituted to carry into effect the trusts and limitations of the will of Tice-

*Mendham*, and to obtain the opinion of the Court upon the validity of the limitations over.

The Bill stated that *Thomas Mendham* (who was formerly in the Petty Bag Office) by his will gave the interest and dividends of certain Long Annuities to his wife for her life, provided she accepted the same in lieu and full discharge of her marriage bond, and her thirds at common law. The testator then confirmed a deed of gift, dated the 8th July, 1818, wherein he had given and granted to his godson, *Thomas Mendham Newson*, otherwise *Thomas Newson Mendham*, immediately after his decease a certain annuity of £150 for his life, which the testator directed to be paid him accordingly by his executrix out of the dividends and interest of his personal estate. But in case such deed of gift should be lost or mislaid, then he directed the said annuity of £150 to be paid to the said *Thomas Mendham Newson*, as and in the nature of a bequest to him for his life; and the testator also gave and bequeathed unto the said *Thomas Mendham Newson* a further annuity of £50, after the decease of his wife, for his life. The testator also gave and bequeathed to his daughter, *Sybella Mendham*, all the interest, dividends, income, and produce of his whole personal estate undisposed of by his will, and the rents, issues, and profits of his real and leasehold estates whatsoever and wheresoever, and of what nature or kind soever for her life, for her own sole and separate use and benefit, and her receipts only to be a proper discharge for the same. And the testator directed that his India bonds and Exchequer bills should be sold by his executrix, with the advice and assistance of Mr. *Marmaduke Langdale* the elder, or of his son if he should be dead, and that the money arising therefrom, together with any other ready money belonging to him at the time of his decease, after payment of his debts, legacies, and testamentary and funeral expenses, should be invested in the public funds, and the interest and dividends thereof should be paid to his said daughter, *Sybella Mendham*, for her life, and after her decease to go along with the residue of his estate, subject to the said annuities, legacies, and payments in the said deed of gift. And after the decease of his wife and daughter, the said testator gave, devised, and bequeathed to the said *Marmaduke Langdale* the elder, his heirs, executors, administrators, and assigns, and to *Thomas George Knapp*, Esq. clerk of the *Haberdasher's Company*, and his heirs and assigns, and to his successors, clerks of the said company for the time being, and to the survivor of them, and to the heirs, executors, and administrators of such survivor all his capital stock in the public funds, and all the rest and residue of his real and personal estate whatsoever and wheresoever, and

of what nature or kind soever, subject to the said deed of gift and legacies as aforesaid, TO HOLD to them, their heirs, executors, administrators, successors, and assigns UPON TRUST, to sell and dispose of his freehold and leasehold estates to the best advantage to such purchaser or purchasers as might be had or gotten for the same; and the money arising therefrom, and all dividends and interest due to the testator, he directed should be laid out in the public funds upon the trusts thereafter mentioned, and to be considered as part of and go along with the residue of his estate. And upon this further trust to transfer and pay *one moiety*, or half part of the whole clear residue of his estate, whether in the public funds or in any other security, to the issue of his said daughter, if she should happen to marry and have any such issue, equally between them, share and share alike, and to be paid and transferred to him, her, or them at their respective age or ages of 21 years; and if only one child, then the whole to be in trust for *such one child*; the dividends and interest and profits thereof in the meantime to be applied in the maintenance and education of such issue, and the overplus (if any) to be in like manner laid out in the public funds, for the use and benefit of such issue. And the said testator directed the same to be transferred and paid to him, her, or them accordingly. And in default of such issue, the said testator gave, devised, and bequeathed the said one moiety, or half part of the residue of his estate, to and amongst all his nephews and nieces who should be living at the time of the decease of his said daughter, *Sybella Mendham*, in shares as therein mentioned. And as to the *other moiety*, or half part of the said residue of his estate, at the decease of his said wife and daughter without issue, the said testator gave and devised the same to the said *Marmaduke Langdale* and *Thomas George Knapp*, their heirs, executors, administrators and assigns, and to the survivor of them, and to the heirs, executors, administrators, successors, and assigns of such survivor, upon trust, to permit and suffer the said *Thomas Mendham Newson*, otherwise *Thomas Newson Mendham*, to take and receive the interest, dividends, and income thereof for his life, to and for his own use and benefit, in lieu and stead of the said annuities given him by the said deed of gift, and by the now stating will; and after his decease, then upon trust to permit and suffer the *Treasurer* for the time being of *St. Bartholomew's Hospital*, London, and his successors, and of *St. Thomas's Hospital* in the *Borough of Southwark* and his successors, and the *Governors of the Society of the Sons of the Clergy at Ipswich in Suffolk*, and also the *Master and Wardens of the Worshipful Company of Haberdashers in Maiden Lane, Lon-*



don, for the time being, and each and every of them to receive and take the dividends, interest, and produce of the last-mentioned moiety of the residue of his estate, and annually to divide the same equally between the said *Hospital*, the said *Society*, and the said *Company of Haberdashers*, share and share alike, for ever, to enable them to relieve and assist their patients, aged, infirm, and decayed members and impotent persons, in their several and respective departments; all which the said testator declared he had given them in return for the relief and assistance afforded by each of them to two of his aged ancestors and relations. And the testator appointed his said daughter, *Sybella Mendham*, sole executrix of his will. Mrs. *Mendham*, the wife of the testator, died in his lifetime; and the testator died in 1812, without altering or revoking his will, which was proved by his daughter and executrix, who survived him. *Thomas Mendham Newson* died in 1817. In 1813 Miss *Mendham*, in contemplation of marriage, suffered a recovery of the freehold estates of the testator, and afterwards married the *Rev. Claude Carter*; she died in 1835 without having ever had a child, and having survived her husband, but having previously made a will, whereby she gave the one moiety of her residuary real and personal estate to her nephew and niece, the plaintiffs, *William Claude Carter* and *Sarah Catherine Carter*, equally; and she gave two-thirds of the remaining moiety to the children of *William Bentall*, who should be living at her death, equally; and the remaining third of the last-mentioned moiety she gave to the children of *William Adams*, equally. The plaintiffs, *William Claude Carter* and *Sarah Catherine Carter*, charged by the Bill that the gifts of the testator's residuary estate for the benefit of his nephews and nieces, and of the charities, were limited to take effect after an indefinite failure of issue of *Sybella Carter*, the daughter of the testator, and were therefore void, and lapsed for the benefit of the said *Sybella Carter*, as the heiress-at-law and sole next of kin of the testator, and passed by her will to the persons beneficially interested in her property under the same. And that if the whole of the residuary real and personal estate of the testator did not pass to the said *Sybella Carter*, at all events no other part of the said residuary estate passed for the benefit of the said charities than one moiety only of the residuary personal estate, other than chattels real, or chattels which savoured of the realty. The Bill prayed that the trusts of the will of the testator might be carried into effect, and that the rights and interests of all parties in his residuary estate might be ascertained and declared; and that the will of the said *Sybella Carter* might be carried into effect, and the rights and interests of all persons interested

in her residuary estate might be ascertained and declared.

Mr. *Pemberton*, for the plaintiff, contended that the limitations over, after the death of *Sybella Carter*, the testator's daughter, were too indefinite and remote, and consequently void.

LORD LANGDALE, after detailing the facts before stated, said, that in relation to the first-mentioned moiety of the residue of the testator's estate, it was a distinct gift to the issue of his daughter; and that the use of the words "if only one child," and "such one child," illustrates that the testator meant by the word "issue," children of his daughter; and in default of such children, the gift over to the testator's nephews and nieces took effect.

With regard to the second moiety of the residue of the testator's estate to *Thomas Mendham Newson*, after the decease of the testator's daughter without issue, this was too remote.

In disposing of the moieties the testator was contemplating his daughter's death, and in doing so with respect to one moiety he considered that he had made a distinct gift, but as to the other he had made no distinct gift. It had been argued that the same intention was expressed in both clauses, but it was difficult to suppose that the testator had used the word "issue" in the will in two senses, and in the last clause there was no prior limitation; he could not, therefore, imply any gift to the issue, since there was no prior limitation in favour of the objects of the previous clause. As to the first moiety the testator makes a distinct gift to his daughter in terms—a gift to her children, and in default of such children he gives the moiety over. As to the second moiety he makes no such distinct gift, but the gift over is to take effect upon the death of his daughter without issue; in the first case the testator has explained his meaning of the word *issue* to mean children; and in the second case he has made no such explanation, nor does he precede the gift over by any prior limitation, in terms that might qualify or explain the meaning of the word "issue." I cannot bring myself to think that in both cases the word "issue" must have the same meaning. I think the gift over as to the second moiety is too remote, and that no effect can therefore be given to it. It is void as to all the property, real and personal.

#### COURT OF COMMON PLEAS—JAN 13

##### Sittings in Banco.

ROBERTSON, Manager of the National Provincial Bank of England v. SHEWARD and Another.  
Construction of the term "Manager" of Bank, such Bank having various Branches.

*in the Country; with a Manager or Chief Clerk to each.—Whether a Promissory Note issued at a Country Branch, and made payable to the Manager, means the General Manager or the Local Manager.*

The plaintiff in this case was the manager of *National Provincial Bank of England*, brought this action against the defendant as maker of a promissory note for £1000. made payable to the *Manager of the National Provincial Bank of England*, or his order, which when it became due was dishonoured. It appeared that the *National Provincial Bank of England* was established in London, with branches at Birmingham, Manchester, Shrewsbury, and other towns. The plaintiff was the manager of the principal establishment; but at each of the branch establishments there was a clerk, who was sometimes called manager. The note in question was dated *Birmingham*. The defendant pleaded several pleas, the third, setting out the note in terms, alleged that the plaintiff was not at the time of making the note, or since the manager of the *National Provincial Bank of England* in the said promissory note mentioned.

The cause was tried at the *Warwick* last August Assizes, before *Lord Denman*, when it was insisted for the defendant that the manager of the note was payable meant the manager of the Birmingham establishment, and that consequently the plaintiff was not the party entitled to recover, he being the general manager.

The jury, however, having returned a verdict in favour of the plaintiff for £1,132., the amount of principal and interest, a rule was afterwards obtained, calling on the plaintiff to show why the verdict should not be entered for the defendants, on the plea which denied that the plaintiff was the payee of the note, or why the verdict should not be a new trial, as the plaintiff had not shown to be the registered public officer of the company, as required by the Act of Parliament.

*Serjeant Goulbourn* now showed cause against the rule.

*MR. JUDGMENT, C. J.* said, the main question arose on the third plea, which amounted very nearly to an assertion that the action was brought in a wrong name, for it was alleging that the plaintiff was not the payee of the note. Now it appeared that the different branches of the *National Provincial Bank of England* were in fact all part of the same co-partnership concern; just as if a banker in London were to take houses in different towns throughout the country, and place clerks to carry on his business. It was the position which the chief clerks or managers of the branch banks occupied; and if

the Court were not to say that a particular construction was to be given to the note, from the fact of its being dated at Birmingham, there was nothing at all to show that the general manager of the bank was not the person intended. The evidence certainly went to show that in point of fact he was the person contemplated as the payee of the note, and he could not see that there was anything in the circumstance of the note being dated at Birmingham to affect that intention. He thought, therefore, that the third plea had been properly determined in favour of the plaintiff. That being so, there was upon the record no room for the other question which had been mentioned; because, if the defendant had intended to make that defence, he should have alleged that this was one of the companies which were required by the act to have a registered public officer, in whose name the action ought to have been brought.

The other judges concurred.—Rule discharged.

July 15.

*Sittings at Nisi Prius.*

PERCIVAL v. HORNE AND OTHERS.

BAILMENTS.—COMMON CARRIERS.—*Their liabilities, and exemptions from liabilities.*

This was an action to recover £50., the value of a parcel sent by the defendants' coach from Newbury to be conveyed to London, but which was lost.

*Mr. Serjeant Atcherley* stated the plaintiff's case.

It appeared that the plaintiff, who is a soap manufacturer in London, employed his son as his traveller; and that the latter had booked a parcel, containing bank-notes and cash to the amount of £50., at *Jackes's* booking-office at *Newbury*, on the 27th of February, 1838. The parcel was directed to the plaintiff in London, but not having come to hand, an inquiry was instituted, when it was ascertained that it had been despatched by the *Regulator* coach, belonging to the defendants, but had never more been heard of. The defence was, that there was a board affixed in the booking-office in question, apprising the public that the proprietors would not be accountable for parcels of the value of upwards of £10., unless entered and paid for accordingly. Upon this point there was contradictory evidence, the plaintiff's son swearing positively that there was no such board up in the office when he booked the parcel, and the defendants' servants swearing that there was.

Verdict for the plaintiff—Damages £50.

## COURT OF EXCHEQUER.—June 17.

Sittings in Banco.

GRIPPER v. BAXSTON.

**WARRANT of ATTORNEY**—*Its due execution under the 1 & 2 Vict. c. 110.—As to the necessity that the Defendant should have the option of naming an Attorney to attest his execution of a Warrant of Attorney.*

Mr. Kelly had obtained a rule to show cause why the judgment entered up on the warrant of attorney should not be set aside, with costs, on the ground that the warrant of attorney had not been properly attested within the regulations of the statute 1 & 2 Victoria, c. 110, which provides that the execution of all such instruments shall be attested by an attorney "expressly named by, and attending on behalf of, the party executing the same." It appeared that the plaintiff's attorney called on the defendant to execute such an instrument, and saying that some professional person must be present, added, "I will send Mr. S—— to attend on your behalf." Upon this they left the house with the intention of going to Mr. S——'s office, but meeting him in the street, the plaintiff's attorney told him the object of their intended visit, when that gentleman proposed that they should go to the office of the plaintiff's attorney. Arrived there, Mr. S—— explained the nature of the warrant to the defendant, and asked him whether he wished him to attest his execution of it, to which he received an answer in the affirmative.

Mr. Richards showed cause against the rule, and contended that the requisites of the act had been substantially complied with, "*Jackson v. Nichol (a)*."

Mr. Kelly supported the rule, on the ground that the nomination of Mr. S—— must be taken upon the affidavits to have proceeded altogether from the attorney for the plaintiff, without any choice having been exercised upon the subject by their client.

ALDERSON, B., said, that to bring a case within the act, it must appear that the defendant understood that he had an option upon the subject. If that was so, and the nomination or recommendation of a professional man by the plaintiff's attorney was confirmed or adopted subsequently by him, then no doubt the act would be substantially complied with. Viewing this rule through that medium, it did not appear satisfactorily that the position of the defendant was clearly explained by him, and, as he might perhaps have executed this warrant of attorney under the impression that he was bound by the nomination of a professional man by the plaintiff's attorney, it was impossible to say that the requisites of the act had been complied with.

Rule absolute.

(a) 5 Bing. N. C. 508.—6 Scott, 786.

## CONSISTORY COURT.—July 18.

WOODS v. WOODS.

**INCESTUOUS MARRIAGES**—*A man married the daughter of his own sister—EVIDENCE.—Whether the Register of the Marriage is the best evidence that it took place.*

This was a proceeding against George Woods for a sentence of the Court that a marriage contracted by him with the daughter of his sister should be declared null and void, as being incestuous. The case will be found fully explained by the sentence.

Dr. LUSHINGTON gave sentence. He observed that the facts of the case were most singular, and there was no doubt as to the law, but unfortunately objections and difficulties had arisen which the Court had greatly to lament. The evidence had been taken partly in London, and partly in Norfolk. The result of the evidence in London was, that there was no proof that the copies of the registers had been collated; but he was of opinion, that if oral evidence was sufficient, there was ample of the very best character—namely, the testimony of the nearest relatives of the parties—to their connexion by blood to their marriage and cohabitation. What was essential to be proved is not the legality of the marriage, but the relationship by blood; and this which rendered such connexions contrary to law. In all the courts the fact of the marriage may be proved by witnesses without any register at all. If there be a connexion between the parties by blood, even if they were illegitimate, the Court must still pronounce a sentence against them, if it was not satisfied that a register was to be consulted as the best evidence, for it was not absolutely necessary that a marriage should be registered at all: a mistake in the register could not affect the validity of a marriage, nor was a register of a marriage like a deed or agreement, that could be proved by *viva voce* evidence; it is a mere return or memorandum. A baptismal certificate is evidence of birth; it is only an acknowledgment of a party that the child so baptized is his. The evidence from Norfolk has been objected to on two grounds; first, that the oath had not been administered by a competent authority; secondly, that the evidence had been so taken as to preclude the possibility of prosecuting the witnesses for perjury if they deposed falsely and contrary to the truth. The first objection he overruled; but with reference to the other, it appeared that, by the mistake of the examiner, the heading of the deposition of seven witnesses purported they had been taken in articles which did not exist, and he was of opinion that there could be no indictment for perjury against them. He was, therefore, bound to reject their evidence. Still there was proof sufficient to establish legally the facts, of which there

no moral doubt, that the party proceeded against had married and still cohabited with his own niece. He therefore pronounced this marriage null and void; he directed the parties to arise from their incestuous connexion, and he would feel bound to enforce this sentence, not only from legal considerations, but according to the principles of general morality: for, whatever eas might be entertained regarding marriages between persons connected by affinity, marriages within the degrees of consanguinity were revolting to the opinions and feelings of mankind. Although in some instances public penance had been directed in such cases, yet, after full consideration, he thought it advisable not to make it a part of his judgment.

3 & 4 VICT. Cap. 96.

*An Act for the Regulation of the Duties of Postage.* [10th August, 1840.]

Whereas by an Act passed in the last session of Parliament, intituled "An Act for the further regulation of the duties on Postage until the 5th day of October 1840," power was given to the Commissioners of Her Majesty's Treasury, or any three of them, by warrant under their hands, to alter, fix, reduce, or remit any of the rates of British or inland or other postage payable by or on the transmission of post letters, and to subject such letters to rates of postage according to the weight thereof, and a scale of weight to be contained in such warrant (without reference to the distance or number of miles the same might be conveyed), and to fix and limit the weight of letters to be sent by the post, and to suspend, wholly or in part, any parliamentary or official privilege of sending and receiving letters by the post free of postage, or any other franking privilege, and also to direct that letters written on stamped paper, or enclosed in stamped covers,

having a stamp affixed thereto, should (if within the limitation of weight to be fixed under the provisions of the said act, and if the stamp could not have been used before) pass by the post free of postage, and also to require, in case the stamp on which any letter should be written, the stamp on the cover in which it should be enclosed, or to which it should be affixed, should be of less value or amount than in such warrant could be expressed, or should have been used before, such letter should be charged and chargeable with such rate of postage as such warrant should direct, and to order and direct the Commissioners of Stamps and Taxes from time to time to provide proper and sufficient dies or other implements for expressing and denoting the rates and duties which should be directed by any such warrant as aforesaid, and to give any other orders and make any other regulations relative thereto

they might deem expedient: And whereas the Commissioners of Her Majesty's Treasury of the United Kingdom of Great Britain and Ireland have, by several warrants under their hands, in pursuance of the power or authority given to them by the said act, fixed and limited a scale of weight of letters to be transmitted by the post, and directed the rates of postage to be charged and taken on such letters, and have made regulations for the sending of letters stamped free of postage, and made other regulations relative to the sending of letters by the post: And whereas it is expedient that such rates and regulations should be made permanent by law: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all letters and newspapers and other printed papers, which shall be posted in any town or place within the United Kingdom, or shall be brought from parts beyond the seas to any port or place within the United Kingdom, or shall be sent by the post between the United Kingdom and places beyond the seas, or between any of the other places herein-after mentioned, or shall pass through the United Kingdom, shall be subject to the several regulations and rates herein-after contained.

2. And be it enacted, that letters transmitted by the post shall be charged by weight according to the following scale, and that the several numbers of rates of postage herein-after set forth, shall be charged by and be paid to her Majesty's postmaster-general, for the use of her Majesty, on letters transmitted by the post; (that is to say,)

On every letter not exceeding half an ounce in weight, one rate of postage;

On every letter exceeding half an ounce and not exceeding one ounce in weight, two rates of postage:

On every letter exceeding one ounce and not exceeding two ounces in weight, four rates of postage:

On every letter exceeding two ounces and not exceeding three ounces in weight, six rates of postage:

And on every letter exceeding three ounces and not exceeding four ounces in weight, eight rates of postage:

And for every ounce in weight above the weight of four ounces, there shall be charged and taken two additional rates of postage, and every fraction of an ounce above the weight of four ounces shall be charged as one additional ounce.

3. And be it enacted, that no letter exceeding sixteen ounces in weight shall be forwarded by the post between places within the United Kingdom, except petitions and addresses to her Ma-

jesty, and petitions to either House of Parliament, and except in such other cases and subject to such regulations and restrictions as the Commissioners of her Majesty's treasury, by warrant under their hands, shall from time to time direct.

4. And be it enacted, that the following rates of postage shall be charged by and be paid to her Majesty's postmaster-general, for the use of her Majesty, on letters transmitted by the post; (that is to say,)

*Inland Letters.*

On all letters not exceeding half an ounce in weight, transmitted by the post between places within the United Kingdom, (not being letters sent to or from parts beyond the seas,) or posted in any post town in the United Kingdom, addressed to persons or places within such town or the suburbs thereof, there shall be charged and paid one uniform rate of one penny, without reference to the number of sheets, or pieces of paper, or enclosures of which the same may be composed, or to the distance or number of miles the same shall be conveyed; and that on all such letters, if exceeding half an ounce in weight, there shall be charged and paid progressive and additional rates of postage (each additional rate being estimated at one penny), according to the scale of weights and number of rates herein-before fixed and declared; provided that such postage of one penny, and such progressive and additional postage, be pre-paid at the time of posting such letters, or that such letters be duly and properly stamped when posted, as herein-after provided; but in case such postage on any such letters shall not be pre-paid, and such letters shall not be duly and properly stamped, there shall be charged on such letters the rate of postage herein-after mentioned.

5. And be it enacted, that the postmaster-general may forward letters between places in the United Kingdom by vessels not packet-boats, and that all letters forwarded under the authority of the postmaster-general by private vessels or packet-boats, and transmitted between places in the United Kingdom, shall be considered as forwarded by the post between such places, and be charged accordingly.

*Colonial Letters by Packet Boat.*

6. And be it enacted, that on all letters not exceeding half-an-ounce in weight transmitted by packet-boat between the United Kingdom and her Majesty's colonies, or between any of her Majesty's colonies through the United Kingdom, (including letters to and from the East Indies by any of her Majesty's Mediterranean packet-boats to and from the United Kingdom *vid* Syria or Egypt, but not including letters sent through France,) there shall be charged and paid the several rates of British postage herein-after mentioned and specified; (that is to say,)

Between any place within the United Kingdom, wherever situate, and any port in her Majesty's colonies, one uniform rate of one shilling, and between any of her Majesty's colonies through the United Kingdom, one uniform rate of two shillings:

And on all such letters, if exceeding half-an-ounce in weight, there shall be charged and paid progressive and additional rates of postage, according to the scale of weight and number of rates herein-before contained, each additional rate being estimated at one shilling or two shillings, according as such letter shall be chargeable under this enactment, if not exceeding half-an-ounce in weight.

*Ship Letters.*

7. And be it enacted, that the postmaster-general may collect and receive letters to forward by vessels not packet-boats to places beyond the seas, and may forward the same accordingly, and may collect and receive letters brought by any such vessels from places beyond the seas.

8. And be it enacted, that on all letters not exceeding half-an-ounce in weight, transmitted by vessels not packet-boats, between the United Kingdom and any place beyond the seas, including Ceylon, the Mauritius, the Cape of Good Hope, and the East Indies, or between any places beyond the seas through the United Kingdom, there shall be charged and paid the British postage the rates following; (that is to say,)

Between the United Kingdom and any place beyond the seas, at whatever place within the United Kingdom the letters may be posted or delivered, one uniform rate of eightpence, and between any places beyond the seas through the United Kingdom, one uniform rate of one shilling and fourpence.

And on all such letters, if exceeding half-an-ounce in weight, there shall be charged and paid additional rates of postage, according to the scale of weight and number of rates herein-before contained, estimating and charging each additional rate at eightpence or one shilling and fourpence, according as such letters shall be chargeable under this enactment, if not exceeding half-an-ounce in weight.

*Foreign Letters.*

9. And be it enacted, that on all letters transmitted by the post between the United Kingdom and foreign parts, or between any of the places out of the United Kingdom mentioned in the schedule to this act annexed, there shall be charged and paid the several rates of British postage mentioned and specified in such schedule.

10. And be it enacted, that all letters brought into the United Kingdom by packet-boats (whether in a mail-bag or not) shall be chargeable with packet postage.

11. And be it enacted, that on all printed votes and proceedings of the Imperial Parliament forwarded by the post between places in the United Kingdom, or posted in any post town of the United Kingdom, addressed to persons or places within such town, or the suburbs thereof, and on all printed votes and proceedings of the Imperial Parliament sent to any of her Majesty's colonies by packet-boat, and on all printed votes and proceedings of the colonial legislatures sent to the United Kingdom from the colonies by packet-boat (but not through France nor to the East Indies by her Majesty's Mediterranean packet-boats *via* Syria or Egypt), there shall be charged and paid the rates of British postage following; (that is to say,)

If not exceeding four ounces in weight, a rate of one penny:

If exceeding four ounces and not exceeding eight ounces in weight, a rate of twopence:

If exceeding eight ounces and not exceeding twelve ounces in weight, a rate of threepence:

And if exceeding twelve ounces and not exceeding sixteen ounces in weight, a rate of fourpence:

And for every additional four ounces in weight above the weight of sixteen ounces, there shall be charged and paid an additional rate of one penny:

And any lesser weight than four ounces shall be charged as four ounces:

Provided always, that it shall be lawful for the Postmaster-general (if he shall see fit) to delay the transmission of any such printed votes or proceedings for any space not exceeding twenty-four hours from the time at which the same would otherwise have been forwarded.

12. And be it enacted, that all letters posted and addressed to any place within the United Kingdom, and enclosed in stamped covers, or having a stamp or stamps affixed thereto, and printed votes and proceedings of the Imperial Parliament, and all newspapers which shall be liable to postage under this act, shall, if posted in any town or place within the United Kingdom, and enclosed in stamped covers, or having a stamp or stamps affixed thereto, (the stamp or stamps in every such case being affixed or appearing on the outside, and of the value or amount herein-after expressed and specially provided under the authority of this act, or of the last recited act, and if the stamp shall not have been used before,) pass by the post free of postage, as herein-after mentioned; (that is to say,) in case any such letters shall be posted in and addressed to any place within the United Kingdom, the stamp or stamps thereon shall be equal in value or amount to the rates of postage to which such letters would be liable under this act re-paid.

In case any such letters shall be addressed to

any other of the British dominions or colonies, or to any foreign country, the stamp or stamps thereon shall be equal in value or amount to the rates of postage to which such votes or proceedings, or newspapers, would have been liable under this act:

And that in all cases in which the same shall be necessary, in order to place on any such letters, printed votes or proceedings of Parliament, and newspapers, the full amount of stamps hereby required as aforesaid, there shall be affixed thereto such a number of adhesive stamps as alone or in combination with the stamp on such letters or packets, or on the envelope or cover thereof, will be equal in amount to the rate of postage to which such letters, printed votes or proceedings of parliament, and newspapers, would be liable under this act.

13. And be it enacted, that in all cases in which letters posted in and addressed to places within the United Kingdom shall be posted without any stamp thereon, and without the postage being pre-paid, there shall be charged on such letters a postage of double the amount to which such letters would otherwise be liable under this act; and in all cases in which printed votes or proceedings of Parliament, or newspapers liable to postage under this act, shall be posted without any stamp thereon, there shall be charged on such votes and proceedings, or newspapers, the postage to which the same would be liable under this act.

14. And whereas letters and packets sent by the post are chargeable by law on being re-directed and again forwarded by the post with a new and distinct rate of postage; be it enacted, that on every post letter re-directed (whether posted with any stamp thereon or not) there shall be charged for the postage of such letter, from the place at which the same shall be re-directed to the place of ultimate delivery (in addition to all other rates of postage payable thereon), such a rate of postage only as the same would be liable to if pre-paid.

15. And be it enacted, that in all cases in which any letters posted in and addressed to places within the United Kingdom shall be posted, having thereon or affixed thereto any stamp or stamps the value or amount of which shall be less than the rate of postage to which such letters would be liable under this act if pre-paid, there shall be charged on such letters a postage of double the amount of the difference between the value of such stamp or stamps and the postage to which such letters would be liable as aforesaid if pre-paid.

16. And be it enacted, that in all cases in which any votes or proceedings of Parliament, newspapers, addressed to places in the United Kingdom, shall be posted, having thereon or affixed thereto, any stamp or stamps, the value

or amount of which shall be less than the rate of postage to which such votes or proceedings or newspapers would be liable under this act, there shall be charged on such votes or proceedings or newspapers a postage equal to the amount of the difference between the value of such stamp or stamps and the postage to which such votes or proceedings or newspapers would be liable as aforesaid.

17. Provided always, and be it enacted, that it shall in all cases be optional with the parties sending any letters, printed votes or proceedings in Parliament, or newspapers, by the post, to forward the same free of postage by means of a proper stamp or stamps thereon, or affixed thereto, in manner herein-before provided, or to forward the same in like manner as the same might otherwise have been forwarded under this act; but nevertheless, in case any letters, printed votes or proceedings of Parliament, or newspapers, addressed to places out of the United Kingdom, shall have thereon, or affixed thereto, any stamp or stamps being less in amount or value than the rates of postage to which such letters, or such votes or proceedings, or newspapers, would be liable under this act, such letters, printed votes or proceedings of Parliament, or newspapers, if the postage thereon be required by the Postmaster-General under the provisions of this act to be paid when posted, shall not in any case be forwarded by the post, but shall, so far as may be practicable, be returned to the senders thereof through the dead-letter office; and if the postage on such letters, printed votes or proceedings, or newspapers, be not so required to be paid when posted, the same may be forwarded charged with such postage as if no stamp had been thereon or affixed thereto.

(To be continued.)

#### NOTICE TO CORRESPONDENTS.

C. J.—Such was the case, and the blunder was of such importance as to require another Act of Parliament. See 2 Legal Guide, p. 365. Our Subscribers have the most early information of every change in the “actual practice of the Courts.”

A COUNTRY ATTORNEY AND SUBSCRIBER.—Either party, if not prepared to support or shew cause against a rule nisi, should move that it be enlarged to a future day, in the same or the next term; or to support or shew cause against it before a Judge at Chambers in the vacation. In a recent case, it was considered, that where a defendant resides such a distance from town that he cannot be served before the day for shewing cause, and the term expires on the day after that day, the rule may be revived in the next term. (*Rowbottom v. Ralphs*, 6 Dowl. 291.) If a rule be drawn up to shew cause in one term, it cannot be made absolute in the next term with-

out enlarging it, though it may be revived. (*Smith v. Collier*, 3 Dowl. 100.) But it is not by any means of course that the Court should thus enlarge a rule; sufficient grounds must be stated to induce them to do so, (MS. E. 1814.) If the application be made by the party who obtained the rule, the Court usually grant it when it is in his own delay; but not where it would have the effect of detaining the opposite party in custody; nor in other cases without consent or some evident necessity: if moved for by the opposite party, the Court will frequently enlarge it upon terms; or, if the rule were not served in time to give the party an opportunity of shewing cause against it, he may demand that the rule be enlarged as a matter of right, (Fidd. 447, 448; see Anon. 1 Smith, 199.) Formerly, if a party wished to have a rule enlarged, it was usual to give notice to the counsel for the adverse party of the intended motion to the Court to have it enlarged; and the Court of Common Pleas would not, if the rule nisi had been served, have enlarged the rule unless such notice had been given. (R. M. 2 Geo. 2. C. P.; and see Anon. Cas. Pr. C. P. 67.) And now by general rule of all the Courts, (H. T. 2 W. 4. s. 1. r. 97) “a rule may be enlarged, if the Court think fit, without notice.” It is not the practice to serve enlarged rules, because both parties are before the Court. (Anon. 1 Smith, 199.) If it be enlarged in a subsequent term, it is set down in the peremptory paper, and called on in its order, (see Vol. 1. Archbold's Prac. by Chitty, 96); but if it be enlarged or stand over to another day in the same term, either party may bring it on upon the day so appointed, by moving to discharge the rule and make it absolute, (2 Archbold's Practice by Chitty, 1190, ed. 7.)

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ADVERTISEMENTS RECEIVED BY BARNES AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

PUBLISHED IN DUBLIN AND EDINBURGH EVERY MONDAY.

# The Legal Guide.

[VOL. IV.]

SATURDAY, SEPTEMBER 12, 1840.

[No. 20.]

Price Sixpence.

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### ESSAY.

## ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 290.)

### LOCATIO CUSTODIE. AGISTERS OF CATTLE.

AGISTERS of CATTLE fall within this class of Bailments; they are bound by *ordinary diligence*, and are responsible only for losses by *ordinary negligence*; they do not *insure* the safety of the cattle entrusted. If an agister of cattle or his servants leave open the gates of his field, and by such means the cattle stray or are stolen, it is *ordinary negligence*, for which he will be made responsible. (a) In regard to reward, a question of very great importance to the *Agister* arises, viz. Is there any reward for AGISTMENT at the Common Law? *Chapman v. Allen* (b) is one of the earliest

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cases upon this subject. There it was held by *Croke, J.* and *Jones, J.* that the defendant with whom the cows were depastured might *not* detain the cattle until the agistment money was paid, but that he was obliged to bring his action for the pasturage; those Judges observed it is not like to the case of an innkeeper or tailor; they may retain the horse or garment delivered to them until they be satisfied. But not where one receives horses, or kine, or other cattle to pasturage, paying for them a weekly sum, *unless there be such an agreement between them.* Lord ELLENBOROUGH, in *Chase v. Westmore* (c), took a very elaborate view of all the cases upon this doctrine of *lien*, including *Chapman v. Allen*; that was an action of trover for a quantity of wheat-meal, fine pollard, coarse pollard, and bran, which had been sent to the defendants (millers) to be ground, and which the millers detained for the grinding at a specific price. Lord ELLENBOROUGH, in delivering the judgment of the court, said (d),—This case stood over

(a) Jones's Bailm. 91, 92.

(b) Cro. Car. 273.

(c) 5 Mau. & Selw. 180.

(d) S. C. 5 Mau. & Selw. 183.



for our consideration upon the single question whether a workman having bestowed his labour upon a chattel in consideration of a price or reward fixed in amount by his agreement with the owner at the time of its delivery to him, can by law detain the chattel until the price be paid, or must seek his remedy by action, no time or mode of payment having been appointed by the agreement. We are all of opinion that if a right to detain exists in the general case that I have mentioned, the present defendants have a right to detain the goods in question for the money due to them for grinding all the wheat; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels and at different times. The general question is of very great and extensive importance. Several authorities were referred to against the right to detain; but if these authorities are not supported by *law and reason*, the convenience of mankind certainly requires that our decision should not be governed by them; and we believe the practice of modern times has not proceeded upon any distinction between an agreement for a stipulated price and the implied contract to pay a reasonable price or sum, and that the right of detainer has been practically acknowledged in both cases alike. In the case of *Wolf v. Summers*, (e) Mr. J. LAWRENCE does not appear to have been aware of any such distinction. It is impossible, indeed, to find any solid reason for saying that if I contract with a miller to grind my wheat at 15s. a load, he shall be bound to deliver it to me when ground without receiving the price of his labour; but that if I merely deliver it to him to grind without fixing the price, he may detain it until I pay him, though probably he would demand, and the law would give him, the very same sum. (Certainly, if the right of detainer, considered as a right at common law (and it must be so

considered in this case), exists only in those cases where there is no manner of contract between the parties, except such as the law implies, this court cannot extend the rule, and authorities were quoted to establish this proposition; but upon consideration we are of opinion, that those authorities are contrary to reason, and to the principles of law, and ought not to govern our present decision. The earliest of them is to be found in 2 R. Ab. p. 92, which, however, is only a dictum of WILLIAMS, J.; and it does not appear on what occasion it was pronounced, or that it governed the decision of any case. It is in these words:—"If I put my clothes to a tailor to make, he may keep them until satisfaction for the making. But if I contract with a tailor that he shall have so much for making my apparel, he cannot keep them until satisfaction for the making." (f) This distinction appears to have been acknowledged by Lord Holt in a case of *Collins v. Ongly*, (g) as quoted by C. J. RYDER, in the case of *Brenan v. Currint*. (h) But the point was not in judgment before Lord Holt, and therefore the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision of that very learned judge. The latter case of *Brenan v. Currint* is, as far as we can find, the only case wherein this distinction was made the foundation of the judgment of any court. It was there carried to the extremest limit; for the contract was only to pay a reasonable sum, which is more than the law would have implied, if the parties had not expressed it. The opinion of POPHAM, C. J., in the case of *the Hosteler*, (i) has sometimes been cited as an authority for this distinction; but the only distinction plainly expressed on that occasion applies to the sale of a horse for his keep, and not to a detainer of the animal.

(f) T. T. 3 Ja. K. B.

(g) Selw. N. P. C. 1280. Ed. 4.

(h) Sayer, 224.

(i) 10 B. 68.

(e) 2 Camp. 631.

The Chief Justice there says, "That an innkeeper cannot sell a horse for his keep, where the price of it has been agreed upon, though he may do so if there has been no agreement for the price." But the power of sale in the case there put has been since denied. (k) The case in *Yelverton* was an action for the keep of the horse; and all that was said by the Chief Justice as to detainer and sale was extrajudicial. It was in the very same year, term, and court, in which the opinion of WILLIAMS, J. is said to have been delivered; and if (as seems very probable) his opinion was delivered on this occasion, it was extrajudicial also. The case of *Chapman v. Allen* (l) has also been noted on this subject. That case, however, does not appear to have been decided on the ground supposed, but rather on the ground that a person taking in cattle to agist could not detain until the price be paid, or if he could in general do so, yet that in the particular case the defendant was guilty of a conversion as against the plaintiff, who was purchaser of the cattle by having delivered them over to a third person, on receiving from such third person the amount of his demand. In *Cowell v. Simpson*, (m) the LORD CHANCELLOR considers a lien as a right accompanying an implied contract; and in the passage of his judgment he is reported to have said, "If the possession commences under an implied contract, and afterwards a special contract is made for payment, in the case of the thing the one contract destroys the other;" but it is evident from other parts of the report, that the LORD CHANCELLOR there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the possession, and consequently to defeat a claim to the exercise of such a right. And we agree that where the parties contract for a particular time or mode of

payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract; and if WILLIAMS, J. is to be understood to speak of a contract for the time as well as the amount of payment, his opinion will not be contrary to our present judgment; and the authorities built upon it will have been founded on a mistake. And we are inclined to think that he must have intended to express himself to that effect, because the earliest authority that we have met with mentions an agreement for the time of payment, but makes no distinction between an implied contract and a contract for a determinate price. This authority is in the Year Book. (n) "Note also by *Haydon* that an *hosteler* may detain a horse if the master will not pay him for his eating. The same law is if a tailor make for me a gown, he may keep the gown until he is paid for his labour. And the same law is, if I buy of you a horse for twenty shillings, you may keep the horse until I pay you the twenty shillings; but if I am to pay you at Michaelmas next ensuing, here you shall not keep the horse until you are paid." In this passage the law, as applied to the cases of the *hosteler*, the tailor, and the vendor, is said to be the same; and in the latter the sum is supposed to be fixed. The distinction drawn is where a future time of payment is fixed. If so material a distinction as that which depends upon fixing the amount of the price had been supposed to exist at that time, we think it would have been noticed in this place, and not being noticed we think it was not then supposed to exist. So in the case of *Comperv. Andrews*, (o) LORD HOBART, speaking of the word "*pro*," "*for*," says, that this word "works by condition precedent in all personal contracts. As if I sell you my horse *for* ten pounds, you shall not take my horse except you pay me ten pounds; 18 Ed. 4, 5., and 14 E 5

See *Jones v. Pearle*, 1 Stra. 556.

Ante. (m) 16 Ves. 275.

(n) *Easter T. 5 Edw. 4. fol. 2. b.*

(o) *Hob. Rep. 41.*

22.. except I do expressly give you day; and yet in this case you may let your horse go, and have an action of debt for your money; and so may the tailor retain the garment till he be paid for the making by a condition in law." The reason in the case of sale is given in the 14th *Hen.* 8. 20. a; "The cause is for that each has not the same advantage the one against the other, for the one will have the thing in possession—the other but an action, which is not reason, nor the same advantage." Considering the operation of the word "*for*," as noticed by LORD HOBART, whose opinion is confirmed by the cases he refers to, and by others also, no reason can be assigned for saying that it shall not have the same effect in a contract to grind a load of wheat for fifteen shillings, as in a contract to sell a load of wheat of £15. The former, indeed, is in substance, a sale of a certain portion of the time and labour of the miller and of the use of his machinery, and as it is clear that the miller could not maintain an action upon the contract without averring that he had ground and was ready to deliver the wheat, if the other party can by law recover the wheat without averring that he had paid or tendered the price of the grinding, he will have an advantage above the miller, for he will have his goods and the miller will have only an action. If the distinction, which has been contended for on the part of the plaintiff, should be allowed, what must be said in those cases, where a workman is not only to bestow a portion of his labour on a chattel delivered to him, but also to apply to it some materials or goods of his own, for a fixed price? As in the case of a picture frame sent to be gilded or varnished, and even in the old case of cloth sent to a tailor to be made into a garment, is the chattel to be retained by the workman, on the ground of his having applied to it his paint or varnish, or thread, or other materials, or must he deliver these to his employer with-

out payment, because he has bestowed his own personal labour in addition to them? Upon the whole, we think this supposed distinction is contrary to reason, and to that principle in the law which requires the payment of the price and the delivery of the chattel to be concurrent acts, where no day of payment is given, and therefore we think the case of *Brenan v. Currant*, and the dicta on which it appears to have been founded, are not law, judgment was given for the defendants.

(To be continued.)

## PROBLEM XX. VOL. IV.

### REFLEVIN.

For what does it lie? What are the different sorts?—By and against whom does it lie?

TO THE EDITOR OF THE LEGAL GUIDE.  
ANSWER TO PROBLEM 6.—VOL. 4.

### FIXTURES.

SIR,—I beg to offer for your consideration an answer to the concluding part of this Problem—"What is the effect of Bankruptcy upon the Tenant Right."

By the Bankrupt Acts, 6 Geo. 4, c. 16, s. 65, and 1 & 2 Wm. 4, c. 56, s. 25, when a person shall have been adjudged a bankrupt, all his present and future personal estate, (including course leases and terms for years) and all properties acquired previous to his obtaining his certificate, vests in the assignees by their appointment; but fixtures while attached to the land do not pass to the assignees of a tenant and a steam engine erected for the purpose of working a colliery, to be used by the tenant during his term, but to be held as the property of the landlord, subject to such use will not pass to the assignees, for it does not come within the description of "goods and chattels," in sec. 65 (infra), nor had the bankrupt the actual or apparent ownership—and where by a lease, recited that lessee had purchased fixtures on condition of their being repurchased, the lessor covenanted to repurchase, and the lessee on becoming bankrupt, and the assignees declining the lease (which was delivered up) required the repurchase, it was held that as by Stat. 6 Geo. 4, c. 16, s. 75, a bankrupt on delivering up the lease, was discharged from all the covenants on his part, the performance of the covenant to repurchase could not be enforced against the lessee (*see Wood*, 183, 187, last ed.).

This I had supposed would have sufficiently answered this part of the problem, but as it appears that the subject of fixtures, as regards their passing to the assignees of a bankrupt tenant, has from the *unsettled state of the law* become of some importance, I shall proceed to work up some other cases on the subject, in pursuance of your notice appended to *King's* case, p. 206.

The question I shall assume principally arises in the construction of words "goods and chattels" in the 72nd sec. of the bankrupt act of Geo. 4, which enacts, that if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his *possession, order, or disposition*, any *goods or chattels*, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have the power to sell and dispose of the same for the benefit of the creditors under the commission.

As the judges of the court wherein the question was argued, it appears cannot unfortunately agree upon the construction of those words as contained in this section, it cannot be supposed that I shall attempt to lay down any rules on the subject; but for the information of myself and such of your readers as feel an interest in the subject, I have responded to your call as far as the materials within my reach will afford, and have "worked up" the following cases in the hope that the time I have bestowed upon it may not be thrown uselessly away.

Without any reference at all to whom the property in the fixtures really belonged, I have ranged the cases I allude to under four distinct heads, and shall begin—

1. With those cases decided under the present and former bankrupt laws, wherein fixtures do pass to the assignees.

Under this head I shall commence with the case of *Bryson v. Wylie*, (1 B. & P. 83, n.) in which A. a dyer, purchased a plant of B., but as he was unable to pay the purchase money, he sold it to B. who never took actual possession, but demised it to him for three years, during which time A. became bankrupt, and the assignees having seized the plant in his possession under the statute of James, which I shall more particularly mention hereafter, it was held a good defence to an action brought against them by B.—the term *se owner* with reference to the 72nd section (ante), means the person having a legal right to the possession and power of disposing of the property (*Exp. Dale, Buck, 365.*). Therefore, where a trustee for infants sold the lease of a warehouse and the plant, and let the purchaser to possession before payment of the purchase-money, it was holden that the purchaser was in possession, with the consent of the true owner,

within the meaning of this clause. (Id.) Where a creditor purchased under a bill of sale from the sheriff the machinery of his debtor, seized in execution at his suit, and marked it with the initials of his name, allowing the debtor to retain the possession of it until he committed an act of bankruptcy:—it was held that as the change of ownership was not notorious, the bankrupt must be deemed to have the reputed ownership of the machinery, and that it therefore passed to his assignees. (*Lingard v. Messiter*, 2 D. & R. 495.; 1 B. & C. 308.; and see *Storer v. Hunter*, 5 D. & R. 240.) Machinery erected for the purposes of trade, in a neighbourhood where machinery of such description is commonly removed, and capable of removal without injury to the freehold, was held to be personal estate; and where, from the mode of dealing between the mortgagor and mortgagee, it appeared the machinery was not intended to be included in the mortgage deed, it was held to have passed to the assignee of the mortgagor, (*Frappier v. Harter*, 2 C. & M. 153, 3 Tyrw. 603.)

2. Cases so decided in which such fixtures were held not to pass to the assignees.

The leading case under this head is that of *Horn v. Baker*, 9 East, 215, alluded to in *King's* case, (ante) in which it appears that A. B. & C., distillers, occupied as partners certain premises leased to A. and another, and used in common in the trade the stills, vats, and utensils necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises, and by deed between the two last and A. it was covenanted and agreed that A. should withdraw from the business, and permit C. & J. to use and occupy the still-house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade, specified and numbered in a schedule annexed, in consideration of an annuity to be paid by C. and J. to A., and his wife and the survivor, with liberty for C. and J. on the decease of A. and his wife, to purchase the distill-house and premises for the remainder of A.'s term, and the stills, vats, &c. mentioned in the schedule, and C. and J. covenanted to keep the stills, vats, and utensils in repair, and deliver them up at the time if not purchased, with a proviso for re-entry, if the annuity were two months in arrear. Under this C. and J. took possession of the premises, with the stills, vats, and utensils, and carried on the business as before, and made payments of the annuity, which afterwards fell in arrear more than two months; but A.'s widow and executrix who survived him did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of C. and J. who

continued in possession of the stills, vats, and utensils on the premises. The court held that the stills which were fixed to the freehold did not pass to the assignees under the words "goods and chattels" in the statute, but that the vats, &c. which were not so fixed, did pass to the assignees, as being left by the true owner in the possession (as it appeared to the eye of the world) of the bankrupts as reputed owners. This case was decided under the 11th section of 21 Jac. 1, c. 19, the only alterations between which and the said 72nd section, appear to be that in the latter the words are "possession, order, or disposition," and "whereof he was reputed owner, or whereof he had taken upon him the sale, &c.;" and in the statute of James they were "possession, order, and disposition," and "whereof they shall be reputed owners, and take upon them the sale, &c."

A stocking frame let on hire to a working hosier in manufacturing districts, is not a chattel within his disposition, per Lawrence, J. 3 Saun. 490.

Where a lessee becomes bankrupt, and the assignees decline the lease, they cannot maintain an action against the lessor upon a covenant in the lease, to repurchase the fixtures at a valuation.

In the seventh edition of the work of Mr. Archbold on Bankruptcy, by Mr. Flather, it is laid down as a general rule, that to bring a case within the meaning of such 72nd section—"The property must consist of goods and chattels, therefore the possession of land or things fixed to the freehold are not within the meaning of the statute, and even tenants' fixtures, as stoves, grates, cisterns, &c. or steam-engines, machinery, and fixtures so attached to the premises of which the bankrupt is in possession, as to be legally affixed to the freehold, are not "goods and chattels" within the statute, and in support of this position, the following cases are there cited, (p. 188) *Ryall v. Rolle*, 1 Vesey, 348., 1 Atk. 165., 1 Wils. 260.; *Horn v. Baker*, (supra) *Clarke v. Crownshaw*, 9 Bing. 804.; (a) *Coombe v. Beaumont*, 2 N. and Man. 235., 5 B. and Ad. 72.; *Boydell v. Michael*, 1 C. M. and R. 177.; *Erp. Wilson*,

(a) In that case a lessee purchased fixed and moveable implements, &c. and agreed with his lessor upon certain notice, to deliver them up at the end or other determination of the term, at a valuation, and afterwards the lessee assigned them over to a creditor upon trust, in case of default in payment of the debt, to enter and sell, and pay the debt; and if the lessor required to repurchase under the agreement, then the debt to be paid out of the purchase money; default was made, the lessee became bankrupt, and the creditor after the bankruptcy entered; it was held that the moveables only were in the order and disposition of the bankrupt, and passed to his assignees.

4 Dea. and C. 314.; *Erp. Belcher*, 4 D. & C. 751., 2 Mon. and A. 209.

Under this section it has also been decided that where the bankrupt was in possession of a factory steam engine and fixtures, under a contract for the purchase, and the day before he committed an act of bankruptcy, he requested the vendor to resell and pay himself, and the vendor accordingly retook possession, and the man then in charge for the bankrupt agreed to continue the charge of the property for the vendor: it was held that the steam engine and fixtures were not in the "order and disposition" of the bankrupt, so as to pass them to his assignees (*Erp. Watkins*, 1 Dea. 296.). So where a distillery with coppers, vats, stills, &c. was let on lease to traders who became bankrupt, it was held that the stills, &c. which were fixed to the freehold, did not pass to the assignees, (*See Sinclair v. Stephenson*, 10 Moore, 46, 2 Bz. 514). Also, where a colliery with all the machinery and implements for working was leased for years, with a proviso for re-entry by the landlord on non-payment of rent, and a covenant on the part of the lessee, at the expiration or sooner determination of the demise, to deliver up the machinery and implements conformably to an inventory annexed to the lease, of which a valuation was to be made three months before the expiration of the demise, the landlord recovered judgment in ejectment in Trinity term, for a forfeiture in non-payment of rent, but did not execute the writ of possession until the 8th of November following, being the day before the tenant committed an act of bankruptcy; it was held that the landlord was entitled to take possession of the machinery and implements (some of which had been brought on the premises by the tenant during the term) though no previous valuation had been made; that the possession of the machinery and implements by the tenant was only qualified, and did not come within the meaning of the statute of James, so as to bar the landlord's right of entry on the 8th of November, and that tenants' use of the machinery and implements in the interval between the judgment in ejectment and the execution of the writ of possession, did not give him the "possession, order, or disposition" thereof, with the consent of the true owner, within the meaning of the statute, so as to pass the property to his assignees (*Storer v. Hunter*, 5 D. and R. 248, 3 B. and C. 368.); and trade fixtures mortgaged with the buildings, and so attached as to be part of the freehold, or if the bankrupt had been tenant, or had the property for the purposes of trade, or if the bankrupt had been tenant, and the property fixed were goods and chattels; but there is a custom to let such property along with such premises, it will not be a case of replevin.

ownership within the said 72nd section, (*Exp. Wilson*, 4 Dea. and C. 143., 2 Mon. and A. 11.) and the same of machinery affixed to the freehold of iron works, (*Rufford v. Bishop*, 1 Russ. 346.) and also of the steam engine of a cotton mill, mortgaged and left in possession of the bankrupt, although the material part of the engine is not affixed to the freehold, save by bolts and screws, and could be removed by the tenant (*Hubbard v. Bugshaw*, 4 Sim. 326.; *Exp. Lloyd*, 3 Dea. and C. 765., 1 Mon. and A. 494.). (To be continued.)

## TO THE EDITOR OF THE LEGAL GUIDE.

SIR,—As a regular attendant in our Courts of law, and in the Criminal Court on the Circuit, have often been struck with the mode of address adopted by judges to prisoners on their conviction. If it is the man's first offence the judge anxiously hopes, and sincerely trusts, that after he shall have served the term of his imprisonment he will endeavour to make amends to society for the crime he has committed by leading an honest and upright life. If it is the second time of his appearing at the bar, the judge tells him that, on the former occasion, leniency was extended to him but that he has abused it, and shewn himself to be incorrigible; and therefore (generally) he must be sent out of the country for fifteen years or for life, and this appears for merely stealing a duck. Now, Sir, this may appear all very well to the common observer, but to those who will reflect but for a moment, this idea presents itself—what was this man to do when he first came out of prison? How was he to obtain a livelihood or in what manner could he regain a character? The man had no alternative, he must either beg or steal; if he did the former he would be taken up as a vagrant, and upon its appearing that he had only lately been discharged from prison, he would meet with punishment for endeavouring to avoid crime. We see by every day's experience, that he must not sell an apple in the streets. But to the judge who thus off hand awards him the heavy penalty he again steal, I would suggest this for his consideration: I would suppose a man to have been out of prison and to have committed some petty theft, for which his Lordship condemns him to three months imprisonment, at the same time expressing before-mentioned hope as to his future conduct. A most excellent character has been given to a prisoner.—His time has expired and he calls on the judge and says, Your Lordship tried me for a small offence and you hoped I might be reformed. My Lord, I have expiated my offence, I am anxious to make reparation—you know I was a good character, I now ask your Lordship to employ me and I will shew you how grateful I can be. Will any man pretend to tell me that

there is any judge who would employ him, and yet from what he heard in Court he must know more of the man than most people. What then is to become of him—if the person who was so desirous and so “sincerely trusted” that the prisoner might regain his character, will not employ him, where is he to look? But the same judge would tell him that there was abundance of employment to be had: But, says the man, tell me where—tell me how I am to obtain it? You must go from hence at all events (adds the Judge), I can have nothing to do with you. The man leaves, &c. Is this an overdrawn tale; and when judges are complimenting magistrates upon their exertions and talking of preventing crime, should they not put their heads together and endeavour to suggest some system by which an unfortunate criminal might regain a character, and be enabled to fulfil the anxious wish of the dispenser of the law. I know of no point to which the attention of those who are desirous of preventing crime, might be more beneficially directed than that of producing some plan, by which a discharged convict might purge himself of his former sin, and become a worthy member of society. As there are fifteen judges, and as during the long vacation they will have an opportunity of consulting many of the country Magistrates, whose services they deem so valuable, I sincerely trust, that this year will not pass away without something being done on this particular subject, and the judges will then, most likely, be able to discharge their duty to the country, by trying all the prisoners themselves, instead of recommending adjourned sessions, or calling to their aid practising barristers to get rid of the calendar.

I beg to remain, Sir, yours, &c.

ANTI-HUMBUG.

## Law Reports.

## ROLLS' COURT.—June 7.

ROBINSON and others v. ADDISON and others.

LEGACIES—*What are general, and what are specific Legacies.*

This bill was filed by John Robinson, and John Tillotson Robinson, infants, by John Robinson, their father, and next friend, William Gibson and Jane, his wife, and their seven children, infants, by William Gibson, their father, and next friend, against James Addison, John Crick, Charles Shackelford Robinson, and Dorothy Jemima, his wife, Clara Maria Robinson, and Henry Robinson, praying for a declaration of the court upon the several bequests contained in the will of the late Rev. John Robinson, vicar of Althorn, Essex, of shares in the Leeds and Liverpool canal, to, or in trust for the plaintiffs. The bill stated, that the testator, The

*Rev. John Robinson*, by his will, dated the 2nd October, 1819, after devising a freehold estate at Althorn, in Essex, to *Joshua Robinson* and *James Addison*, theirs heirs and assigns, to the use of his son *John Robinson*, for life, and after his death, upon trust to sell the estate, and apply the proceeds for the benefit of the children of his said son. And if only one child, then the testator devised the estate to such one child; and if no child should live to acquire a vested interest upon trust to sell the estate, and pay a moiety of the interest of the proceeds to be invested to his daughter, the plaintiff, *Jane Gibson*, for life, for her separate use, and to pay the other moiety to his daughter, the plaintiff, *Dorothy Jemima Robinson*, for life, for her separate use, and after the decease of either daughter upon trust for the benefit of her children. And in case either of the testator's daughters should die without having children, who should acquire a vested interest in the trust monies, then upon trust for the surviving daughter and her children. The testator also gave to the said *Joshua Robinson* and *James Addison*, their executors, administrators, and assigns, five and a-half shares in the *Leeds* and *Liverpool Canal*, upon trust, to permit and suffer his son, the plaintiff, *John Robinson*, and his assigns, to receive the yearly produce thereof for his and their own use, and after his decease upon the same trusts as were declared of the freehold estate at Althorn. And after devising a freehold house, situate in Old Bond Street, London, upon trust for his daughter, *Jane Gibson*, for life, for her separate use, and after her decease upon trust for her children, in manner therein mentioned, the testator gave and bequeathed five other shares in the *Leeds* and *Liverpool Canal* unto the said *Joshua Robinson* and *James Addison*, upon the same trusts, for the benefit of his daughter, *Jane Gibson*, and her children, as he had declared, of his freehold house in Bond Street; and after devising another freehold house in Dean Street, London, upon trust for his daughter, *Dorothy Jemima Robinson*, for life, for her separate use, and after her decease upon trust for her children in manner therein mentioned; and in case of her death without issue, then to his other daughter, *Jane Gibson*, and his son, *John Robinson*, and their respective families, in moieties. The testator gave and bequeathed five other shares in the *Leeds* and *Liverpool Canal* unto the said *Joshua Robinson* and *James Addison*, upon the same trusts, for the benefit of his said daughter, *Dorothy Jemima Robinson*, and her children, as he had declared of his freehold house in Dean Street, London. And as to all the rest and residue of his, the said testator's estate and effects whatsoever, as well real as personal, the testator gave, devised, and bequeathed the same

and every part thereof unto the said *Joshua Robinson* and *James Addison*, and the survivor of them, and the heirs, executors, administrators, and assigns, of such survivor, for ever, upon trust, for the separate use and benefit of the said *Dorothy Jemima Robinson*, for her life, and of her issue after her decease; and, in default of issue, for the use and benefit of the said *John Robinson* and *Jane Gibson* during their respective lives, and of their respective issue after their several deceases, and appointed the said *Joshua Robinson* and *John Addison* executors of his will. At the date of this will the testator was possessed of fifteen and a half shares of £10 each, in the *Leeds* and *Liverpool Canal*, between that time and his death (which happened in October, 1824) he sold the whole of such shares, and was not at the time of his death possessed of any shares in the said canal. The bill alleged, that the several bequests of the shares in the *Leeds* and *Liverpool Canal* were in the nature of general legacies, and that the testator not being at the time of his death possessed of or entitled to any shares, the several legatees of such shares, upon the testator's death, were entitled to have so much of his personal estate as at the end of one year after his death would have been sufficient to purchase the said canal shares, according to the current market price thereof, invested upon the trusts, and for the intents and purposes by the will declared, and to have the interest thereof accounted for and applied in the same manner as the dividends in respect of such shares would have been applicable under the trusts of the will. And prayed that it might be declared that the several bequests, contained in the will, of the said canal shares, were general and not specific legacies, and that the plaintiffs and the other persons entitled under such bequests were entitled to have as much money as at the end of one year, next after the decease of the testator, would have been sufficient for the purchase of fifteen and a half shares in the said *Leeds* and *Liverpool Canal*, according to the then current market price thereof, raised and paid out of the testator's personal estate; and to have such money, when raised, laid out and invested upon the trusts by the will declared concerning the same; and that it might also be declared that the plaintiffs, *John Robinson* and *Jane Gibson*, were entitled to receive and be paid interest after the rate of £4. per cent. per annum, from the end of one year after the death of the testator, on the amount which should be required to be invested to purchase the said legacy of five and a half shares in the *Leeds* and *Liverpool Canal*, to the plaintiff, *John Robinson*, and his children; and the said legacy of five like shares to the plaintiff, *Jane Gibson*, and her children. The Canal Act then passed

Geo. 3, by which it was enacted, that the sum of £260,000. or such part thereof as should be raised by the several persons thereinbefore named, and by such other person or persons who should at any time within one year from the passing of that act become a subscriber or subscribers to the said navigation, should be divided and distinguished into 2,600 equal parts or shares, at a price not exceeding £100. per share; and that the said 2,600 shares should, and they were thereby vested, in the several persons thereinbefore mentioned, and their respective executors, administrators, and assigns, to their and every of their proper use and benefit, proportionably to the sum they and each of them should severally subscribe and pay thereunto; and that *all and every the said shares should be deemed to be personal estate, and be transmissible as such*. Much evidence was given, showing the difficulty of buying shares in the canal: the defendants showing that such shares were *not* generally in the market, and that there was *no* current market price for them; but that sales and purchases of them were more in the nature of private bargains, and the plaintiffs showing the very reverse, that such shares were constantly bought and sold, and that there *was* a current market price for them.

Mr. Kindersley, for the plaintiffs, contended that a gift of a certain sum of any particular stock is not of itself *specific*, though the testator died at the date of his will precisely the sum of stock bequeathed; that the inclination of the court is against specific legacies. (*Innes v. John*, 4 Ves. J. 568.) The will did not describe the shares as actually belonging to the testator, the words were, "I give and bequeath unto Robinson and Addison, the trustees, five and a half shares in the Leeds and Liverpool Canal;" but there were no such words as "my shares," or "shares now in my name." He submitted that the bequest must be considered as a general and not a specific bequest, and therefore the legatees were entitled to have  $15\frac{1}{2}$  of the canal shares purchased for their benefit out of the proceeds of the testator's estate. The act declares that the shares shall be deemed to be personal estate, and transmissible as such. He cited *Coleman v. Coleman*, 2 Ves. J. 639; *Bronsdon v. Winter*, 10 Ves. 57 (which is not very accurately reported. See 4 Ves. J. 573, per *Master of the Rolls*).

Mr. Pemberton, for the defendants, the residuary legatees, contended, that looking at the language of the will, and the circumstances of the testator having  $15\frac{1}{2}$  canal shares when he made it, it was impossible to suppose that after he sold the shares he could have intended other persons to have been bought. That for all purposes except those of descent the shares were real estates, or in the nature of chattels real, and

were therefore specific. Suppose a testator bequeathed a leasehold house in Berkeley Square, or elsewhere, and afterwards sold it, the legacy was specific and adeemed by the sale; that so here the canal shares were specific legacies, and adeemed by the testator's sale of them. To hold otherwise would be unjust, and defeat the testator's manifest intention, who could never have looked to have re-purchased those shares, which are now at a much greater price than he sold them for.

Mr. Cooper, for the defendants, the executors, said that, although the testator had died in 1824, it never had entered into the minds of the legatees to claim to have the legacies considered as general legacies, and canal shares bought out of the residue, until the year 1836, just before the bill was filed.

Lord LANGDALE said that he was of opinion, upon the cases that he was bound to hold, that the legacies were general and not specific. It had been often held that legacies of stock of the precise amount of what the testator was possessed did not make the legacies specific. There must be words referring to the stock as standing in the testator's name for the court to decree the legacy specific. It was true there might be difficulty in purchasing shares in this canal, but that must not deprive the legatees of the benefit of the bequest. There might be something in the Leeds and Liverpool Canal Act that might justify the argument that the shares, except for purposes of descent, were to be treated as real estate. If so, the devise of such shares, like the devise of all real estates, might be regarded as a specific devise. He would give judgment on some future day.

His Lordship now gave judgment, and after stating all the facts of the case said, the number of shares given corresponded with those he was possessed of at the time of making the will; but the will contained no words showing an intention to give the shares which he then had. The testator subsequently sold his shares in the canal, and died in 1824 not possessed of any. Various arguments had been used to show that the gifts were specific. It was also said that they were an estate in land, and that the parties became entitled to the shares as a real and specific legacy. There were times when the shares were not purchasable for money. The testator ~~in fact~~ have meant those shares as gifts, but there was no ground on which he could act, and there was no evidence that the testator meant to give specific shares to each. The canal was ~~not~~ real property, and the shares were ~~not~~ divided among the members of the corporation, which ~~in fact~~ directed should be deemed to be personal estate and to be transmissible as such: ~~and~~ were not frequently said, yet ~~that~~ ~~was~~



to prevent their being sold; and as the testator did sell them, and left none at his death to answer the legacies of such shares, yet he left ample property from which the shares might be bought. He did not by his will designate the shares. He was, therefore, of opinion, that the bequests had no quality of specific legacies, but that they were general legacies.

Decree as prayed.

COURT OF QUEEN'S BENCH—June  
*Sittings in Banco.*

REGINA v. D'OYLEY, Clerk.

CHURCHWARDENS—*Where is the proper place to elect them—Who has the common right to preside at such elections—RIGHT RECTORS.*

The following judgment of the Court given by LORD DENMAN in this case, is of considerable importance, upon a question agitated by party parish agitators, as to the rights of rectors of parishes.

Their lordships thought the proper person to elect the churchwardens was a conveni-ent within the precincts of the church, and a rector had a common right to preside for ecclesiastical purposes the head of the church and as being the owner of the free church. Although the churchwardens were temporal officers, yet they were so far from interfering with ecclesiastical matters, that the rector had the right to interfere. The authorities confirmed that opinion, and the 58th Act was decisive; that act did not confer the right on the rector by enactment, nor by custom, but it was a recognition of his right by assuming them that he had a right to be considered what power was to be considered what power was to be considered upon him, and whether he had the functions according to law. The 58th Act required notice to be given of a poll, but it did not say by whom that notice was to be given; they apprehended that the rector was the proper person to give notice, but it was at the head of the parish that the poll was to be taken, and one of the churchwardens was to be elected, and candidates present must make the declaration or the poll had fallen. The question then was, who was to do that? Certainly not the rector, but the person presiding at the time the poll was to be made that declaration. It was then ordered that the parishioners should be asked whether a poll was to be taken, and if it was mandable of right, and if it was not, then the person to grant it. In the event the poll would be taken immediately, but otherwise the

ial. Upon that rule coming on for argument, the plaintiff contended that the defendant had no jurisdiction in this case, to issue the warrant for the seizure, and that the present form of action was, consequently, the proper one; and that the justices had power to levy a rate only in the instances where the whole of the township was in the county for which the rate was levied.

TINDAL, C. J. now delivered the judgment of the Court, and said—The Court was of opinion that the defendant had not adopted the proper course to direct the rate to be levied by the overseer of Cheadle Bulkeley, although that officer resided within the borough. The mayor had not, therefore, the authority to levy, as he had done, on the plaintiff. On the second ground of objection, that the action was in the form of trespass, and not case, the Court thought that the proper course had been adopted. The verdict was, consequently correct, and the rule must be discharged.—*Rule discharged.*

COURT OF EXCHEQUER—June 29.  
Sittings at Nisi Prius.

MILBANK v. OLDREY.

APOTHECARIES—*What Proof is necessary for an Apothecary to maintain an Action under the Statute 55 Geo. III. 194.*

The plaintiff, an apothecary, brought the present action against the defendant, to recover the sum of £38. 14s. 10d., the amount of a bill for drugs supplied and money lent to the defendant.

The defendant paid 12s. 4d. into court, on the count in the declaration for money lent; and upon the count for goods sold pleaded that the plaintiff was not practising as an apothecary on or previous to the 1st August 1815, so as to entitle him to maintain the present action under the Statute 55 Geo. III. c. 194. s. 21 of which acts, that no apothecary shall be allowed to cover any charges claimed by him, in a court of law, unless he shall prove at the trial that he was practising prior to or on the 1st August, 1815, that he has obtained a certificate required by the act.

The plaintiff proved that in 1809 he was appointed assistant-surgeon to the Tipperary regiment of militia, and so continued till the 25th of July, 1815, during which time he was in the habit of attending to the general treatment of various detachments, as well as that on one occasion, in 1814, he attended the family of a lady as accoucheur and apothecary. No evidence was given that he continued to practise after the time he obtained his discharge in 1815 till 1818, when it was shown that he was again appointed to a situation of assistant-surgeon, that previously held by him. Under the circumstances the

who was a half-pay officer and in indifferent health, was received into the plaintiff's house as a lodger and boarder, and so remained for the space of six months, during all which time he was suffering from "bronchitis" and other ailments, for the relief of which he was treated by the plaintiff constantly. When this connexion between the parties ceased, the bill was sent in to the amount of £38. 11s. 6d., but payment being refused, Dr. Johnson was called in by the defendant, for the purpose of arbitrating between them. On this gentleman's recommendation the plaintiff consented to take the sum of £30. his bill; but the defendant rejected these terms and hence this action became necessary.

Mr. *Whately*, for the defendant, submitted that the plaintiff ought to be nonsuited for want of sufficient evidence to bring the case within the provisions of the act of George III., coupled with the case of "*The Apothecaries' Company v. Roby*," 5 B. and Ald. 949, under which it was contended that the plaintiff ought to shew that he had been actually practising on, as well as prior to the 1st of August 1815, (a) and urged that the plaintiff's appointment and practice as assistant-surgeon in the militia was not that species of proof contemplated by the act of Parliament; or if such practice was enough, then the evidence would go to shew that the plaintiff had ceased to practise on his discharge, on the 25th of July, in which case also he could not maintain this action.

PARKE, B. thought that the practice was sufficient to entitle the plaintiff to sue, but would not serve the point under the act, on the authority of the case cited, for the consideration of the court above, it being a question for the jury to decide whether the plaintiff might not have meant to practise generally after his discharge as he had done before.

Mr. *Whately*, for the defendant, said the jury would take the bill into their hands, and, exercising their discretion, they would say by their verdict whether any one man could, as a matter of possibility—whether it came within the realm of physical possibility, that one man could, in the course of six months, actually swallow 12 boxes of pills, 137 draughts, and 124 mixtures, besides enduring the application of 2 blisters, and 131 leeches? He could not but think of a witty physician who described such a course of treatment in the following language:—

"If patients send for me, I physician, I bleed 'em; if they die, what's that to me?—I let 'em bleed."  
PARKE, B. said that he was not under any circumstances, as apothecary, bound to give the plaintiff a bill for the value of the leeches, he might take upon himself to sell them, yet were not included in the

act enumerating the other articles, and for which, therefore, he might recover, whether he had practised before the act passed or not.

Verdict for the plaintiff—Damages 30*l.* 1*s.* 6*d.*

(a) This is the leading case upon the subject, and was an action for a penalty on the statute 55 G. 3. c. 194, for practising as an apothecary without having obtained the certificate required by that act. At the trial, the defendant put in evidence to shew that he had been practising as an *apothecary* in town, in *June* and some part of *July*, 1815, including the 12th of *July* in that year; but as the evidence, such as it was, did not extend to the first day of *August*, the defendant having before that day left town and became an *assistant* to an *apothecary* at *Chatham*, the judge was of opinion, that no person was exempt from this penalty who was not in practice as an apothecary *on* the 1st of *August*; the jury found their verdict for the plaintiffs. A rule to shew cause why there should not be a new trial was obtained, and upon shewing cause it was contended by the plaintiffs, first, that the direction was right in point of law, and if not so, then secondly, that there was no evidence that the defendant had, at any time, practised as an apothecary within the meaning of this statute. The Court was all of opinion, that the direction was right in point of law. The statute was passed on the 12th of *July*, 1815, but it may be said generally to take its effect from the 1st of *August* following.

LORD TENTERDEN in giving the judgment of the Court, said (*b*), the great object of the statute, as appears by the preamble to the 7th section, was to prevent danger to the health and lives of the King's subjects by ignorant and incompetent practitioners. For this purpose provisions were made regarding two classes of persons, viz. persons practising as apothecaries and persons acting as assistants to apothecaries. It would be known to the legislature, that some persons

would be found engaged in each of those branches at the time, (whatever that should be) at which the penalties imposed by the act might be made to take effect, and it was reasonable that some, at least, of such persons should be exempted from its enactment; and we are to learn from the language of the statute, what is the precise time at which a person must have been so engaged in order to be thus exempted.

There are five sections in which the time is mentioned, viz. the 14th, 17th, 20th, 21st, and 29th. The 14th regards apothecaries and is a prohibitory clause, and it runs thus, "from and after the 1st of *August* it shall not be lawful for any person or persons (except persons *already* in practice as such) to practise as an apothecary, unless," &c. Now, the word "*already*," as here used, is of doubtful import, it may either relate to the 1st of *August*, or to the passing of the act. The 17th section relates to assistants, and is the prohibitory clause as to them, and it is thus—"from and after the 1st of *August* it shall not be lawful for any person or persons (except the persons *then* acting as assistants) and except those who have served an apprenticeship to act as an assistant." In this clause there is no ambiguity, the word "*then*" plainly and obviously refers to the 1st of *August*.

The 20th section is the penal clause; it embraces both the classes, viz. apothecaries and assistants, with a difference, however, as to the amount of the penalty; and it is thus—"if any person (except such as *are then* actually practising as such) shall *after* the first of *August*, act or practise as an apothecary without, &c. he shall forfeit £20. And if any person, except such as *are then* acting as such, and except those who have served an apprenticeship, shall *after* the first day of *August*, act as an assistant, he shall forfeit £5."

In this clause also taken by itself, there is no ambiguity, the word *then* plainly refers

(b) S. C. 5 Barn. and Ald. 949.

the first of August. And this seems to indicate that the word *already*, as used in the 14th section, is there used to denote the same day, unless it was intended that no apothecary should be exempt from the penalty, who was not actually in practice both on the 12th of July, and the 1st of August.

The 21st and 29th sections speak of apothecaries only, and do not mention assistants or apothecaries.

The 21st section relates to the recovery of charges, and it is thus: "No apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial that he was in practice prior to or on the 1st of August, or that he has obtained a certificate," &c. Now, it was well observed by Mr. Campbell, that this clause relates only to the proof to be given at the trial, and the legislature might not think it expedient to require proof of the precise day, which might lead to questions as to actual employment and practice on that day, but might reasonably conclude, that he who could prove himself to be in practice before the 1st of August, and was in practice, and claimed charges for practice after that day, was really in practice on that day. We, therefore, do not see any thing in this section that may reasonably control the plain language of the 20th section; and it is not necessary to say, whether the word *or* ought in this 21st section to be read as *and*, which has been the construction put on that word in some other statutes, and which may perhaps be its proper construction in this case. The only remaining section to be noticed is the 29th, the general saving clause. It enacts that the act shall not lessen, prejudice, or defeat the rights, authorities, privileges, and immunities, vested in and exercised, and enjoyed by either of the two universities of *Oxford* and *Cambridge*, the Royal College of Physicians, the Royal

College of Surgeons, or the said Society of Apothecaries, except such as have been altered, varied, or amended by the act, or of any person or persons practising as an apothecary previously to the 1st of August, but the said universities, colleges, and persons shall have, &c. all such rights, &c. save and except as aforesaid, in as beneficial a manner as they might have done if the act had not been passed.

Now, if the words previously to the 1st of August are to be taken in their large and unqualified sense, this saving clause will be quite irreconcilable with the 14th section, whether the word "*already*" there used, be referred to the day of the passing of the act, or to the 1st of August; and also with the 20th section, which plainly mentions the 1st of August, and the inquiry in any proceeding on the statute may always be, not whether the party was in practice on the 12th of July, or on the 1st of August, but whether he had been in practice at any remote period of his life. It is impossible to suppose that this was intended, and it seems to us that the only mode of reconciling all the clauses, and carrying the plain object of the law into effect, is to consider those apothecaries only to be exempt from its provisions, who were in practice on the day on which the act took effect, that is the 1st of August. This construction is not inconsistent with the words of this clause, for the clause contains only a saving of the rights of those persons who were in practice before the 1st of August, except as altered or varied by the act, and that alteration is to be found in the 20th section, which imposes the penalties on persons not in practice on the 1st of August. It is not necessary, as I have before observed, to say in this case whether a person, claiming the exemption, must have been in practice both before and on the 1st of August. If the meaning of this saving clause be doubtful, then according to all sound rules of construction, the plain

sense of the penal clause must prevail. Attending to all the parts of this saving clause, it appears to have been introduced *ex majori cautela*, and not intended to control any previous enactment; we think the language of it too doubtful, to have the effect of controlling the plain words of the penal clause, and we are consequently of opinion, that the direction at the trial was right, and that the rule for a new trial must be discharged.

#### INSOLVENT DEBTORS' COURT—Sept. 8.

##### SITTINGS.

The Court will meet again on Tuesday next to hear applications for bail, and then adjourn until the 22nd instant, the time appointed for the hearing of cases.

#### *Allowance to Prisoners under Sec. 118 of the Insolvent Act.*

Four applications were made by prisoners in Whitecross-street Prison, for an allowance under the 118th section of the late act, out of the fund in court, arising from the interest on unclaimed money, and in each case a sum was ordered, thereby enabling the poor prisoners to file their proceedings and appear for hearing. It is understood that about £300. a-year arises from the fund in question, and a great number of persons have been assisted who would otherwise have had to remain in confinement. It is required by the court that in all cases the gaolers should give certificates, that the parties applying are in distressed circumstances, and cannot otherwise obtain their liberation but by an allowance of the money vested in the discretion of the commissioners under the 118th section.

3 & 4 VICT. Cap. 96.

#### *An Act for the Regulation of the Duties of Postage.* [10th August, 1840.]

(Continued from p. 304.)

18. And be it enacted, that it shall be lawful for the Postmaster-General at any time hereafter, with the consent of the Commissioners of her Majesty's Treasury, by writing, under his hand, to declare that letters enclosed in stamped covers, or having a stamp or stamps affixed thereto, (such stamps being provided under or in pursuance of the said recited act or of this act, and being equal in value or amount to the rates of postage to which such letters would be liable under this act if sent by the post pre-paid,) may be sent, conveyed, and delivered otherwise than by the post, under and subject nevertheless to all such regulations and restrictions as the Post-

master-General, with such consent as aforesaid, may think fit, which declaration shall be inserted in the *London Gazette* before coming into operation; and from thenceforth, so long as the said declaration shall continue in force (but no longer), any such stamped letters may be sent, conveyed, and delivered otherwise than by the post accordingly: Provided always, that it shall be lawful for the Postmaster-General, with such consent as aforesaid, at any time, by writing, under his hand, inserted in the *London Gazette*, to rescind and annul any such declaration and the authority thereby given, or to alter and vary any of the regulations and restrictions therein contained, and to make and establish any new or other regulations and restrictions respecting the sending, conveying, or delivering of such stamped letters otherwise than by the post, as the Postmaster-General, with such consent as aforesaid, shall deem expedient: Provided also, that nothing herein contained shall authorize or be construed to authorize any person to make a collection of stamped letters for the purpose of being sent or conveyed otherwise than by the post.

19. And be it enacted, that the Commissioners of Stamps and Taxes shall from time to time provide proper and sufficient dies or other implements for expressing and denoting rates or duties of one penny and two-pence, or rates or duties of any other value or amount as may be directed by the Commissioners of her Majesty's Treasury, for the purposes herein mentioned; and it shall be lawful for the said Commissioners of Stamps and Taxes to use for the purposes any dies, plates, or implements which have been provided, made, or used under or in pursuance of the said recited act of the last session of Parliament; and all stamps and impressions which have been or shall be made or expressed by or from any such last-mentioned dies, plates, or other implements shall be valid and available for the purposes of this act.

20. And be it enacted, that the Commissioners of Stamps and Taxes shall cause a separate account to be kept of the stamp duties arising under this act; and it shall be lawful for the Commissioners of her Majesty's Treasury, and they are hereby empowered, from time to time to direct the said Commissioners of Stamps and Taxes to authorize their Receiver-general to pay over such sum and sums of money arising from the said stamp duties as the Commissioners of her Majesty's Treasury shall think proper to the account of the Receiver-general of her Majesty's Post-office at the Bank of England; and all such sums of money which shall be so paid over shall be held by the said last-mentioned Receiver-general subject to all moneys and yearly sums now charged by law or by

ble out of the Post office revenue, and all other barges, outgoings, and disbursements to which the Post-office revenue is at present liable.

21. And be it enacted, that the rates or duties which shall be expressed or denoted by any such dies as aforesaid shall be denominated and deemed to be stamp duties, and shall be under the care or management of the Commissioners of Stamps and Taxes for the time being; and all the powers, provisions, clauses, regulations, directions, fines, forfeitures, pains, and penalties contained in or imposed by the several acts now in force relating to stamp duties shall (so far as the same may be applicable, and may be consistent with the provisions of this act), in all cases not hereby expressly provided for, be of full force and effect with respect to the stamps to be provided under or by virtue of this present act, and the paper on which the same shall be impressed, or to which the same shall be affixed, and shall be observed, applied, enforced, and put in execution for the raising, levying, collecting, and securing of the rates or duties denoted hereby, and for preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully and effectually, to all intents and purposes, as if such powers, provisions, clauses, regulations, and directions, fines, forfeitures, pains, and penalties, had been herein repeated and specially enacted with reference to the said last-mentioned stamps and rates or duties respectively: Provided always, that the commissioners of Stamps and Taxes shall not make or allow any allowance or discount on the payment to them of any of the said duties arising under this act, or on the purchase from them of any stamps denoting the said duties, unless they all be directed to do so by the Lords of the treasury.

22. And be it enacted, that if any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any die, plate, or other instrument, or any part of any die, plate, or other instrument, which hath been or shall or may be provided, made, or used by or under the directions of the Commissioners of Stamps and Taxes, or by or under the direction of any other person or persons legally authorized in that behalf, for the purpose of expressing or denoting any of the rates or duties which are or shall be directed to be charged under or by virtue of the authority contained in the said recited Act of the last Session of Parliament, or under or by virtue of this Act; or if any person shall forge, counterfeit, or imitate, or cause or procure to be forged, counterfeited, or imitated, the stamp, mark, or impression, or any part of the stamp, mark, or impression, of any such die, plate, or instrument which hath been or shall or may be provided, made, or used as aforesaid, upon any paper or other substance or material whatever;

or if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument resembling or intended to resemble either wholly or in part any die, plate, or other instrument which hath been or shall or may be so provided, made, or used as aforesaid; or if any person shall stamp or mark, or cause or procure to be stamped or marked, any paper, or other substance or material whatsoever, with any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid; or if any person shall use, utter, sell, or expose to sale, or shall cause or procure to be used, uttered, sold, or exposed to sale, or shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any paper, or other substance or material, having thereon the impression or any part of the impression of any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid, or having thereon any false, forged, or counterfeit stamp or impression, resembling or representing, either wholly or in part, or intended or liable to pass or be mistaken for the stamp, mark, or impression of any such die, plate, or other instrument, which hath been or shall or may be so provided, made, or used as aforesaid, knowing such false, forged, or counterfeit stamp, mark, or impression to be false, forged, or counterfeit; or if any person shall, with intent to defraud her Majesty, her heirs or successors, privately or fraudulently use, or cause or procure to be privately or fraudulently used, any die, plate, or other instrument so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, or shall with such intent privately or fraudulently stamp or mark, or cause or procure to be stamped or marked, any paper or other substance or material whatsoever with any such die, plate, or other instrument as last aforesaid; or if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any paper or other substance or material so privately or fraudulently stamped or marked as aforesaid; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years, as the Court shall award.

23. And be it enacted, that if any person shall

fraudulently get off or remove, or cause or procure to be gotten off or removed, from any letter or cover, or any paper or other substance or material, the stamp or impression of any die, plate, or other instrument so provided, made, or used, or hereafter to be provided, made, or used as aforesaid, with intent to use, join, fix, or place such stamp or impression for, with, or upon any other letter, cover, paper, or other substance or material; or if any person shall fraudulently use, join, fix, or place for, with, or upon any letter or cover, or any paper or other substance or material, any such stamp or impression as aforesaid which shall have been gotten off or removed from any other letter, cover, paper, or other substance or material; or if any person shall fraudulently erase, cut, scrape, discharge, or get out of or from, or shall cause or procure to be so erased, cut, scraped, discharged, or gotten out of or from any letter or cover, or any paper, or other substance or material, any name, date, or other matter or thing thereon written, printed, or expressed with intent to use any stamp or mark then impressed or being upon such letter or cover, paper, or other substance or material, or that the same may be used for the purpose of defrauding her Majesty, her heirs or successors, of any of the rates or duties aforesaid; or if any person shall make, do, or practise or be concerned in any other fraudulent act, contrivance, or device whatever, not specially provided for by this or some other Act of Parliament, with intent or design to defraud her Majesty, her heirs or successors, of any of the rates or duties aforesaid; every person so offending in any of the several cases in this clause mentioned shall forfeit and pay to her Majesty, or her heirs and successors, the sum of twenty pounds, to be recovered with full costs of suit and all expences attending the same.

24. And whereas under the laws in force it is provided that no licence shall be granted to any person to deal in or to retail stamps in any town or place in Ireland (except within the district of the Dublin metropolis) where a distributor of stamps shall have been appointed by the Commissioners of Stamps, and shall reside and act as such distributor, and it is expedient to alter such restriction so far as the same relates to persons who may be licensed solely for the purpose of dealing in or retailing stamps denoting the duties on the postage of letters; be it therefore enacted, that it shall be lawful for the Commissioners of Stamps and Taxes to grant licence to any person or persons to deal in and to retail stamps denoting the stamp duties on the postage of letters in any town or place in Ireland, whether a distributor of stamps shall have been appointed in such town or place, and shall reside and act as such distributor therein, or not, any thing in any Act or Acts contained to the contrary notwithstanding.

25. And be it enacted, that no licence which

shall be granted by the said Commissioners to deal in and retail stamps of the description aforesaid only, nor any bond to be taken on the granting of any such last-mentioned licence, shall be subject or liable to any stamp duty.

(To be continued.)

#### NOTICE TO SUBSCRIBERS.

We have complaints of the irregular delivery of this paper from some of our country friends. We will only say that it *ought* to be delivered with the London *Saturday* delivery of letters, and that we take every pains, and spare no expence, to ensure such delivery. We beg, therefore, that when any such neglect occurs, "THE EDITOR" may be informed of it by letter.

We have to regret also that our Reporter, last week, occasioned the case of *Percival v. Hunt*, to be twice inserted, (see *ante* p. 221.) *Cicero* says: "*Necesse est eum qui velit peccare aliquando primum delinquere*;" such is the case in this instance, had he been in town attending his duty, this would not have occurred.

"A Subscriber from the first." Thanks for your communication, which we will divide into three parts.—The *first* is answered in the preceding notice—the *second*—our country subscribers *all* think otherwise, and we wish to oblige *all* our subscribers—the *third*, we have no wish to be *hugged* by Her Majesty's Attorney General.

#### ERRATUM.

*Ante*, p. 278, col. 1, line 28 from top, for the words "leaving out," read "followed by."

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ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.  
PUBLISHED IN DUBLIN AND EDINBURGH EVERY MONDAY.

# The Legal Guide.

Vol. IV.]

SATURDAY, SEPTEMBER 19, 1840.

[No. 21.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 308.)

#### LOCATIO CUSTODIÆ. AGISTERS OF CATTLE.

THE case we last quoted opened a new and more liberal light upon the doctrine of *lien*. It was argued in *Scarfe v. Morvill*, (a) that the decision in *Chapman v. Allen* (b) might, perhaps, be supported on the ground that a *lien* on the milch kine sent to agist would have been inconsistent with the object of the bailment, there certainly no other authority to shew that there can be no *lien* for agistment. The question had considerable discussion in the

a) 4 Mee & Wels. 278. (b) Ante, p. 305.  
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recent case of *Jackson v. Cummins*, (c) which was an action of TRESPASS for breaking and entering an out-house and premises belonging to the plaintiff, and seizing and driving away ten cows the property of the plaintiff, and converting and disposing of the same to the defendant's own use.

The defendant pleaded first not guilty; secondly, as to taking two of the cows, that the said cows for eight months had been depastured, agisted and fed by the defendant for the plaintiff in and upon certain lands of the defendant, at the request of the plaintiff, for a certain reward and remuneration to be paid the defendant by the plaintiff, and there was due and owing to the defendant from the plaintiff £16. 5s. for and in respect of the said two cows, and that it was agreed between the plaintiff and defendant that the defendant should retain, have and take and

(c) 5 Mee & Wels. 342.



keep the possession of the said two cows so long as the said sum of £16. 5s. should remain unpaid: that the said two cows then and at the time of the said agreement, were in the possession of the defendant, and so remained until the plaintiff fraudulently, unlawfully, and wrongfully, took them out of the same; that afterwards, and after the said agreement, and whilst the said two cows were in the possession of the said defendant, under the same, and whilst the said defendant had a *lien* upon the same by law and by the agreement aforesaid, and just before the said time when, &c. the plaintiff wrongfully, unlawfully, and surreptitiously, and contrary to the said agreement, with force and arms broke and entered the close of the defendant in which the said two cows were depasturing and agisting as aforesaid, and wrongfully, fraudulently, unjustly, and unlawfully took, carried, and drove away the same out of the said close of the said defendant without paying the said sum so agreed to and then due to the defendant. The plea concluded with a justification by the defendant.

The plaintiff took issue on the first plea, and to the second replied *de injuria*.

At the trial before PARKER, B., it was proved that the cows had been depastured on land belonging to the defendant. The jury found that there was *no such agreement* as stated in the plea; that the defendant should retain and keep possession of the cows until the amount due for the pasturage was paid, and thereupon found a verdict for the plaintiff; leave was reserved to the defendant to move to enter a nonsuit, in case the Court should be of opinion that a lien existed at common law for the agistment of cattle. A rule was accordingly obtained.

The Court was of opinion, that the rule ought to be discharged. MR. BARON PARKER, who delivered the judgment, said, the first question is, whether it was competent for the defendant under this plea, which speaks of a

lien by agreement, to set up a claim for a lien at common law? If it were necessary to decide that question, I should say that I think it was competent for him to do. The plaintiff, it is true, might have demurred specially to the plea, for duplicity in setting up two distinct grounds of lien, viz. by force of an agreement; and by the general law; but as it is, the averment of the agreement for a lien may be rejected, and the claim of lien under the general law supported, should such really exist. I also think that after the recent decision in *Owen v. Knight*, as to the effect of lien in actions of trover, the defendant would have done better to have pleaded that the plaintiff was not possessed of these cows, which plea would have been supported by proof of the lien, giving to the defendant a special property in them at the time of the trespass. It is not, however, necessary to decide either of these points; because I think that by the general law no lien exists in the case of agistment. The general rule, as laid down by BARNES, C.J., in *Bevan v. Waters*,<sup>(c)</sup> and by this Court in *Scarfe v. Morgan*, is, that by the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now the case of agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in *Scarfe v. Morgan*; he simply takes in the animal to feed it. In addition to which I have the express authority of *Chapman v. Allen*, that an agister has no lien; and although possibly that case may have been decided on the special ground that there had been an agreement between the parties or a conversion of the animal had taken place, still it is also quite possible that

(d) 4 Bing. N. C. 54.

(e) *Mod. & Hist. Cases*.

might have proceeded on the more general principle that no lien can exist in the case of agistment; and it was so understood by this Court in *Judson v. Etheridge*. (f) The analogy also of the case of the livery stable keeper, who has no lien by law, furnishes an additional reason why none can exist here, for this is a case of an agistment of milch cows, and from the very nature of the subject matter, the owner is to have possession of them during the time of milking, which establishes that it was not intended that the agister was to have the entire possession of the thing bailed, and there is nothing to shew that the owner might not for that purpose have taken the animals out of the field wherein they were grazing, if he had thought proper so to do. This claim of lien is therefore inconsistent with the necessary enjoyment of the property by the owner. As to the case of the training groom, it is not necessary to say any thing, as it has not been formally decided; for in *Jacobs v. Latour*, (g) the point was left undetermined. It is true there is a *Nisi prius* decision of *Barr, C. J.* in *Bevan v. Waters*, that the trainer would have a lien on the ground of his having expended labour and skill in bringing the animal into condition to run at races; but it does not appear to have been present to the mind of the judge, or was the usage of training to that effect explained to him, that when horses are delivered for that purpose, the owner has always a right during the continuing of the process, to take the animal away for the purpose of training races for plates elsewhere. The right of lien therefore, must be subservient to this general right which overrides it; so that I doubt if that doctrine would apply here the animal delivered was a race horse, that case differs much from the ordinary use of training. I do not say that the case in *Bevan v. Waters* was wrongly decided;

I only doubt if it extends to the case of a race horse, unless perhaps he was delivered to the groom to be trained for the purpose of running a specified race, when of course these observations of mine would not apply. But at all events I am clear that this agister has no lien, as his case certainly does not come within the general principles which have been established, in addition to which, such a claim would be inconsistent with the more general right exercisable by the owner of the cattle.

So that the doctrine at the present day, may be safely held to be, that no lien exists for agistment, except under a special agreement. (To be continued.)

#### PROBLEM XXI. VOL. IV.

##### VENDOR AND PURCHASER.

What amounts to notice of claims and incumbrances—taking for granted that there is no difference between actual and constructive notice in its consequences?

#### ANSWER TO PROBLEM 6.—VOL. 4. (Continued from p. 311.)

3. Cases in which it has been decided whether the sheriff may seize fixtures in an execution on a writ of *fiery facias*.

I introduce a few cases and authorities under this head, because in the discussion of *King's* case (*supra*) it was stated in support of the assignees' right to the fixtures in that case, that "they might have been reached by an execution (I presume) against the tenant."

The sheriff under this writ cannot sell things fixed to the freehold, and which go to the heir and not to the executor (*Winn v. Ingelby*, 5 B. & Ald. 625; 1 D. & R. 247, S. C.; and see *Steward v. Lambe*, 4 Moore, 281; 1 B. & B. 506, S. C.; *Scorall v. Boxall*, 1 Y. & I. 398); such as furnaces, ovens, doors, windows, &c. (Com. Di. Execution); hearths, chimney-pieces, &c. (*Poole's Case*, 1 Salk, 368; *Elwes v. Maw*, 3 East, 38.) In the 7th edition of Archbold's Practice by Mr. Chitty, it is laid down that "where a mill with mill machinery was demised for a term, and the tenant without leave severed the machinery, it was held that the property in the machinery reverted to the landlord, and that it could not be taken under a *fi. fa.*; and so it would be in every case where the tenant severs from the freehold, fixtures which he

(f) 1 Crompt. & Mee. 473; 3 Tyrw. 954.

(g) 5 Bing. 130. 2 M. & P. 201.

cannot lawfully remove; but the sheriff may sell utensils fixed by the tenant for the purposes of his trade, such as vats, coppers, or the like; so he may sell fixtures, which may be removed by the tenant. Where the sheriff takes a lease and fixtures in execution, he must sell the fixtures separately if he cannot find a purchaser for the whole." In support of this doctrine the cases following are cited in the work alluded to:—*Farrant v. Thompson*, 5 B. & Ald. 826; see *Steward v. Lombe*, ub. sup.; Poole's case, and *Elwes v. Maw*, ub. sup.; *Duck v. Braddyl*, McClel. 217; *Storer v. Hunter* (sup.); per *Parke, B. Minshull v. Lloyd*, 2 M. & W. 459; *Barnard v. Lee*, 1 Stark, 43.

4. Cases on the right to fixtures as decided between the executor and the heir-at-law.

I am induced to bring these cases before you, not for the purpose of lengthening my answer to this problem, but because it appears (p. 207) that upon the question of "order and disposition," a learned judge has always understood the rule on which the decision of the question before us turns, to be, with regard to the trade fixtures of a bankrupt, that the assignees are entitled to such of them as an executor can claim against the heir-at-law.

"Things that are affixed to the tenement, and are made parcel of the freehold, belong to the heir, and not to the executor." (Swinb. part 6, s. 7.) The general rule thus stated is exemplified in the following manner:—"With respect to wainscot, this being annexed to the house either by the lessor or the lessee, becomes parcel of the house; and there is no difference whether it be affixed with nails or by screws, or irons thrust through the posts or walls of the house, and any other such like thing affixed to the freehold or to the ground with mortar and stone; as tables dormant, mangers, leads, and such like; these also belong to the heir and not to the executor. (Id.) The like of millstones, anvils, doors, keys, window shutters, none of which being chattels, go to the heir."

In 21 Hen. 7, an executor taking away a furnace set up in the middle of a house, and not fixed to any wall, the heir brought an action of trespass against him, and it was adjudged that the furnace should go to the heir. But in Day and Austin, Lord Dyer's opinion was stated to be that where the furnace is not affixed to the wall, the lessee might within his term take it away, but otherwise if it was fixed to the wall (per Walmsley, J.—*Law of Test.* 342); but in the case of *Harvey and Harvey*, M. 14 Geo. 2, in trover, by the executor against the heir, it was held by Lee, C. J. that hangings, tapestry, and iron backs to chimnies, belonged to the executor, who recovered accordingly against the heir. (2 Str. 1141.) And the law seems now not to

be held so strict as formerly; for if these things can be taken away without injury to the fabric of the house, it seems that the executor shall have them; as tables, although fastened to the floor, furnaces, if not made part of the wall, grates, iron ovens, jacks, clock cases, pumps, and such like, although fixed to the freehold by nails or otherwise. (*Grymes v. Boweren*, 6 Bing. 437; 4 Moo. & P. 143; 4 Burn's E. Law. 301.)

The important case of *Lawton v. Lawton* was decided in 1743, and in which the question for decision was "whether a fire engine (or steam-engine), set up for the benefit of a colliery by a tenant for life, shall be considered as personal estate, and go to the executor, or fixed to the freehold, and go to a remainder man."

For the plaintiff (who was a creditor of the tenant for life) evidence was read to prove that the fire-engine was worth to be sold £350., and that it is customary to remove fire-engines; and it was urged that the testator had died greatly in debt, and it would be hard when he had been laying out his creditors' money in erecting this engine that they should not have the benefit of it, but that the strict rule of law should take place. And it was compared to the case of a cyder mill, which is let very deep into the ground, and is certainly fixed to the freehold, and yet L. C. B. Comyns, at the assizes at Worcester, upon an action of trover, brought by an executor against the heir, was of opinion that it was personal estate, and directed the jury to find for the executor. And Lord Chancellor Hardwicke, on the question of the fire-engine, whether it should be considered as personal estate, and consequently applied to the increase of assets for the payment of debts, said, "It appears in evidence that in its own nature it is a personal moveable chattel, taken either in part or in gross before it is put up. But then it is insisted that fixing it in order to make it work is properly an annexation to the freehold. In the old cases they go a great way upon the annexation to the freehold: and so long ago as Henry the Seventh's time the courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the courts have gone upon, of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed on by screws, and marble chimney-pieces, is now allowed to be done. Coppers, and all sorts of brewing vessels, cannot possibly be used without being as much fixed as fire-engines; and brewhouses, especially, pipes must be let through walls, and supported by walls, and

notwithstanding this, as they are laid for convenience of trade, landlords will not be allowed to retain them. The old rules of law have been relaxed chiefly between landlord and tenant, and not so frequently between executor and heir-at-law, or tenant for life and remainder-man. But even in these cases it admits the consideration of public convenience for determining the question." In conclusion, Lord Hardwicke said, "Upon the whole I think this fire-engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for increase of assets," and he decreed accordingly. (3 Atk. 13, 4, B. E. L. 301; et vide Western's Conv. vol. 4, p. 16, where the Law of Fixtures is very ably deduced, and clearly arranged.) A similar decision was made a few years afterwards by the same judge in a case closely resembling *Lawton v. Lawton* in its material circumstances (*Lord Dudley v. Lord Warde*, Ambl. 113; Western's Conv. vol. 4, p. 17); and these decisions, and the principles upon which they were decided, have been recognized and confirmed by subsequent judicial authorities. (Lord Mansfield in *Lawton v. Salmon*, 1 H. Bl. 260, n.; Lord Ellenborough in *Elwes v. Maw*, 3 East, 54; and Lord Lyndhurst in *Trappes v. Harter*, supra); and trade fixtures have, between the executor and the heir or remainder-man, been considered to belong to the former, either when they were erected exclusively for the purposes of trade or for a mixed purpose, "between enjoying the profits of the land and carrying on a species of trade" (3 Atk. 16); as in the case of the cider-mill, before-mentioned. But if the property be essential to the value and enjoyment of the real estate, it cannot be removed by the executor or administrator, but will descend to the heir as parcel of the inheritance. Thus in the said case of *Lawton v. Salmon*, the salt pans in salt works, erected by the testator were considered as merely the means of enjoying the inheritance of the land wherein the salt spring rose, and not as accessories to a trade, and therefore Lord Mansfield held that they must go to the heir, and not to the executor; and apparently for a similar reason it has been held that the executor is not entitled to remove things erected on the land for agricultural purposes, (*Elwes v. Maw*, sup.) nor greenhouses, conservatories, or the like, that are let into the ground or attached to a permanent building. (*Buckland v. Butterfield*, 2 Bro. & B. 54; 4 B. Moore, 440, vide 3 East, 56.)

The ancient rule, that whatever is annexed to the freehold is thereby made part of the freehold, and subject to all its incidents and qualities has thus been considerably relaxed in favour of the personal representatives of the deceased owner of the land. But this relaxation is not considered

to be carried so far between the personal representative of tenant in fee and the heir, as between the personal representative of tenant for life or tenant in tail, and the remainder-man or reversioner, nor between these latter parties so far as between the parties whose relation to each other is the principal object of this problem, viz. tenant and landlord. (Vide 3 Atk. 16; 2 East, 91, 3 Id. 51.)

The right of the personal representative may also, it seems, be extended by the custom of the neighbourhood to articles which would not elsewhere be removeable fixtures; for instance, a granary built on pillars in Hampshire, is by custom a chattel, and belongs to the executor. (Viner's Ab. tit. Executors (U.), pl. 74.) It will also depend upon the manner in which the thing is fixed, whether it shall be considered to be so annexed to the soil as to become part of the inheritance, and transmissible together with it. Thus a barn set upon blocks or pattens, but not fixed in or to the ground (*Culling v. Suffnall*, Bull. N. P. 34); and a post windmill, constructed upon cross traces laid upon brick pillars, but not attached or affixed thereto (*Rex v. Londonthorp*, 6 T. R. 377), and other buildings erected in a similarly detached manner, have been held to continue mere chattels. (*Rex v. Otley*, 1 B. & Ad. 161; *Wansborough v. Matton*, 4 Ad. & El. 884; 6 Nev. & M. 367); and generally, in order to constitute such an annexation as shall raise a case of fixtures, it is not enough that the article has been laid upon the land and brought into contact with it, but it is necessary that the soil should have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground. (Amos & F. on Fixt. 2.)

A tenant having a right of removing fixtures must exercise it during his term, otherwise he will be considered as having abandoned it in favour of the reversioner (*Lyde v. Russell*, 1 B. & Adol. 394); and therefore an executor or administrator of a tenant from year to year should take care to remove or dispose of the fixtures before the expiration of his notice to quit. (See Lovelass on Wills, Ed. 12, 62.) E. A.

#### TO THE EDITOR OF THE LEGAL GUIDE.

#### CASE OF FROST THE CHARTIST,

#### THE JUSTICE OF HIS SENTENCE CONSIDERED.

Sir,—The leisure of the long vacation induces me to refer to this case, which, in my judgment, is the most important as regards the administration of our laws that has ever yet taken place. Every one knows that on the trial an objection was taken, that the copy of the indictment, the panel of the jury, and the list of witnesses had

not been delivered at one and the same time. The point was reserved for the opinion of the fifteen judges; the trial proceeded, and the prisoner was found guilty of high treason, and the sentence of the law was pronounced upon him. The question was afterwards argued at very great length before all the judges, who almost immediately made known their decision; and that is the point which appears to me to strike at the root of every thing dear to us. The judicial opinion, far from being unanimous, was, I must say, pronounced with "indecent haste!" If a jury do not agree, they are locked up until they do, or at all events for many hours; and be it recollected that their opinion is asked upon matters of fact, depending very frequently upon contradictory testimony: but the opinion of the judges was required upon the law of the land, of which they were supposed to be conversant; but it turns out that judges are, like other men, liable to disagree. Did they, however, follow the course that would have been adopted with regard to a jury? Did they "lock themselves up in some convenient room without meat, drink, or fire, candle-light excepted;" and so endeavour to reconcile their different opinions? Did they shew to the world, that after what is termed "solemn argument," there was "solemn deliberation?" On the contrary, that opinion was promulgated almost instantaneously; and what was it? A majority of three had decided that the objection was valid, and therefore that the trial was a farce. Why then was the prisoner not set at liberty? Why, by some extraordinary chance, a majority of three had determined that the objection, if good, was not made in time; that it ought to have been before plea pleaded. If it had been made before the plea it would have gone for nothing, as the trial would have been postponed and fresh documents delivered. Does not this question then as to "*time*" become a mere quibble; and ought not the prisoner in common sense to have had the benefit of the decision of the majority of three, that the objection was a good objection? But how much it is to be regretted that there should have been such a difference of opinion. Surely judges are not so stubborn in their judgments that the arguments of each other have no weight with them. Upon general subjects we find them agree; and yet we must feel assured that there is some little compromise of opinion between them. But might not this have been a compromise in order to reduce the severity of the punishment, or, in other words, "to fritter away the law." For heaven's sake, if judges cannot agree, let us call in a little common sense to our aid, and we shall feel that if the objection was a good one the prisoner ought to have the full benefit of it, and not to be met by legal quibbles arising from inconsistency

of opinion among those who, as the administrators of the law, ought to be masters of it. What are we to think of our laws, when those who deal them out to us cannot come to an unanimous opinion upon them? Why do not the judges themselves frame drafts of bills to be laid before Parliament upon strictly legal subjects? They would by these means be far better employed than by finding fault with almost every Act of Parliament which is brought before them—which it certainly is the common practice of one judge on the bench to do. Maintaining, as I shew shall, that justice has not been dealt out to the prisoner, I also contend that the want of unanimity in the judges has cast a blot on the judicial character that will not be easily removed.

I remain, Sir,  
Your very obedient servant,  
JUSTITIA.

### Law Reports.

#### ROLLS' COURT.—July 6.

GREENLAW v. KING.

**ANNOURY.**—*Whether a person placed in a fiduciary situation is allowed to contract for his own benefit.*—**ANNOURY** purchased by a party holding that character *et cetera*.

This suit was instituted to set aside a renuity granted by the Rev. Hugh Fraser, under an Act of Parliament for raising money for building a new Rectory house to, or in trust for the late Bishop of Rochester, the Bishop of the Diocese.

The bill stated that the Rev. Hugh Fraser was the Rector of the parish church of St. Mary, Woolwich, Kent, and the Bishop of Rochester was patron of the living. The Rectory house being in a very dilapidated state, it was thought advisable to obtain an Act of Parliament for sale of the present house, and to build another. Accordingly, by an Act of the 49 Geo. 3, intituled "An Act to enable the Rector of the said Parish, for the time being, to grant building leases of the glebe lands belonging to the Rectory, and to sell the then present Rectory house and garden, and build a new Rectory house." The Rectory house and garden were vested in the Rev. Avery Hall and Alexander Fraser, upon trust for sale, and the money to arise thereby was to be invested in the purchase of Navy or Exchequer bills, and applied towards building a new Rectory house, garden, and offices; and it was provided that such new rectory house should be built to the satisfaction of the Bishop of Rochester for the time being, at a price not exceeding £2,000, within a limited time, and that in case the money arising from the sale of the rectory house and

garden should fall short of, and not be sufficient to answer the purposes of the act, the rector for the time being was empowered to take and receive of and from any person or persons, to whom he should grant any lease or leases under the said act, any sum or sums of money, by way of fine as might be necessary, but so as such fine should not in the whole exceed the sum of £2,000. Another act was passed in the 52 Geo. 3. for enlarging the powers of the said act, which after reciting that the trustees had sold the rectory house and garden, and after defraying the expenses of the sale, and of the said act, invested the residue of the money arising therefrom in the purchase of exchequer bills; and also, with the consent of the *Bishop of Rochester*, had subsequently sold such exchequer bills, and applied the produce thereof towards defraying the expense of building a new rectory house, garden, and offices, and that the said *Hugh Fraser*, with the approbation of the *Bishop of Rochester*, had granted and contracted to grant building leases of part of the said glebe lands in favour of divers persons at reserved rents, amounting in the whole to a sum exceeding £100. per annum, and had taken premiums or fines amounting to about £1,500.; and that the building of the said rectory house had been proceeded in, and was then nearly completed; and that, towards carrying on the said works, the sum of £2,100. or thereabouts, had been expended; and that after the application of the produce of the exchequer bills, in which the residue of the money arising from the sale of the old rectory house and garden had been invested, and the amount of the said premiums or fines, there would be wanting the sum of £2,000. or thereabouts, to enable the said *Hugh Fraser* to carry the purposes of the said act into execution. It was enacted that it should be lawful for the rector for the time being, by bond or bonds, grant or grants, deed or deeds, or by some other instrument valid in the law by him sealed and delivered in the presence of and to be attested by two or more credible witnesses, by and with the consent of the *Bishop of Rochester for the time being*, to borrow any such sum or sums of money not exceeding in the whole the sum of £2,000., as might be necessary towards defraying the expense of the act, and for finishing and completing the said rectory house, garden, and appurtenances, in the manner directed by the first act, by the sale of one or more annuity or annuities, upon one or more life or lives, and to secure the payment of such annuity or annuities by a grant or charge upon the ground rents reserved under the leases then granted, or which might be granted under and by virtue of the said act. And it was further enacted, that, if the amount of the ground

rents should be found insufficient for the purpose of borrowing the said sum of £2,000., it should be lawful for the rector for the time being, to charge the said annuity or annuities upon the rents and profits of the said rectory. And it was further enacted, that the money to arise by sale of the said annuities, should upon the receipt thereof, (subject to the payment of the costs, charges, and expenses, preparatory to and attending the applying for and obtaining and passing the act) be invested in the purchase of Navy or Exchequer bills, in the joint names of the said *George Avery Hatch*, and *Alexander Fraser*, their executors, administrators, and assigns, and that such navy or exchequer bills should from time to time be sold, and the money thence arising be applied and disposed of towards defraying the expenses of finishing and completing the said new rectory house, garden, offices, and appurtenances. And that when and as soon as the said new rectory house, garden, and offices, should have been finished and completed to the satisfaction of the *Bishop of Rochester*, for the time being, a declaration in writing to that effect under the hand and seal of the *Bishop*, should be a sufficient release and discharge to the said *George Avery Hatch* and *Alexander Fraser*, for all the monies which might have been applied by them or by the said *Hugh Fraser*, under their authority, for and towards the expense of building, finishing, and completing the said new rectory house, garden, and offices, pursuant to an account thereof to be by them rendered and approved of, under the hand and seal of the *Bishop of Rochester* for the time being. And that in case there should be any balance remaining in the hands of the said trustees, after the purposes of the said act should have been carried into effect, it should be lawful for the Rector for the time being to lay out and expend the same, by and with the approbation of the *Bishop of Rochester for the time being*, towards the making of permanent improvements upon the rectory house, garden, and glebe lands of the said rectory. After this Act was obtained, the Rector advertised to grant an annuity for £2,000. through his surveyor *Mr. Hogg*, and required tenders to be made for such annuity, but no person could be procured to advance the money at less than £9. per cent, for two lives, which was offered by one *Mr. Hill*, and was accepted, but on applying to the *Bishop* for his consent, his Lordship thought £9. per cent. too high a rate of interest, and said that he thought he could procure one *Mr. Broderip* to purchase an annuity at £8½. per cent. This however was not done, and the *Bishop* offered to become himself the purchaser of the annuity at that rate, if lower terms could not be procured. *Mr. Fraser* and the trustees

appointed by the act accepted this offer and abandoned that of *Mr. Hill*; but the *Bishop* was aware of the difficulty of naming himself in the annuity deed, as the grantee of the annuity, and he therefore proposed that it should be granted to his son, the defendant, *Mr. Walker King*, (then a minor) but it being objected that he was incapable of binding himself, it was agreed that the name of *Mr. Venables* should be inserted in the annuity deed, as a trustee for the *Bishop*, and thus the matter was settled by all the parties, and by an indenture dated the 19th January, 1813, and made between the *Bishop of Rochester* of the first part, the *Rev. Hugh Fraser* of the second part, the *Rev. Avery Hatch* and *Alexander Fraser* of the third part, and *Thomas Venables* of the fourth part. The *Bishop*, it was witnessed, pursuant to and by force and virtue, and in exercise and execution of the power and authority to him given or reserved by the act, did consent that the said *Hugh Fraser* should borrow the said sum of £2,000. from the said *Thomas Venables*, for the purposes of the said act, by the sale to him of an annuity of £170. for the lives of two sons of the *Bishop*, and the life of the survivor.

And it was further witnessed that, in consideration of £2,000. paid to the said *Avery Hatch* and *Alexander Fraser* by the said *Thomas Venables*, the said *Hugh Fraser* did give, grant, bargain, and sell and confirm unto the said *Thomas Venables*, his executors, administrators, and assigns, one annuity, or clear yearly rent or sum of £170, to be paid and payable for and during the lives of the said two sons of the *Bishop*, and the life of the survivor of them, and to be charged and chargeable upon and yearly issuing, and payable out of all and singular the rents reserved by the several building leases then already granted in pursuance of the said acts: and the said *Hugh Fraser* charged the said ground rents, and also the rents and profits of the said rectory of the parish and parish church of *St. Mary's, Woolwich*, with the payment of the same annuity. On the 20th January, 1813, *Mr. Venables* executed a *Declaration of trust* of the annuity in favour of the *Bishop*, and in the year 1820 assigned over the annuity to his son, the said *Walker King*. The *Bishop* died in 1827, and the annuity was paid by *Mr. Hugh Fraser* till the time of his death, which took place in 1837, when the present plaintiff, *Mr. Greenlaw*, was instituted to the living, and he finding that a great portion of the income arising from the Rectory was absorbed in paying this annuity, he refused to pay it, and filed the present bill against *Walter King*, the annuitant and the representatives of *Mr. Venables*, who had also died. The bill alleged that £2,000 was an inadequate price for the annuity, and sub-

mitted that under the circumstances aforesaid the plaintiff ought to be relieved from further paying it, and that the indenture of the 19th January, 1813, ought to be delivered up to be cancelled, and prayed that it might be declared that the grant of the annuity was fraudulent and void, and that it might be set aside; and that it might be declared that all sums which had been paid on account of the annuity ought to be considered as applied in or towards satisfaction and discharge, first of the interest and then of the principal of the said sum of £2,000, or of so much thereof as from time to time remained undischarged, and that an account might be taken for the purpose of ascertaining whether, according to the declaration aforesaid, any thing and what remained due in respect of the said sum of £2,000 and interest, and if upon the taking of such account, it should be found that by means of such several sums so paid in respect of the said annuity, the whole of the said principal sum of £2,000, together with interest for the same, had been satisfied and discharged, then that the plaintiff might be relieved from further paying the said annuity, and that the said defendants might be decreed to deliver up to the plaintiff the indenture of the 19th January, 1813, to be cancelled; but if, on the taking of such accounts, it should be found that any thing still remained due and owing in respect of the said principal sum of £2,000 and interest thereon, then on payment of what might be so found to be due, the plaintiff might be relieved from further paying the said annuity, and that the said defendants might be decreed to deliver up to the plaintiff the said indenture to be cancelled. It was admitted by the defendant *King* in his answer, that the payments made in respect of the annuity would together amount to more than £2,000 with interest from the time of granting of the annuity; but he insisted upon the length of time and acquiescence on the part of the predecessor of the plaintiff, as grounds to dismiss the plaintiff's bill, and submitted to any inquiry the Court should direct.

*Mr. Pemberton*, for the plaintiff, did not charge the *Bishop* with any fraud, and contended that the *Bishop* was totally precluded from purchasing the annuity consistently with the point of the law and the principles and rules of the Court regarding *Trustees*, which character the *Bishop* filled in the present case in a pre-eminent degree, and cited *Grover v. Hugell* (a), where a person had entered into an agreement for the purchase of land, which was formerly part of the glebe of a Rectory, and had been before sold for the redemption of the land tax, and the Court held upon the general rule in equity, that a man cannot place himself in a situation as

which his interest conflicts with his duty, that the purchaser was not bound to complete his purchase, it appearing upon the prior sale for the redemption of the land-tax the Rector was himself the actual purchaser, and made use of the name of his Curate in the conveyance.

Mr. Richards, for the defendants, relied upon the length of time and the acquiescence of Mr. Fraser, sufficient grounds to warrant the Court in dismissing the bill—he cited *Champion v. Rigby* (b), *Howard v. Ducane* (c), where Lord Eldon held that Trustees who had a power of sale or exchange with the approbation of the tenant for life, might sell to or exchange with the tenant for life himself; and in such a case the tenant for life stood in a relation to the property, and to the person who remained very analogous to that of the late Rector in this case, and he insisted that though a trustee for sale cannot purchase from himself, it had not been determined that a trustee cannot purchase from his *cestui que trust*.

Lord LANGDALE said, it was manifest that the Bishop had a most important duty conferred upon him by the Acts of Parliament. He was not only to protect the right of patronage vested in the see and its interests, but also the Rectory and its interests, as well as the interests of all future Rectors. The Bishop, by the course he had adopted, had made himself an interested party, and though it was not done with a view to take any sinister advantage, yet when a person is placed in a fiduciary situation he was not allowed to contract for his own benefit. The impossibility of determining the advantage derived in each particular case had been the cause of the rule. In *ex parte Bennet*, (d) LORD ELDON explained the principle of the rule upon which purchases by trustees of the trust property are set aside, and he did so in that case because LORD ROSSELLYN had said more than once, that to affect the sale the trustees must make an advantage, but that was not LORD ELDON's opinion. "The principle," his Lordship said, "is deeper; viz. that if a trustee can buy in an honest case, he may in a case having that appearance; but which on the infirmity of human testimony may be grossly otherwise;" and upon this principle I must decide this case. I am therefore of opinion that the transaction cannot stand; and as the principal and interest has been paid by the money received, the annuity must cease, and the deed must be given up to be cancelled. Time only began to run against the plaintiff from the period he became rector, and he has committed no wrong. Costs to be paid by the defendants.

(b) 1 Russ. & Myl. 539.

(c) Turn. & Ross. 81.

(d) 10 Ves. 381.

COURT OF QUEEN'S BENCH—Jan. 17.  
Sittings in Banco.

BOSANQUET v. RAINSFORTH.

JOINT STOCK BANKING COMPANIES—PRACTICE—Construction of 7 Geo. 4. c. 46, ss. 12, 13, (a)—What is the proper course to be adopted for obtaining execution against Proprietors of Shares.

In this case a rule nisi had been obtained against certain individuals, calling upon them to shew cause why a suggestion should not be entered upon the roll for the purpose of making them chargeable as private and separate individuals, and why execution should not issue against them as proprietors of shares returned to the Commissioners of Stamps, upon a judgment obtained in an action against the registered officers of the Company.

Judgment had been obtained against the defendant as the registered public officer of the *Leamington Joint Stock Bank*.

Lord DENMAN this day gave the judgment of the Court, and observed, It was admitted that according to the Act of Parliament this personal liability could only be created by the interposition

(a) 8. 12, "All and every judgment and judgments, decree or decrees, which shall at any time after the passing of this Act be had or recovered, or entered up as aforesaid in any action, suit, or proceedings in law or equity against any public officer of any such co-partnership, shall have the like effect and operation upon and against the property of any such co-partnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such co-partnership."

8. 13, "Execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or co-partnership carrying on the business of banking under the provisions of this Act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or co-partnership; that in case any such execution against any member or members for the time being of any such corporation or co-partnership, shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member or members of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements in which such judgment may have been obtained, was or were entered into, or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: Provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion, in open court, by the court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership."



of the Court; and the question was, whether such interposition ought to be effected in the manner proposed by the rule, or in the form of a *scire facias*. It was, in fact, a question in what manner new parties were to be placed upon the record, which, according to antecedent usage, must be by *scire facias*, the proceeding by suggestion being only appropriate to the introduction of collateral facts, as the change of name or death of parties. No party ought to be chargeable with any liability without full notice and opportunity of defending himself, and this could most effectually be done upon a *scire facias*. In *Bartlett v. Pentland*, (h) it was determined that if an Act of Parliament authorizes the making an officer of the Company a nominal defendant, and enables the plaintiff to take out execution against the individual partners as being the real defendants, it is necessary that he should in some way have the authority of the Court before he can have such execution. A *scire facias* is the usual course in such cases. A suggestion is applicable only to collateral facts affecting other parties than those upon the record, and that was not the point in *Bartlett v. Pentland*.—Rule discharged.

**COURT OF COMMON PLEAS—June 1.**  
*Sittings in Banco.*

**HAUGHTON v. BRINE** and another.  
**STAMPS—AGREEMENT—PRACTICE—ENTRIES**  
*in the Books of an Association.*

The plaintiff, who had been secretary to the *Brighton and Sussex Zoological Association*, brought this action against the defendants, who were two of the directors, for £20, the alleged amount due to him for four weeks' salary at £5 a week. The defendants pleaded *non assumptum*.

The books of the Association were produced, in which were found the following entry: "Resolved, that J. Haughton be secretary, at a salary of £5 per week," which was signed by the defendants. This was refused on the part of the defendants to be received as evidence, it being contended that it was an agreement, and could not be received without a stamp.

The plaintiff had a verdict for the amount claimed.

Mr. Mansell afterwards obtained a rule nisi for a new trial, on the grounds—1st, that the resolution of the Company, by which the plaintiff was appointed secretary, was not admissible in evidence from the want of an agreement stamp; and 2nd, that the jury ought to have found, upon the evidence, that the plaintiff was discharged before the period for which he claimed remuneration.

(b) 1 Barn. & Ad. 704.

TRIAL, C. J., said that the only real question was, whether the resolution of the directors came within the operation of the Stamp Act. There is no evidence to show that the plaintiff was present when the resolution was made and signed, nor is he a party to it, and we are of opinion that the resolution of the Association did not come within the terms of the Stamp Act, and therefore had been properly received in evidence, *although unstamped*; and that the other question had been properly referred to the jury, with whose finding upon it there was no just ground for being dissatisfied.—Rule discharged.

**COURT OF EXCHEQUER—June 16.**  
*Sittings in Banco.*

PAGE v. THOMAS.

**JOINT AND SEVERAL PROMISSORY NOTE—EVIDENCE—COMPETENCY** of one of the makers of a Promissory Note, who was a SURETY for the others, to be a WITNESS to prove the making of the Note by all the makers.

This was an action against the defendant, Stephen Thomas, by the payee of the following note:

"Haverfordwest, May 9, 1835.

"Twelve months after date we jointly and severally promise to pay George Page or order £100, with lawful interest at £5 per cent per annum, value received. STEPHEN THOMAS,

J. A. ALLEN,  
JOHN JENKINS."

"Witness—JAMES THOMAS."

At the trial the witness James Thomas denied his signature, and John Jenkins, one of the makers of the note, was called, who proved on the *voir dire* the signing of the note by all the makers, and that himself and J. A. Allen signed it as sureties for the defendant.

The jury found a verdict for the plaintiff for £125, principal and interest, leave being reserved to the defendant to move to enter a nonsuit.

Mr. Evans accordingly obtained a rule nisi.

Mr. Wilson now showed cause against the rule, and contended that the evidence of a surety on a promissory note had been improperly received to prove the handwriting of the defendant, who was sued as the principal on the same note. He cited *York v. Blott*, (a) where the plaintiff called T. S., one of the makers of the note, an uncertificated bankrupt, who acknowledged his own and proved the defendant's signature to the note, and it was resolved upon the authority of *Lockhart v. Graham*, (b) that T. S. might be allowed to be a witness to prove the hand-

(a) 5 Man. & Selw. 71.

(b) Str. 35.

iting of the defendant to the note, and the reason given was that if the plaintiffs recovered against the defendant, T. S. would be liable to him for contribution; or if they failed in the action, they might resort to T. S. for the whole, and then T. S. would be entitled to contribution from the defendant: so that *quæcunque viâ* T. S. stood indifferent.

LORD ABINGER.—Does this case apply here? Here, if the plaintiff recovers, the witness will be discharged from liability.

Mr. Wilson. This witness is only a surety. Mr. Williams followed on the same side, attending that as a co-trespasser might be called, might one who would be liable on a note under a certain state of things—*Buller's N. P. C.* 286, and *Hall v. Curzon*, 9 B. and C. 646.

Mr. Evans distinguished the case of co-trespassers from co-sureties, on the ground that there was no right of contribution between them. LORD ABINGER gave judgment, and said, it is the opinion of the Court that the evidence the witness was admissible in the same manner as the evidence of the indorser of a bill of exchange is admissible in an action against the acceptor, the witness is presumed to stand indifferent.—*Rule discharged.*

#### COURT OF EXCHEQUEUR CHAMBER, July 6.

##### *Appeals from the Court of Exchequer.* *VINCE v. WAKEFIELD.*

*WARRANT—Practice—Pleading—Covenant to effect a Life Policy of Insurance, and not to go beyond the limits of Europe—on breach Declaration, must aver that the Defendant had notice of the Policy having been effected, or of its containing a Condition upon which the breach is alleged.*

This was an appeal from the decision of the Court of Exchequer, in which the defendant had verdict on demurrer.

By an indenture, dated the 3d March, 1827, the defendant, Edward Gibbon Wakefield, entered into a covenant with the plaintiff that he would at all times, at the request of the plaintiff, appear at an office for insurance of lives within the bills of mortality, or before the agents of any such office in the country; where he might happen to be residing, or happen to be, and then and there to answer such questions as might be required, concerning the state of his health, to enable the plaintiff, if he should think proper, to insure the defendant's life; and should not afterwards do, as far as with him should lay, permit to be done, any act, deed, matter, or thing whatsoever, whereby any such insurance might be, or become void, or be prejudiced or affected in any manner whatsoever.

In pursuance of this covenant, the defendant did, on the 8th March, 1827, appear at the Rock Insurance office, London, where the plaintiff insured his life for £3000. at an annual premium of £81. 17s 6d—the policy contained the usual proviso, that in case the insured should go beyond certain limits of Europe it should become void.

The defendant subsequently went to reside at Canada, in North America, beyond the limits of Europe, by which the policy had become void, and the plaintiff brought his action against the defendant for breach of covenant.

The defendant demurred to the declaration for the want of an averment, that the defendant had notice that the policy had been effected, and that it contained such a condition for making it void.

Upon this demurrer the defendant had judgment, Lord Abinger stated the rule to be, that when a party stipulates to do a certain thing in a certain specified event which may become known to him, and with which he can make himself acquainted, he is not entitled to any notice; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given to him.

PARKER, B. expressed his doubts upon this question. He considered the general rule to be, that a party is not entitled to notice unless he has agreed for it; though there are cases where the law requires that he should have notice, and he thought this to be one of those cases. There is certainly notice by the plaintiff to the defendant of his intention to effect a policy, but no notice that the policy was effected, or of the conditions of such policy as applied to the covenant of the defendant, for breach of which the action was brought.

Mr. Henderson supported the appeal; but the COURT stopped the argument, being clearly of opinion that the averment of notice was necessary, and that no such averment, or any thing equivalent to it, was found in the declaration. Judgment of the Court below affirmed.

#### EXAMINATION OF ARTICLED CLERKS. MICHAELMAS TERM, 1840.

The number of applicants for admission is 154. Testimonials must be left before the 9th November.

The day of Examination is not yet fixed.

#### 3 & 4 VICT. Cap. 96. *An Act for the Regulation of the Duties of Postage.* (Continued from p. 320.)

26. And be it enacted, that the Commissioners of Excise, or such person or persons as the Commissioners of her Majesty's Treasury shall direct,

shall cause to be provided such moulds, frames, or instruments, or machinery or parts of machinery, as may be necessary for the making of paper, to be used as covers, or envelopes, or stamps, and to receive the impression of the dies, plates, or other instruments which have been or shall be provided, made, or used by or under the direction of the Commissioners of Stamps and Taxes, or of any other person or persons legally authorized in that behalf, for the purpose of expressing or denoting any of the rates or duties of postage which are or shall be directed to be charged under or by virtue of the authority contained in the said recited Act of the last Session of Parliament, or under this Act, which paper shall have such distinguishing words, letters, figures, marks, lines, threads, or other devices worked into or visible in the substance of the same as the said Commissioners of Excise, or such other person or persons so directed by the Commissioners of her Majesty's Treasury, shall from time to time order and direct; and it shall be lawful for the said Commissioners of Excise or other person or persons, from time to time as they shall see fit, to alter or vary any such words, letters, figures, marks, lines, threads, or other devices, either by the removal of any of them, and substitution of other words, letters, figures, marks, lines, threads, or other devices, or by any change in the position or arrangement thereof; and all such moulds, frames, or instruments, machinery or parts of machinery, shall be provided, and all such paper shall be made and manufactured, under such regulations, and by such person or persons, as the said Commissioners of Excise or other person or persons as aforesaid shall from time to time appoint or contract with for that purpose; and all the said moulds, frames, or instruments, and machinery or parts of machinery, shall be kept by such officer or officers or other person as the said Commissioners of Excise, or other person or persons directed by the Commissioners of her Majesty's Treasury, shall appoint; and all the paper so made shall, as the same is required, be delivered over to the Commissioners of Stamps and Taxes, or to such officer or warehouse keeper as such last-mentioned Commissioners shall direct to receive and take charge of the same.

27. And be it enacted, that all contracts and agreements to be entered into by the Commissioners of Excise for or relating to the supply of any such paper as aforesaid shall be made in the name of the Secretary for the time being to the said Commissioners, and his successors in office, for and on behalf of her Majesty, her heirs and successors.

28. And whereas the Commissioners of Excise have, under the orders and directions of the Commissioners of her Majesty's Treasury, con-

tracted with certain persons for the manufacture and supply of and have supplied to the Commissioners of Stamps and Taxes, for postage envelopes and covers and stamps, certain quantities of paper made and manufactured with certain words, letters, figures, marks, lines, threads, or devices worked into or visible in the substance of such paper, according to the samples thereof annexed to such contracts; be it enacted, that all the paper so made and supplied, or which hereafter shall be made or supplied under any such contract or contracts, shall be deemed and taken to be paper subject to and the same shall be subject to all the enactments and provisions of this Act in the same manner as if the same had been made and supplied under the enactments and provisions herein-before contained.

29. And be it enacted, that if any person shall make, or cause or procure to be made, or shall aid or assist in the making, or shall knowingly have in his custody or possession, not being legally authorized by the Commissioners of Excise, or other person or persons appointed by the Commissioners of her Majesty's Treasury, and without lawful excuse (the proof whereof shall lie on the person accused), any mould, frame or other instrument having therein any words, letters, figures, marks, lines, or devices peculiar to and appearing in the substance of any paper heretofore or hereafter to be provided or used for postage covers, envelopes, or stamps, or any machinery or parts of machinery for working any threads into the substance of any paper or any such thread, and intended to imitate or pass for such words, letters, figures, marks, lines, threads, or devices; or if any person, except as before excepted, shall make, or cause or procure to be made, or aid or assist in the making, or any paper in the substance of which shall be worked or shall appear visible any words, letters, figures, marks, lines, threads, or other devices peculiar to and worked into or appearing visible in the substance of any paper heretofore or hereafter to be provided or used for postage covers, envelopes, or stamps, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same; or if any person, except as before excepted, shall knowingly have in his custody or possession, without lawful excuse (the proof whereof shall lie on the person accused), any paper whatsoever, in the substance whereof shall be worked or appear visible any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or devices, and intended to imitate or pass for the same; or if any person, except as aforesaid, shall by any art, mystery, contrivance, cause or procure, or aid or assist in causing or procuring, any such words, letters,

ures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate or pass for the same; to appear marked into or visible in the substance of any paper whatever, then and in every such case every person so offending shall for every such offence be adjudged a felon, and shall be transported for the term of seven years, or shall be imprisoned at the discretion of the court before whom such person shall be tried, for any period not less than two years.

30. And be it enacted, that if any person not lawfully authorized, and without lawful excuse he prove whereof shall lie on the person accused) shall purchase or receive, or take or have in his custody or possession, any paper manufactured and provided by or under the directions of the Commissioners of Excise, or other person or persons appointed to provide the same by the Commissioners of Her Majesty's Treasury, for the purpose of being used for postage covers, envelopes, or stamps, and for receiving the impression of the dies, plates or other instruments provided, made, or used under the directions of the Commissioners of Stamps and Taxes, or other persons legally authorized in that behalf, before such paper shall have been duly stamped with such impression and issued for public use, every such person shall for such offence be guilty of a misdemeanour, and being convicted thereof, shall, at the discretion of the court before whom such person shall be tried, be imprisoned for any period not more than three years nor less than six calendar months.

31. And be it enacted, that in all cases in which there now is or shall be a treaty between the Postmaster General and the post office of a foreign country, for collecting and accounting for the British postage on foreign letters sent by the post from the United Kingdom to that foreign country or to any other foreign country, the Postmaster General may, so long as the treaty or agreement shall continue in force, receive upon any such foreign letters from the sender the postage, both British and foreign, in one entire sum, and upon foreign letters addressed to places within her Majesty's dominions may, whether there shall be any such treaty or not, charge the foreign postage in addition to the British postage, and he may account for and pay over to the foreign countries entitled to receive the same, the amount of all such foreign postage; and it shall be optional with the sender of a letter addressed to any foreign country included in such treaty, or to any foreign country to which such treaty shall extend, either to pay the British and foreign postage thereof in one entire sum, or to send the letters without paying any postage, either British or foreign, or he may otherwise pay the British

postage only; and, subject to this enactment, the postmaster-general may cause the postage of all letters sent out of the United Kingdom to be paid or stamped on being put into the post-office.

32. And be it enacted, that the foreign postage marked on any letter or newspaper, or other printed paper brought into the United Kingdom, shall in all courts of justice and other places be received as conclusive evidence of the amount of foreign postage payable in respect of such letter, newspaper, or other printed paper, in addition to the British postage; and such foreign postage shall be recoverable within the United Kingdom and other her Majesty's dominions as postage due to her Majesty.

33. And be it enacted, that it shall be lawful for her Majesty's postmaster-general to charge on all letters conveyed by the post between places within any of her Majesty's colonies, or conveyed by packet-boats between one part of her Majesty's dominions and another part of the same dominions, or between her Majesty's dominions and foreign parts, or between one port in any foreign country and another port in the same or any other foreign country, where post communications shall be established, and where rates of postage have not hitherto been authorized by law, and also to charge on all letters conveyed by any vessels to or from any of the colonies, or between any of the colonies, or between any of the colonies and a foreign port, and on all letters which shall be brought by the master of any vessel to the post-office in any of the colonies, such rates of postage as the Commissioners of her Majesty's Treasury, by warrant under their hands, shall from time to time direct.

34. And be it enacted, that it shall be lawful for her Majesty's postmaster-general to require the postage from time to time payable for letters transmitted by packet-boats or private ships between places out of the United Kingdom to be paid by the sender on the tender or delivery of such letters at the post-office, or other place appointed by the postmaster-general for the receipt of such letters.

36. And be it enacted, that the owners, charterers, or consignees of vessels inward-bound, and the owners, consignees, or shippers of goods on board vessels inward-bound, shall have their letters by such vessels free from postage (except as herein-after mentioned) if delivered at the port of the ship's arrival; and if delivered at any other place within the United Kingdom, on payment of the postage, as on pre-paid inland letters, according to the scale of weight and number of rates herein-before mentioned, from the port of arrival to the place of delivery, and if delivered in any of her Majesty's colonies, on payment of the colonial rates of postage to which letters in such colony may be liable, on conveyance from

such port of arrival to the place of delivery, provided the letters brought by any one vessel to any one such person shall not collectively exceed six ounces in weight (except in the case of letters brought by vessels coming from Ceylon, the Mauritius, the East Indies, or the Cape of Good Hope, into any port of the United Kingdom, for an owner, charterer, or consignee of such vessel, in which case they may be collectively twenty ounces in weight), and the owner, charterer, or consignee shall be entitled to have their letters which come within the above conditions before the master of the vessel delivers the other letters in his charge to the post-office: Provided nevertheless, that all ship letter gratuities payable by law to masters of vessels bringing any such letters, shall in all cases be paid to the post-office by the parties to whom the same may be addressed (in addition to any postage payable thereon) before delivery of such letters to the parties entitled to receive the same, whether such letters shall be delivered at the port of arrival of such vessel or elsewhere.

(To be continued.)

#### REVIEW OF NEW BOOKS.

*ADVENTURES of an ATTORNEY in SEARCH of PRACTICE, or a DELINEATION of PROFESSIONAL LIFE. SECOND EDITION. London, Saunders & Ottilley, Conduit-street, 1840.*

We have read this interesting book, and at once pronounce it a nut that every professional man should crack during the vacation.

We assuredly have heard before of Attornies in want of practice—Attornies in good practice—Attornies in bad practice, and Attornies of all shades and grades. There are few persons who really know more about them than we do.—We could write a red book and a black book, with names fair and names foul.—The communications we receive for the purpose of publication, would astonish the many highly honourable attornies which the profession boasts of; but we think it better for the attornies at large to suppress all such communications. We know also that a race of men are springing up

in the profession quite unknown to it in the olden time. Men of fortune, and of education, men whose honour and reputation will be (we trust) above all price.

The author of this work, in speaking of "the non-respectable of his body," says—

It must be confessed that till within the last forty or fifty years an attorney's title to be ranked even among the middle classes of society was very equivocal.

Legal business itself was at this period of a very inferior stamp: now and then cases might arise on family settlements—on real titles—on complicated relations of debtor and creditor—or doubtful customs in trade or commerce; but these were comparatively rare, and by no means constituted the bulk of legal practices; that was to be found in petty personal disputes or delinquencies—in small controversy between small people.

In our days though this inferior business remains and is even extended as population has extended, and the lower classes have acquired greater property, yet it by no means forms the principal inducement to enter the profession. So intimately has commerce become interwoven with law, in all its branches, that there is scarcely any important transaction in which the merchant can engage, that does not involve or less require the counsel of his solicitor, till long familiar with the subject has made him half a lawyer himself. The law of Insurances, the law of principal and factor, of lien, of partnership, of bankruptcy, of bills of exchange, and many other heads that might be mentioned, enter into the daily affairs of the counting house. So many, too, of our patrician families, have of late years found it convenient to place their wealth in mercantile or banking houses, and consequently to raise capital by the mortgage or sale of their patrimonial estates, that questions of pure conveyancing often become entangled with commercial law, and the nobleman, not less than the merchant, is thrown more frequently and more entirely into the hands of his attorney. The immense increase of public companies and parliamentary business, and even the growing importance and independence of our colonies, have largely contributed to swell the stream of professional profit, and at the same time to purify its source, by giving a legitimate and acknowledged value to the solicitor's services. The gradual elevation of our duties has naturally led to the introduction among us of many young men from that rank of life, who less than half a century ago, would have spurned the calling as derogatory to their birth; and attornies in the higher walks of the profession have in conse-

stances, established for themselves an acknowledged title to rank with the first circles, though do not say the most fashionable, for I by no means class these among the most worthy, or the most important; but though by this accession of better born, and therefore, generally, better educated men, we have improved our social position, and can now enumerate hundreds among us who are not less gentlemen by birth, by feeling, and by manners, than we are by Act of Parliament, there still remains too much of that low business which was once the staple of our trade, not to attract many low people into the profession; the rather because if once admitted here, the best prizes are as open to them as to others, if by happy accident they can insinuate themselves into the first or second class of competition: indeed, to be an attorney is itself a great step in life, a sort of gentility of station, in the estimate of the lower ranks of shopkeepers and mechanics; nor does it require any great outlay of money to give a son a title to the name, provided no lavish expenditure has been made in his previous education. Let it not be supposed that I feel contempt for this humble and even laudable ambition; far from it, for I profess principles too liberal, as well in politics as I trust in Christian faith, to deride it; but I will think myself at liberty to protest against the absurdity, as well as the silly pretension of placing a boy of sixteen in an attorney's office, without any preparatory education beyond the Latin Grammar, and too often less than that, simply to qualify him to be a gentleman, whilst his brothers are tinkers and tailors, and his father a Bow-street runner, or a Sheriff's officer.

The author in treating of an honest and respectable Attorney, says,

If I were asked to define the professional character to which I should most willingly trust myself, in an affair of delicacy or importance, involved in intricate details of circumstance, and tangled perhaps with much of personal and private feeling, I should select a man distinguished by calm energy, a clear head, and sound common sense: if in addition to this, he were gifted with a cheerful disposition, and marked, not by studious delicacy of mind, but by that enlarged honesty which is usually intended by "honourable principle," I should consider that he possessed the finest qualities for a useful attorney. Of course there are not many who come up to this standard; but in proportion as they approach it, and as the general nature of their business implies that they keep it constantly in view, a prudent man may consider himself safe in their hands. My work were not necessarily anonymous, and anonymous praise, however sincere, goes for nothing, I could with ease name a hundred so-

litions that well deserve to be classed with such as I have here described.

Again, upon the subject of Attornies' charges, he says,

How my unprofessional readers will stare (if I chance to find any), when I remark that one of the most difficult problems that an attorney has to solve, is to what extent he may properly make any charge at all! Yet I rejoice to say, for it is to the credit of my profession, that with the respectable members of it, this is frequently a perplexing question. It occurs in many ways: the most common is this:—An old and valuable client becomes acquainted with a case of great hardship, and perhaps oppression, involving legal points; he calls on his attorney, and avowedly on benevolent impulse, asks his opinion; the opinion involves, as a matter of course, inquiry into fact and evidence, for very few clients understand the value of the one, or detail the other with accuracy; the sufferer is sent to explain his grievance: it admits of redress; the client liberally offers to indemnify against disbursements; the attorney can do no less than wave profits; and thus a suit is begun gratuitously, partly from charitable feeling, yet more from anxiety to oblige a client, and time and labour are soon bestowed to a most inconvenient extent. In a simple case like this, there is no help for it: matters must proceed to an end in the usual routine, and compensation must be found in conscience; but this simple case admits of many variations, and then the difficulty begins. The client may go no farther than just asking an opinion; the opinion is, on the whole, favourable; the injured pauper is not poor enough to claim a pauper's privilege; if you desert him, you offend your client, who, ignorant of the expence, as well as trouble, that the offer implies, expects you will spontaneously take up the case; partial success follows; a wrong-headed jury—and nineteen out of twenty are wrong-headed,—give ten pounds damages for a broken leg, when they would not have their own gouty toes trod upon for fifty; some thirty more are recovered for taxed costs, and (the case has occurred to myself) after receiving these "party and party" allowances, you remain more than twenty out of pocket. You may gain a verdict for your pauper client, and swallow up all the fruits of his triumph, even to repay extra costs out of pocket! Reason and equity would say, in such a case, that the attorney is excusable for pocketing the damages, as well as the costs; yet character and interest forbid it. It is a hard case: but the attorney must relinquish all, though successful; and to retain the character of a gentleman, must abandon, not only reputation, but bare indemnity. The most annoying of all causes that a man can undertake

is where he recovers damages, moderate or temperate damages, as they are called, that is to say, fifty pounds for the loss of an eye, or thirty for the crippling of a limb, for a humble client thrust upon him by a wealthy patron, or adopted out of christian charity! How often have I known jurymen vaunt with self-complacency, of their justice, when some poor devil has obtained from this same justice, just enough to pay his surgeon's bill, after having been disabled for life by a drunken coachman, or a larking dandy: while the attorney who has brought the action for mere compassion, has had the pleasure of hearing himself branded by Counsel, as a wretch prowling about the streets for quarrels, and obtains for his benevolence, taxed costs that will just pay for coach hire and a blue bag to take his papers home!

An axiom on the question of costs is so obviously true, that we cannot avoid surprise at our clients so often losing sight of it. If they wish only to pay their attorney like a shoe-black, they will soon have only shoe-blacks for their attorneys. No man can limit himself as to the extent of costs, without cramping his exertions to a degree that may prove highly injurious to his client's interests.

We wish that our space permitted our extracting some of the very trite and amusing anecdotes with which the work abounds. The writer is a man of considerable intelligence and practical experience, and the advice he gives to young practitioners is of that solid kind as to be invaluable. The work is written more as a lesson to the young generation than as an exposure of knavery—illustrations there are of no very delicate hues, but they all lead to the end the author intended his work should reach, viz.—*raising the respectability of his Profession*. The narratives are written with good sense, good taste, and good feeling; and there is nothing that can be called offensive in the whole work. The first edition certainly appeared to contain an unmerited attack upon the Bar; but in the Preface to the present Edition the Author has explained that away. We think that whether for instruction or amusement, no professional man should be without it in his library.

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*Vox ab Ulstero, (Newtown, Ireland),* and *H. B. P.* shall have attention.

*Mr. Fisher, Calcutta.*—Your article is inadmissible.

*J. B.*—We believe all the material decisions upon the New Will Act are to be found in the work. The section is very obscure; but we advise you not to omit on any occasion an attestation clause, or probate in any case will not be granted without very sufficient evidence of the due execution according to the statute; besides under a devise of property for sale, a purchaser would not (or should not) accept the title without such evidence.

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ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

# The Legal Guide.

OL. IV.]

SATURDAY, SEPTEMBER 26, 1840.

[No. 22.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 323.)

#### VADIUM OR PAWN.

WE will now direct our consideration upon the fourth class of Bailments, *vadium* or *pawn* or *pledge*.

In the Civil Law it was called *Pignus*, and defined thus:—*Pignus appellatum a pmo, quia res, quæ pignori dantur, manuidentur. Unde etiam videri potest, quod idam putant, pignus proprie rei mobilis institui; (a) but there appears to have been a distinction between pignus and hypotheca, that where the thing was delivered to*

the creditor it was called *pignus*; but where it remained with the debtor, although pledged in security, it was called an *hypotheca*. (b) And yet we find *Justinian* to say there was no difference between a pledge and an *hypotheca*. *Inter pignus autem et hypothecam (quantum ad actionem hypothecariam attinet), nihil interest; nam de qua re inter creditorem et debitorem convenerit, ut sit pro debito obligata, utraque hac appellatione continetur; sed in aliis differentia est; nam pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori, maxime si mobilis sit; at eam, quæ sine traditione nuda conventionione tenetur, proprie hypothecæ appellatione contineri dicimus. (c) Pothier defines it to be a contract, by which a debtor gives to his creditor a thing to detain as security for his debt. (d) Domat*

(a) Dig. Lib. 50. tit. 16. l. 2. sec. 38; Hein. Pand. 20. tit. 1. ss. 2, 3, 4, 5.  
VOL. IV.

(b) Dig. Lib. 13. tit. 7. l. 9. s. 2.  
(c) Inst. Lib. 4. tit. 6. sec. 7.  
(d) Pothier *De Nantissement*, art. prelim. 1.



defines it as being an appropriation of the thing given for the security of an engagement. (e) This is certainly a more comprehensive definition, because the former definitions apply solely to cases of debt, but the security may be pawned for any engagement besides debt. (f) Lord HOLT, in *Coggs v. Bernard*, (g) defined it thus: — “When goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in *Latin*, *vadium*, and in *English* a *pawn*, or a *pledge*.” (h) And in his observations upon it in the same case, he considered two things, “First, what property the pawnee has in the pawn or pledge; and, secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for (i) the pawn is a securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the (k) pawnee cannot use it as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she (l) might use them; but then she must do it at her peril: for whereas if she keeps them locked up in her cabinet if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and, as such, is not liable to be used. And to this effect is *Ow*. 123. But if the pawn be of such a nature as the pawnor is at any charge about the thing pawned to maintain it, as a horse, cow, &c. then (m) the pawnee may use the horse in a reasonable manner, or milk the

cow, &c. in recompence for the meat. As to the second point *Bracton* gives you the answer: ‘*Creditor, qui pignus accepit re obligatur, et ad illam restituendam tenetur; a cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impediatur creditum petere.*’ (n) In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote’s* case is. But indeed the reason given in *Southcote’s* case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of *Assize*, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an *ordinary care* for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee by detaining them after the tender of the money is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them in all events; for the detaining of them by him is the reason of the loss. Upon the

(e) Domat, B. 3. tit. 1. sec. 1. n. 1.

(f) See *Isaac v. Clark*, 2 Bulst. 308.

(g) 8 Lord Raym. 909.

(h) See ante vol. 3. p. 385.

(i) 3 Salk. 268. Holt, 258.

(l) See *Jones’s Bailm.* 80.

(k) Id.

(m) Id.

(n) 99 b. Justinian says, (Lib. 3, tit. 15, sec. 4 *De Pignore*.) Creditor quoque, qui pignus accepit, re obligatur; quia et ipse, de ea re, quam accepit restituenda, tenetur actione pigneratitia. Sed, si pignus utriusque gratia datur, et debitori, quo magis pecunia ei credatur, et creditoris, quo magis ei in tuto sit creditum, placuit sufficere, si, ad eam rem custodiendam, exactam diligentiam adhibeat; qualem si præstiterit, et aliquo fortuito casu rem amiserit, securus esse, nec impediri creditum petere.

ne difference as the law is in relation to  
wns, it will be found to stand in relation  
goods found."

Sir William Jones defines a pledge thus:—  
A bailment of goods by a debtor to his  
ditor, to be kept till the debt is dis-  
arged," (o) and according to *Pothier* it may  
treated in the *common law*, as in the civil  
r, as a contract founded in the law of  
ture, of reciprocal obligations, and of  
tual benefit. (p)

(To be continued.)

## PROBLEM XXII. VOL. IV.

### LANDLORD and TENANT.

#### TIMBER and TREES.

What is meant by the term Timber?

What are the implied rights of Landlord and  
nant?

What acts of a tenant amount to waste?

What construction has been put upon Cove-  
ats relating to Trees?

TO THE EDITOR OF THE LEGAL GUIDE.

### SUPPLEMENTARY ANSWER TO PROBLEM 11.—VOL. 4.

#### INTERESSE TERMINI.—What is it?

SIR,—I lay before you my ideas of an *inter-  
esse termini*, its nature, properties, and effect in  
r.

1. It is a technical phrase denoting the in-  
st which accrues to a lessee for years, on the  
cution of the lease; and which continues to  
until he enters on the premises leased. It  
his interest in the term. It is his right of  
y on the tenement at the time from which  
lease is to commence (a).

Some allege it to be a right only, and not an  
te, the estate notwithstanding being still  
he lessor; others maintain it to be more than  
ight. (b) It is not a vested interest, not  
g accompanied with a delivery of possession,  
is supposed to be similar to a naked right.  
stranger can acquire a naked right in land  
vate from possession; but an *interesse ter-  
mini* is no right in land, but a mere interest in  
term. (c) It is said to be merely an execu-  
tute interest; but I submit it might be more  
larly denominated an interest derived from

an executory contract; for the interest being  
created by the execution of the lease, is *in esse*,  
and ceases to be executory, whilst the contract  
from which it springs remains *executory* during  
the continuance of the *interesse termini*. (d)

Whilst there are a variety of opinions as to  
whether it is an estate or a right only, the fact  
may be best ascertained by a consideration of its  
nature and properties. Mr. Preston holds that  
it is not an estate; and, in this opinion, he is  
strengthened by the view taken of it in *Rawlings  
v. Walker* (e), that it has all the properties and  
consequences of a right only, and not of an  
estate; and it would seem that he is supported,  
to some extent, by the fact, that an *interesse  
termini* cannot be enlarged by a release; for, a  
release which must enure to enlarge an estate,  
cannot work without a *possession* joined with an  
estate (f). But this rule is not less applicable  
to any other estate with which possession is not  
joined; and consequently, does not shew that an  
*interesse termini* is not an estate. And, Lord  
Coke says, that this peculiarity is incident to an  
*interesse termini*, because "the lessee has not  
possession in the land at the time of the release  
made" (g). An *interesse termini* cannot be  
the object of a confirmation, neither can it be  
surrendered; yet, withal, an *interesse termini*  
may be conveyed to the owner of the freehold,  
which would be a surrender in substance, though  
not in form; for, by its union with the freehold  
from which it arose the *interesse termini* would  
be extinguished (h), and it has been decided that  
an assignment of it, by the lessee to the lessor  
will have that operation (i). But, let attention  
be turned to the definition of the word "estate"  
itself, and try, does an *interesse termini* fall  
within its terms? Mr. Preston defines the word  
estate to be "the interest which any one has in  
lands, or in any other subject of property" (k).

Now, if the definition had limited its meaning  
to the interest which any one has in lands, an  
*interesse termini* clearly cannot be comprehended  
within its meaning, for the reason given, that it  
is not a right in lands but a mere interest in the  
term (l). But if a term for years be a subject of  
property, a matter which, perhaps, admits not of  
a doubt, an *interesse termini* is an estate ac-  
cording to Mr. Preston's own definition.  
Again, "the word *estate* is a general term,  
being applied to every species of property which  
a man may have an interest in" (m); here the

(d) See Bac. Ab. tit. Leases, N.

(e) 5 Barn. & Cres. 119.

(f) Shep. Touch. 324.

(g) 5 Co. 125 a. Co. Lit. 270 a.

(h) Preston on Merger, 208.

(i) *Salmon v. Sicann*, Cro. Jac. 619.

(k) Preston on Estates.

(l) 2 Blacks. Com. 144.

(m) Ib. 103.

Jones's Bailm. 117.

De Nantissement, n. 13, 14, 15, 16, & 17.

2d Blackst. Com. 144, 314.

*Rawlings v. Walker*, 5 B. & C. 118.

Preston on Merger.

term is applied to the substance of the property; but, "the word, in its most comprehensive sense, signifies the interest which a person has, in any subject of property whatever," so that the idea which the word estate gives rise to in the lawyer's mind, is of an immaterial, not of a material nature, it conveys to his mind the idea of an interest in property, and not the substantial property itself, which is only the object of that interest. The properties which are incidental to an *interesse termini* are the result of its peculiar quality of estate; and do not prove it to be a mere right; for though an *interesse termini* cannot be surrendered, nor confirmed, nor can be the foundation of a release to enlarge the estate, it is not from any essential similarity to a mere right.

It cannot be released because he, to whom the release is made, must have some estate in *possession*, in deed, or in law (n). It cannot be surrendered, because it is not that description of estate to which the class of conveyances called surrenders are applicable. It cannot be confirmed, because the owner has not possession of the land; but this does not prove that it is not an estate, it only shews that the owner has not possession joined with an estate. Its similarity to a naked right is attempted to be proved by the circumstance of it being held that it cannot merge any estate, nor be itself merged (o). Yet Mr. Preston admits, that if an *interesse termini* unite with the freehold out of which it is to arise, it will be discharged (p); and Lord Coke says, that "by a surrender in law, an *interesse termini* may be drowned" (q). Yet, supposing its incapability of merging or being merged, even that is no argument, that it is not an estate, for it is the doctrine of merger, that both estates "must come to one, and the same person in one and the same right, else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger." So, also, if he who hath the reversion in fee, marries the tenant for years, there is no merger (r). Further, a man may have, in his own right, both an estate tail and a reversion in fee, and the estate tail, though a less estate, shall not merge in the fee (s). Lord Coke occasionally calls it an estate (t); and, remarking on a section of Littleton, where an *interesse termini* is spoken of as a right, says that, "this is not so to be understood that he hath but a naked right; for, then he could not grant it

over" (u). And, in *Laffyn's case*, Judges Walmsley and Daniel said, an *interesse termini* "is well grantable over;" and in this it differs from a mere right, such as a chose in action, which, by the strict rules of the ancient common law, could not be transferred to another person; for no chose in action could be assigned or granted over (v). But where an *interesse termini* vests in possession, the owner may grant it before entry, even though the lessee continue in possession (w). And that fact, and also the fact that it is devisable prove that it is an estate; because the properties of being devisable and transferable were, at common law, peculiar to estates, and not attached to naked rights.

*Interesse termini* are of two kinds, present and future, present, when they entitle their owners to immediate possession, as where a lease for years is made to commence immediately, and the lessee has not yet entered. Future, when they do not entitle the owner to possession, till a future time, as, where a freeholder makes a lease to A. to commence at Michaelmas next. But future *interesse termini* are not necessarily estates in remainder; for estates commencing by way of remainder are fed with possession of the owner of the particular estates on which they are raised, and by which they are supported; and a remainder cannot be created without a particular estate. There must necessarily be some precedent to the estate in remainder (x). An estate created to commence at a distant period of time, without any intervening estate, is therefore strictly no remainder, it is the whole of the gift and no residuary part. Future *interesse termini* may commence without any intervening preceding estate, or they may commence by way of remainder after another *interesse termini*; and they may be either vested or contingent, as they may be limited to commence at events contingent or not contingent. An *interesse termini* is, in some respects, a perfect term, and has the properties of an estate for years. The lessee may enter, though he neglect to do so during the life of the lessor (y). He may grant or devise his interest (z); and it is transmissible to his executors, and it may be divested, and put to a right, into which it is said to be converted by ouster of its owner. But though it is in some respects an estate for years, it is not so for all purposes (aa). They are not as estates for years are, sufficient foundation for confirmation (bb), nor for a release to enlarge

(n) Shep. Touchstone, 324.

(o) *Rawlings v. Walker*, ante.

(p) Preston on Merger, 208.

(q) Co. Lit. 333 a.

(r) Plow. 418, Cro. Jac. 275, Co. Lit. 338.

(s) 3 Rep. 61, 8 Rep. 74, 2 Blacks. Com. 177.

(t) 5 Co. 125 a.

(u) Co. Lit. 270 b.

(v) Co. Lit. 214

(w) *Wheeler v. Thororoughgood*, Cro. Eliz. 127.

(x) Co. Lit. 49, Plow. 25.

(y) Co. Lit. 46.

(z) Cro. Jac. 61.

(aa) Co. Lit. 46.

(bb) Co. Lit. 296 b.

tate (cc), nor is a transfer of it to the freeholder called a surrender (dd) but a release. Nor is the estate which remains in the lessor acknowledged by law under the name of a reversion (ee). Nor can the owner of an *interesse termini* maintain an action of trespass *quare clausum fregit*; for to maintain this action, the plaintiff must have possession actual or constructive. Neither can he maintain an action *ejectione firmæ* (ff).

*Interesse termini* are estates for years. But if so, then they may be merged, as it is now early settled, that one term of years may merge in another (gg); and as all terms of years are equal in the eye of the law, a lease of 1,000 years may merge in a term of one year, if the latter be the term in reversion. The writer in the Law Magazine puts a case of which the following is an outline:—Where A. termor for one hundred years, makes to B. an estate for 20 years, to commence at the end of 80 years, it is not an *interesse termini*, being part of an estate perfected by possession. Now, if A. seised in fee grants an estate for life to B., who having become seised, makes a lease to C. for 10 years, from Michaelmas next (if B. should so long live). This, I should suppose, would give C. an *interesse termini*, and yet his term would, I apprehend, be a part of an estate perfected with possession. (hh) VOX AB ULSTERO.

We have been obliged to alter very many of the numerous references cited by our correspondent in support of his answer. We commend him to have recourse to *legitimate authorities*; if he continues to pin his faith to works that are of no authority, he will soon find himself bewildered in a labyrinth, that he will not easily get out from. Whoever has advised him in the choice of a lawyer, has given him very ill advice.

EDITOR.

TO THE EDITOR OF THE LEGAL GUIDE.

# DISCUSSION UPON CONDITIONS ANNEXED TO GIFTS OR LEGACIES IN RESTRAINT OF MARRIAGE.

SIR,—The honour you have done me on many former occasions by devoting a corner of

your valuable journal to the insertion of my communications now emboldens me to address you, in forwarding the following observations upon that part of the principles of equity jurisprudence which relates to the conditions annexed to gifts or legacies in restraint of marriage, and the distinctions raised by courts of equity upon them. I propose confining the present communication to the former of these, and, should it meet with your concurrence, to consider the latter in a second letter the ensuing week. The three great heads of equitable concurrent jurisdiction are Accident, Mistake, and Fraud. It is of the last-mentioned I would now speak, which is thus generally defined by Labeo:—“*Dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam*,” and the Digest says, “*Labeonis definitio vera est.*” (lib. 4. tit. 3. l. 1. s. 2.; id. lib. 2. tit. 14. l. 7. s. 9.) This is descriptive of positive actual fraud, but there is another class of frauds which, as distinguished from the former, are treated as *implied or constructive frauds*, by which (as a learned writer says) are meant such acts or contracts as, though not originating in any evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to mislead or deceive other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*. And it is for the protection of public interests, and from considerations of public policy, that courts of equity include within their jurisdiction the class of cases it is my present intention to consider, under the head of *Constructive Frauds*. In the civil law all gifts, bequests, &c. in restraint of marriage generally, were held void, as inconsistent with public policy; “*Si testator rogasset heredem ut restitueret hereditatem mulieri, si non nupsisset dicendum erit compellendum heredem, si suspectam dicat hereditatem, adire, et restituere eam mulieri, etiam si nupsisset Pothier.*” (Pand. lib. 5. tit. 1. n. 33.); and this upon the ground, “*Quod in fraudem legis ad impediendas nuptias scriptum est, nullam vim habet.*” (Lib. 35. tit. 1. n. 35.) And courts of equity in acting upon this and other cases of a similar nature, have been much influenced by these doctrines of the civil law. (1 Fonbl. Eq. B. 1. c. 4. 10.) It is not here necessary to enter into detail upon the probable causes which introduced and facilitated the progress of the civil law doctrine into the English courts of equity, and I therefore refer all who wish for information upon this head to the arguments of Lord Rosslyn in *Stackpole v. Beaumont*

(cc) Shep. Touchstone, 324.

(dd) Bridgman, 7.

(ee) Co. 5, 125 a.; Co. Lit. 270 a.

(ff) Cro. Jac. 61.

(gg) *Hughes v. Robotham*, Cro. Eliz. 303; *Stephens v. Bridges*, 6 Madd. 66.

(hh) 6 Monthly Law Mag. 121.

(3 Ves. Jr. 96); and to the case of *Scott v. Tyler* (2 Bro. C. C. 432), where the subject is treated with much learning and ability by Lord THURLOW, who lays it down that devises of land follow the rule of the common law. And Legacies of money follow the rule of the canon law. The doctrine, as to restraints on marriage, and the conditions creating the same, has, however, undergone important changes; and that which is at present supported and administered by courts of equity is far better calculated for the benefit of mankind, and the advantage of society in general, than that which was asserted in the Roman law; for though it upholds the general freedom of choice in marriage, it does not fail to preserve a just and proper control in the parents, and a reasonable power in all persons, to qualify and restrict their bounty in such a manner, and on such conditions, as the general right of dominion over property in a free country justifies and protects upon grounds of general convenience and safety. The general result of the modern English doctrine on this subject, may be shortly stated by saying, that conditions annexed to gifts, devises, and bequests in restraint of marriage, are of force and binding, provided they be reasonable in themselves, and are void when they operate in any manner as an undue restraint upon the freedom of marriage as against public policy and the due economy and morality of domestic life; for instance, a condition that a child should not marry till 50 years of age, or should not marry any person in the same town, county, or state, would of course be void, and be deemed a mere evasion or fraud upon the law. (*Scott v. Tyler*.) But the same principles of public policy which annul such conditions when they tend to a general restraint of marriage will confirm and support them, when they merely prescribe such reasonable and provident regulations and sanctions, as tend to protect the individual from those melancholy consequences, to which an over hasty, rash, or precipitate match would probably lead (Fonblanque, B. 1. c. 4.); and some provisions against such improvident matches, especially during infancy, or until a certain age of discretion, cannot be deemed an unreasonable precaution for parents and other persons to affix to their bounty. Thus a legacy given to a daughter to be paid her at twenty-one years, if she did not marry till that period, would be held good; for it postpones marriage only to a reasonable age of discretion.(a) And a condition annexed to a gift or legacy, that the party should not marry without the consent of parents or trustees, or other persons specified, is held good; for

it does not impose an unreasonable restraint upon marriage. *Desbody v. Beyville* (2 P. W. 547). Also a condition that a widow shall not marry is no unlawful injunction, for it is not a general restraint of marriage. A condition to marry or not to marry Titus or Mævius is good; so also a condition prescribing due ceremony and a due place of marriage is good; and so are other conditions of a similar nature, if not used evasively, as a covert purpose to restrain marriage generally. *Scott v. Tyler*, *Godolphin's Orphan's Legacy* (pl. 3. c. 17; Ayliffe Pand. B. 3. p. 374).

Having now seen what the general state of the law is with regard to conditions annexed to gifts or bequests in restraint of marriage, we have paved the way for the consideration of these nicer distinctions resorted to by courts of equity in order to escape from the positive direction of the party imposing such conditions, which will be the subject of my next; and I cannot do better than close this letter by adopting the words of *M. Fonblanque*, that "the only restrictions which the law of England imposes, such as are dictated by the soundest policy, and approved by the purest morality. That a parent professing to be affectionate shall not be unjust that professing to assert his own claim, he shall not disappoint or control the claims of nature nor obstruct the interests of the community; that what purports to be an act of generosity shall not be allowed to operate as a temptation to that which militates against nature, morality, and sound policy, or to restrain from doing that which would serve and promote the essential interests of society, are rules which cannot reasonably be reprobated as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise," and, "on these considerations are founded those distinctions which have from time to time been recognised by our courts of equity, respecting testamentary conditions with reference to marriage, and which I purpose to consider in my next.

Remaining, Sir,  
Your very obedient servant,  
H. D. M

TO THE EDITOR OF THE LEGAL GUIDE.  
CASE OF FROST THE CHARTIST.  
*On the Justice of his sentence as awarded by Justitia (a.)*

SIR,—A letter on the subject of the objection taken on the trial of Frost, the Chartist, in this week's Guide, is the occasion of these observations.

"The question," (it should be questioned)

(a) Ante. 325.

(a) According to the civil law the requirement of the consent of a third person, especially of one interested, was ~~not~~ and upon the law. *Scott v. Tyler*.

says *Justitia*, "was afterwards argued at very great length before all the judges."

Now, in an argument, and particularly one of very great length, we naturally conclude that every thing was said on the subject that could be said, that the matter was duly considered and debated in all its bearings; and I should think here could be little doubt but that it was so:—wherefore then the necessity of solemn deliberation after such solemn argument? Why deliberate on a point on which nobody had any thing more to say? Nor do I see very clearly what would have been gained if the judges had locked themselves up for the purpose.

A majority of three had decided that the delivery of the list of witnesses was not a good delivery in point of law. A similar majority decided at the same time that the objection was not taken in due time, both which decisions were given together as their judgments on the questions reserved. I don't understand how the decision on the second question was the result of an extraordinary chance as discovered by *Justitia*, either do I understand why the decision on the first ought to have effected the conviction, and the decision on the second have gone for nothing. The effect of the two together appeared to my weak mind to be that the objection was *not* *alid*, because not taken in time. Had it been taken in time, the error could have been rectified. In other words, the hole could under no circumstances have been big enough for Mr. Frost to slip through.

Every honest man will unite with *Justitia* in commenting that there should have been a difference of opinion on this and other occasions, when perfect unanimity would have looked so much better. But if the learned gentleman will refer to the letter which accompanied the opinions, (b) he will see that doubtful points, under similar circumstances, are uniformly settled by the majority of the judges, which would seem to imply that perfect unanimity is not always a matter of course.

With all proper respect for *Justitia* and his letter, I cannot but think that had his friend, the miserable prisoner, obtained a free pardon instead of a commutation of his sentence, it would have cast a much larger blot on the judicial character, and one which would with much greater difficulty have been removed.

I am, Sir,

Your obedient servant,

E. H.

*Lincoln's Inn Fields,*  
Sept. 22, 1840.

## POSTAGE ACTS.

OPINION OF SIR FREDERICK POLLOCK, AS TO SENDING SHIP LETTERS BY VESSELS OUTWARDS.

We copy, from the *Liverpool Times* of yesterday, the following opinion, which appears to have been given by Sir Frederick Pollock, on a subject of considerable importance to the merchants of Manchester, as well as to those of Liverpool, London, and other parts; and which appears to have been obtained at the instance of the British and American Steam Navigation Company:—

"I am of opinion, that the directors or agents of the company cannot in any office, *or on board the ship*, legally receive letters brought to them for conveyance to the United States.

"The receiving letters from any person who may choose to bring them, by suspending a bag into which they may be put, or by authorising the captain to receive all that may be delivered to him, is only a mode of '*making a collection*.' When the letters are *got together*, they are a '*collection*,' whether '*gathered*' or *brought and received*; and I think a person who opened a bag for the receipt of letters generally would be deemed thereby to '*make a collection*.'"

"I am of opinion, that the penalties imposed by the act 1st Victoria, c. 36, would be incurred by the proceedings of the company in being parties (in the manner above detailed) to a collection of letters being made.

(Signed) "FREDERICK POLLOCK.

"*Temple, Sept. 17, 1840.*"

The *Liverpool Times* has not explained why this opinion was obtained at the present time by the Steam Navigation Company; but we learn from another quarter that the post office authorities have sent notice to the agents for one of the transatlantic steamers (we believe the British Queen), to the effect that they were not at liberty to collect letters to be sent abroad by their vessel; though it was admitted that the sending of letters by private vessels, without the intervention of the post-office, was strictly legal. The power of sending letters, however, will be of very little use, unless somebody can lawfully receive them for the purpose of transmission.

As the circumstances out of which the existing practice of sending letters by private ships arose are not generally known, and as the matter is likely to excite considerable interest among mercantile men, we may probably be excused in giving a short explanation of them. In the year 1814, an act (54 Geo. III., c. 155) was passed, requiring all outward letters by ~~the~~

(b) See 3 Legal Guide, 234.

vessels to be sent to the post-office, to be there taxed and stamped; after which, the parties were allowed to put them on ship-board themselves. This was found to be such an intolerable hindrance to the correspondence of the country, that, in the following year, deputations were sent from various quarters to represent to the then Chancellor of the Exchequer (Mr. Vansittart) the absolute necessity of repealing the clause; and they suggested, as a compromise for the abandonment of the tax on outward letters by private ships, an advance on the rates of postage on inward letters. Mr. Vansittart, after some conferences with these deputations and with Sir Francis Freeling, agreed that clauses should be introduced into a postage bill then before Parliament (55 George III., c. 153), advancing the rate of inward postage to 8d, at which it has continued ever since, and expressly exempting all outward letters by private merchant vessels.

In some of the later post office acts, undoubtedly, clauses have been introduced, making it illegal to collect letters; but these attracted no particular attention, being generally supposed to refer to a practice which prevailed at one time in London, of receiving letters at coffee-houses for a fee of 3d or 6d each, and then forwarding them by private vessels.

We think it is tolerably clear, from the preceding facts, that if the opinion of Sir F. Pollock is correct, and parties are prevented by the recent post-office act from receiving letters for transmission by private ships, the privilege conferred by the 55th George III., of sending outward letters by private merchant vessels without charge, becomes a dead letter, and very great inconvenience (to say nothing of the expence) must necessarily result to parties engaged in commerce with foreign countries, and especially with the United States. If such parties are compelled in all cases to send their letters to the post-office, they will not only be prevented from bringing down their correspondence to the latest period, but will be subjected to many other disadvantages from which they are at present free.

We understand that this important subject has excited—as indeed it was calculated to excite—great interest in Liverpool; and the Chamber of Commerce there was to meet yesterday with the view of agreeing upon a memorial to the Treasury in reference to it. This example, we trust, will be speedily followed by the Manchester Chamber of Commerce, many of the members of which are deeply interested in preventing that interruption in their foreign correspondence which must necessarily result from the proposed change.—*Morning Herald*.

## Law Reports.

ROLLS' COURT—June 16.

RYCRAFT v. CHRISTY.

**SEPARATE USE.**—*Whether a bequest to a feme covert or her assigns for life, for her and their own absolute use and benefit, creates a trust for her separate use, so as to enable her to dispose of the bequest as a feme sole.*

This Bill, filed in January, 1835, by *Ann Rycraft* and *Pamela Rycraft* by their next friend, against *Wm. Miller Christy*, the executor of the will of *John Price*, deceased, and *Harry Rycraft*, the husband of the plaintiff *Ann Rycraft*, for the due administration of the estate of *Mr. Price*, according to the trusts of his will.

It appeared by the Bill that *Mr. Price*, by his will, bequeathed all his leasehold messuages or tenements, personal estate and effects, unto *William Miller Christy*, his executors, administrators, and assigns, upon trust for sale; and the testator directed that his trustee should stand possessed of the produce thereof, and also of such part of his personal estate as consisted of money, upon trust, after payment of his debts, funeral and testamentary expences, to invest the same upon Government or real securities, and to pay the interest, dividends, and annual produce thereof unto, or permit the same to be received and taken by, *Ann Rycraft*, or her assigns, during her life, for her and their own absolute use and benefit. And after her decease, as to as well the said securities as the interest, dividends, and produce thereof, upon trust to pay, assign, or transfer the same to his natural daughter *Pamela*, by the said *Ann Rycraft*, her executors, administrators and assigns; and appointed the said *Wm. Miller Christy* sole executor of his will. The testator died on the 24th November, 1831, leaving the said *Ann Rycraft* and *Pamela* his daughter, and also another natural daughter by one *Ann Elf*, him surviving;—this latter child was provided for. By an agreement in writing, dated the 21st December, made between *Ann Rycraft*, of the one part, and *Wm. Miller Christy*, the trustee and executor, of the other part, reciting the said will of the said *John Price*, and reciting that it was the express wish and desire of the testator, although not stated in his will, that the said *Ann Elf* should be paid or allowed out of his estate seven shillings a week, for the maintenance and support of his said child by the said *Ann Elf*,—the said *Ann Rycraft*, in order to carry into effect such wish and desire of the testator, did thereby direct that the said *William Miller Christy* should, out of the interest of a sum of £500., part of the estate and effects of the

did testator, deduct, pay, and allow unto the said *Ann Elf*, her executors, administrators, and assigns, for the maintenance and support of the said child, the sum of seven shillings weekly and every week, until the said child should attain the age of 16 years, in case such child should so long live. And the said *Ann Rycraft* covenanted for herself, her heirs, executors, and assigns, to indemnify and save harmless the said *William Miller Christy*, his executors and administrators, against all actions, suits, claims, and demands of, from, or by any person or persons whomsoever, in respect of the payment to the said *Ann Elf* of such seven shillings a week, until her said child attained the age of 16 years, in case such child should so long live. And the said *Ann Rycraft* did thereby agree to allow to the said *William Miller Christy* such weekly sum of seven shillings, out of the dividends and interest payable to her as aforesaid. *Ann Rycraft* was married to the defendant *Henry Rycraft*, but she had, for many years previous to the execution of the said agreement with the said *Wm. Miller Christy*, lived separate and apart from him, and still continued to do so. The defendant, *Henry Rycraft*, by his answer, disclaimed all interest in the trust funds. At the hearing, the Master was ordered to inquire and state to the Court whether *Ann Rycraft's* agreement for the payment of seven shillings a week to *Ann Elf* was binding on her, and the Master reported that it was binding upon her. To this report the plaintiffs excepted.—The exception now came on for argument. Three questions were discussed: first, whether the words of the bequest were sufficient to create a trust for the separate use of *Mrs. Rycraft*?—secondly, if not, then whether the subsequent disclaimer by her husband would have that effect?—lastly, whether the agreement, being voluntary, was such as would be enforced by a Court of Equity?

LORD LANGDALE said, the case was not without difficulty, but as the husband had put in his answer, and did not dispute the agreement made by his wife, and as the fund was in the hands of the defendant, and the trust for the testator's natural daughter was therefore executed, he thought the agreement, although voluntary, was one which ought to be enforced against the plaintiff. He stated the will of the testator, and said he did not consider that the gift to "*Ann Rycraft*, or her assigns, during her life, for her and their own absolute use and benefit," constituted a gift to her separate use. At all events, the disclaimer by the husband not only left the trust fund at her own disposal, but gave effect to the agreement she had made with *Mr. Christy*, which was certainly of a meritorious nature. He thought the Master was quite right in his finding: no fraud as shown as having been practised upon *Mrs. Rycraft*, who had herself carried the agreement

into effect, by allowing the payments made by the executor to *Ann Elf*, in pursuance of it; and this Court will carry into effect a voluntary agreement perfected in every way as the present.—It is a trust executed, and upon this there can be no doubt.—Exceptions over-ruled.

### COURT OF COMMON PLEAS—June 13. Sittings in Banco.

MARRIOTT v. STOURLEY.

SHOPKEEPERS' NEGLIGENCE in exposing their goods to the danger of Passengers, and their consequent liability to an action for damages.

This was an action in which the plaintiff sought to recover damages for the injury sustained by him in consequence of the alleged negligent conduct of the defendant in his mode of exposing his goods for sale. The cause was tried at the last spring assizes for Northamptonshire, when it appeared that the plaintiff's pony ran away with his cart, and having come in contact with some ploughs and other articles which the defendant, who was a shopkeeper at Peterborough, had exposed for sale in the street in front of his shop; the plaintiff was thrown down, and received the injury complained of. For the defendant it was contended that his goods were not improperly exposed for sale, but in the usual manner in which those of country shopkeepers are generally placed, and that at all events the plaintiff himself was to blame in putting the cart to a vicious pony, which had already run away with a cart that same morning, and was still in an excited state when he attempted to put him in harness the second time, and that there was want of due care on the part of the plaintiff. The Judge cited *Butterfield v. Forrester*, (a) and directed the jury that if the evidence proved a want of due care on the part of the plaintiff he was not entitled to a verdict, and the jury found accordingly for the defendant.

Mr. Serjeant Goulburn had obtained a verdict to show cause why there should not be a new trial, on the ground that the case had not been properly left to the jury, and that the verdict was against evidence.

The rule now came on for argument.

TINDALL, C. J. is giving the judgment of the Court and, LORD ELLENBOROUGH, who has clearly explained the law (b.) in the case of

(a) 11 East 60.

(b) Lord Ellenborough there observed, "It is not to cast himself upon the charity of others, but to be made by the fault of another. If he does not himself use common sense, it is, if he does not himself use common sense, to be in the right. In cases of negligence upon what is considered to be the usual manner of exposing goods for sale, the plaintiff is to be considered to be the cause of the accident."



by the learned judge who tried the cause and which applied to this case.—Rule refused.

COURT OF EXCHEQUER—May 30.  
*Sittings in Banco.*

BERNEL v. CURTEIS.

LANDLORD and TENANT.

AGREEMENT for a Lease.—Where it shall be construed to amount to a present demise or only as a contract for a Lease.—COSTS of LEASE.—STATUTE of LIMITATIONS when it begins to run upon such an agreement.

Mr. *Humfrey* moved in this case to enter a nonsuit, or to reduce the damages, pursuant to leave reserved for the purpose at the trial of the cause before Lord ABINGER, C. B., when the plaintiff had a verdict for £18; viz. £10 for the costs the plaintiff had been put to in having a lease prepared, which the defendant had refused to execute, and £8 for use and occupation.

The facts of the case were these:—

The plaintiff and defendant, so long back as 1825, entered into the following agreement.

“Memorandum of agreement, dated Oct. 15, 1825, between *David Curteis* of the one part, and *James Bernel* of the other part. The said *David Curteis* agrees to take and the said *James Bernel* agrees to let on lease for the term of 21 years, to be computed from the date hereof, all those, &c., at and after the net yearly rent of £32, payable quarterly, to commence from Michaelmas Day last, without any deduction, and the said lease to contain the same covenants as are in the lease from Sir J. O. to the said *James Bernel*. All erections now on the premises are to be left. The expense of the lease and counterpart to be borne by the said *David Curteis*, and to be prepared by the solicitor of the said *James Bernel*.”

Under this agreement the defendant entered into possession of the premises, and occupied them until 1838, when he gave notice to quit, upon which the plaintiff called upon him to execute a lease of the premises, which, as he contended, he was bound to do under the terms of his agreement. The lease having been drawn up and presented to the defendant, he refused to execute it, contending that *the agreement itself operated as a lease*, and that there was no necessity for any further expense. The plaintiff thereupon brought this action to recover the costs he had been put to in preparing this lease;

road, that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support such an action—an obstruction in the road by the fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff.

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and also a small sum for the use and occupation of the premises, which resulted in the jury finding £10 for the costs of preparing the lease, and £8 for the use and occupation rent, and the motion was now made for a nonsuit, on the grounds that the agreement in question was a lease in itself, and that the statute of limitations was a bar to the action. He cited *Alderman v. Neate* (1), and *Doe dem Phillips v. Benjamin* (b).

Mr. *Humfrey* contended that this instrument contained words of a present demise, in which case as a lease was already in existence, of course the plaintiff was not justified in going to the expense of having another drawn so as to charge the defendant therewith. If this view of the case were correct, then the defendant would be entitled to nonsuit the plaintiff. The other point also had reference to the plea of the statute of limitations, under which the cause of action having arose more than six years ago, the charge of preparing the lease could not be supported by the plaintiff.

LORD ABINGER, C. B., said there was no ground for the application on either of the points. The parties did not intend the agreement to be anything else than an agreement to grant and to execute a future lease of the premises, for the expense of preparing which the defendant was liable. With respect to the statute of limitations, it was equally manifest that the time was to be calculated from the moment at which a cause of action arose, which could only have been when the lease was offered, and the defendant refused to execute it according to his agreement, and not from the date of that agreement itself, which could not give any right of action till a breach of it had been committed.

The other judges concurred.

Rule refused.

(1) 4 Mee. & Wels. 704, S.C. which was an action to recover damages for the non-repair of certain premises; and the question turned on this, whether the agreement, the foundation of the action, was to be construed as a demise, or only as a contract for a lease. The agreement between the parties (which was stamped with a lease stamp) was, that *Edward Sheppard* agreed to demise, and a parish committee agreed to accept and take of the said *Edward Sheppard* certain premises. To hold to the said committee from &c. for the term of 99 years, at and under the yearly rent of £300.

(b)

mittee agreed to pay the rent and all taxes, and other outgoings, and also to keep the premises in repair. And the parties agreed that a lease and counterpart of the premises should be prepared and executed before the 1st of January then next, with covenants and agreements, pursuant to the now stating agreement, and such other general clauses as are usually contained in leases. There was also a proviso, by which Edward Sheppard agreed to convey the fee to the committee at a fixed price. The committee took possession and paid rent. No lease was ever executed. Edward Sheppard died, and his heir-at-law brought assumpsit after notice of dilapidations.

LORD ABINGER, C. B. in giving the judgment of the court said that,—It was contended by the defendant's counsel that this agreement could not operate as an absolute demise for 99 years; and he urged in support of the proposition, the circumstance of its containing a stipulation for the execution of a lease at a future period. But so many cases are to be found where agreements have been held to operate as actual demises, notwithstanding the insertion of a stipulation similar to the above, that this argument cannot be sustained. It was then suggested that it might have been optional on the part of the defendants to treat it as a lease or not; but we think on the view of the whole instrument that it is a question for our decision, whether or not the words it contains are sufficient to amount to a present demise, if it can be collected from the circumstances of the case, that it was the intention of the parties at the time when it was executed, that it should be such. Here the parties agree that the term in question is to commence from the 25th of March, 1782. at a certain yearly rent; on this the question arises, when would the first year's rent become due? No one can suppose for a moment that this can be at any other period than the 25th of March; in which case the term

mediately on the date of the agreement, and if so, what was the term in question but the one for ninety-nine years mentioned in the agreement? If, however, the first half year's rent be not considered as accruing due at Michaelmas 1782, it must necessarily become so at Lady-day next following: and on that construction we are to suppose that although the lessor created a tenancy for ninety-nine years from March 1782, at a half-yearly rent, still no rent was to be payable till the expiration of a full year from the date, and consequently the last half year's rent would become due at the end of a half year after the term had expired. It is much more probable that the rent should be made payable within the term, than after its expiration, as in the latter event, the landlord's remedy by distress would be gone. We think it would have been better if the Court had not given so wide a construction to instruments of this nature; but on examination of all the cases taken together, we do not avoid the conclusion that the agreement for the execution of a lease at a future period does not necessarily contradict the nature of a present demise. Besides the agreement in this case, containing the stipulation usually found in actual leases, to prevent the death and minority of the lessor, such an agreement signifies a present demise, and the specific agreement for the payment of rent was a provision that the lease should be put in effect, if the rent is paid, and the repairs are performed. On all these reasons we think that the lease in this case took effect from the date of the agreement.

It supports the operation of the agreement as an actual demise were the cases of *Pearce v. Bar*, 4 Bing. 17, and *den. Waller v. Green*, 1 P. 1, and *Park v. Bentley*, 12 East, 20, and *Sargent*, 5 Term Rep. 165.

## COURT OF BANKRUPTCY.—Sept. 16.

IN RE JAMES MOORE.

BANKRUPTCY ACT.—*Construction of Sect. 3.*—*What is a sufficient Assignment of a Trader's effects to constitute an Act of Bankruptcy.*

Mr. Walker applied to the Court on behalf of a creditor of James Moore, late of New Bond Street, hatter and army accoutrement maker, whose debt was £400., that a fiat of bankruptcy should be issued against him, on the ground that he had parted with his business and the good-will of his business; that he had executed a conveyance of his property to certain trustees; and that, being a trader and unable to pay his debts, he had, under all the circumstances, committed an act of bankruptcy.

Mr. Sermon opposed the application on the ground that Mr. Moore had not assigned "all" his property to the creditors' trustees, and though embarrassed in consequence of not being able to get in large outstanding debts, and particularly a sum of £30,000. due to him from the Spanish Government, had nevertheless not for a moment contemplated the commission of an act of bankruptcy.

HOLROYD, C., said, the question was, whether a fiat should issue against Mr. James Moore, of Bond-street, on the ground of his having parted with his property under certain deeds. The third section of the Bankruptcy Act said, "That if any trader shall make any fraudulent gift, conveyance, or transfer of his goods or chattels, so as to defeat his creditors, he shall be guilty of an act of bankruptcy." The deeds in question were severally executed on the 24th and 28th July last. By the former, Mr. Moore assigned the lease of his premises, and the good-will of his business, in Bond-street, to Mr. Geo. Armand, for the sum of £3,600; and on the 28th he signed another deed, naming three of his principal creditors as trustees for the general body of creditors, and reciting his former assignment to Armand; the second deed also contained an account of the debt due to Mr. Moore by the Spanish Government for £30,000., which, with interest, was secured by bills on Mr. Carbonell, together with large outstanding debts; it also contained two other covenants—one, that a dividend was to be made by the trustees twice a year, and the other that Mr. Moore was not to be sued; and, therefore, the question was if either of these deeds constituted an act of bankruptcy—for it was quite clear that if either was a conveyance of "all" the trader's property from him, it would certainly amount to an act of bankruptcy, without any imputation

whatsoever of fraud—as such a conveyance would completely put it out of his power to carry on his business. But if the deed on the face of it did not show that, and the first deed did not do so, then some further evidence of his having assigned away the great bulk of his property would be necessary to sustain a fiat. That, however, not having been done, it would next become necessary to show that either was a "voluntary" deed, and also that, when it was executed, Mr. Moore had bankruptcy in his contemplation. But neither of the deeds showed that he had parted with "all" his property; nor was any evidence offered to show that either deed was a voluntary deed, and clearly the first deed was not an act of bankruptcy. Then was the second otherwise? He certainly thought not. Was it then to be considered as a voluntary deed? It stated upon the face of it that, in consequence of his not being able to pay his creditors, he "had made the deed," &c. So that the proposal must have come from Mr. Moore. But then, besides its being voluntary, was it in his contemplation to commit an act of bankruptcy? Sufficient evidence was shown to prove he was insolvent at the time.

Mr. Sermon—No, sir, with submission, only that he was in embarrassed circumstances.

HOLROYD, C.—Well, in embarrassed circumstances. His bills were dishonoured for three or four months before the execution of the deed, and that certainly showed insolvency; but insolvency of itself was held not to be sufficient, unless bankruptcy was contemplated. The evidence adduced in the case fell short of that. Nor was it clearly shown that "all" his property was assigned, nor that he had not at this moment some interest in the shop in Bond-street.

Mr. Walker said that the evidence fully proved the shop to be in the possession of Mr. Armand.

Mr. Sermon—And it should not be forgotten that the trustees had paid a dividend.

HOLROYD, C. had no doubt that with a little more evidence as to the extent of the property assigned to the trustees under the second deed, an act of bankruptcy would be proved to have been committed by Mr. Moore, but until that was supplied the fiat could not be issued.

*Fiat refused.*

## INSOLVENT DEBTORS' COURT,

*Sittings, Sept. 22.*

The Court this day resumed its sittings, to hear cases, for three weeks.

3 & 4 VICT. Cap. 96.

*An Act for the Regulation of the Duties of Postage.*

(Continued from p. 334.)

36. And for encouraging masters of vessels, not being post-office packets, to undertake the conveyance of letters, be it enacted, that the postmaster-general may allow to masters of vessels, on letters and newspapers conveyed by them for or on behalf of the post-office between places within the United Kingdom, a sum not exceeding two shillings and sixpence for each and every number of one hundred of such letters and newspapers, and for any less number in the like proportion, and may allow to the masters of vessels bound from the United Kingdom to the East Indies a sum not exceeding one penny for each letter, and one halfpenny for each newspaper conveyed by them for or on behalf of the post-office, and may allow to the masters of all other vessels a sum not exceeding twopence for each letter conveyed by them for or on behalf of the post-office from the United Kingdom to places beyond sea, and may allow to the masters of all vessels not exceeding twopence for each letter brought into the United Kingdom, which they shall deliver at the post-office at the first port at which they touch or arrive, or with which they communicate, (all which gratuities may be paid at such times and places, and under all such regulations and restrictions as the postmaster-general shall in his discretion think fit;) and every master of a vessel outward-bound shall receive on board his vessel every post letter-bag tendered to him for conveyance, and having received the same shall deliver it, on his arrival at the port or place of his destination, without delay; and every master of a vessel inward-bound shall cause all letters on board his vessel (except those belonging to the owners of the vessel, or of the goods on board, which do not exceed the prescribed weights), to be collected and enclosed in some bag or other envelope, and to be sealed with his seal, and to be addressed to any of her Majesty's deputy-postmasters, that they may be in readiness to send on shore by his own boat, or by the pilot boat, or by any other safe and convenient means, in order that the same may be delivered at the first regular post-office which can be communicated with, and at the regular port or place where the vessel shall report, shall sign a declaration in the presence of the person authorized by the postmaster-general at such port or place, who shall also sign the same, and the declaration shall be in the form or to the effect following; that is to say,)

I, A. B., commander of the [state the name of the ship or vessel], arriving from [state the place], do, as required by law, solemnly de-

clare, that I have, to the best of my knowledge and belief, delivered or caused to be delivered to the post-office every letter-bag, package, or parcel of letters that were on board the [state the name of the ship], except such letters as are exempted by law.'

And no collector, comptroller, or principal officer of the customs, shall permit such vessel to report till such declaration shall be made and produced; and no vessel shall be permitted by any officer of the customs to break bulk, or to make entry in any port of the British dominions, until all letters on board the same shall be delivered to the post-office, where posts are or hereafter may be established, and from whence such letters may be despatched by post, except such letters, commissions, and other matters and things as are exempted by the post-office acts from the exclusive privilege of the postmaster-general, and also except all such letters as shall be brought by a vessel liable to the performance of quarantine, all which last-mentioned letters shall be delivered by the person having possession thereof to the persons appointed to superintend the quarantine, that all proper precautions may be by them taken before the delivery thereof; and when due care has been had therein, the said letters shall be by them despatched in the usual manner by the post; and the principal officer of customs at every port shall search every vessel for letters which may be on board contrary to the post-office acts, and may seize all such letters and forward them to the nearest post-office; and the officer who shall so seize and send them shall be entitled to a moiety of the penalties which shall be recovered for any such offence; and in case an officer of her Majesty's customs shall find a letter superscribed as the letter of an owner or charterer, or consignee or shipper, exceeding the weight herein-before limited, then the officer shall seize so many of the letters as shall reduce the remainder within the proper weight, and he shall take the same to the nearest post-office, and the postmaster of the place shall pay to the officer delivering the same any sum the postmaster-general, with the consent of the Lords of the Treasury, may think fit, not exceeding two shillings and sixpence for every post letter so seized; and the postmaster-general may appoint any person to demand, from the masters of vessels arriving at or off a port of the United Kingdom, all letters on board the same not exempted by the post-office acts; and the master of any such vessel shall forthwith deliver all such letters on board to such person, on his demanding the same.

37. And be it enacted, that the penalty which, by an act passed in the first year of the reign of her present Majesty, intituled "An Act for consolidating the Laws relating to Offences against the Post Office of the United Kingdom, and for

regulating the Judicial Administration of the Post Office Laws; and for explaining certain terms and expressions employed in those Laws," is imposed on every master of a vessel outward-bound to Ceylon, the Mauritius, the East Indies, or the Cape of Good Hope, who shall refuse to take a post letter-bag delivered or tendered to him for conveyance by an officer of the post-office, shall henceforth extend and apply to the master of every vessel outward-bound who shall refuse to take a post-letter bag, delivered or tendered to him for conveyance by an officer of the post-office; and that the penalty which, by the said act of the first year of the reign of her present Majesty, is imposed on every master of a vessel who shall refuse or wilfully neglect to make the declaration of having delivered his ship letters to the post-office, as required by an act passed in the first year of the reign of her present Majesty, intituled "An Act for the Regulation of the Duties of Postage," shall henceforth extend and apply to the master of every vessel who shall refuse or wilfully neglect to make the declaration of having delivered his ship's letters to the post-office, as is required by this act; and that the penalty by the said first-mentioned act imposed on every collector, comptroller, or officer of the customs, who by the said last-mentioned act is required to prohibit any vessel reporting until the requisites of such last-mentioned act shall have been complied with, and who shall permit such vessel to report before the requisites of such act shall have been complied with, shall henceforth extend and apply to every collector, comptroller, or officer of the customs who by this act is required to prohibit any vessel reporting until the requisites of this act have been complied with, and who shall permit such vessel to report before the requisites of this act shall have been complied with.

38. And whereas the postmaster-general hath, with the concurrence of the Commissioners of her Majesty's Treasury, made regulations by which the public are enabled to remit small sums of money through the post-office by means of money orders; be it enacted, that such mode of transmitting money through the post-office may have continuance so long as the Commissioners of her Majesty's Treasury shall see fit; and the postmaster-general is hereby authorized to demand and receive for the use of her Majesty, in respect of such money or money orders, such rates of poundage as, with the consent of the Commissioners of her Majesty's Treasury, he may from time to time consider reasonable, which poundage shall be applied in the same manner as the post-office revenue is or shall be applicable by law; and all such money orders and the payment thereof shall be subject to such regulations and restrictions as the postmaster-general, with

the consent of the Commissioners of her Majesty's Treasury, may from time to time direct.

39. And whereas it may be expedient that certain post letters should be registered; be it enacted, that in case the postmaster-general shall at any time deem it expedient that all or any post letters should be registered by the post-office, the postmaster-general may, with the consent of the Commissioners of her Majesty's Treasury, forward letters so registered without charging any additional rate for the registration thereof, or he may charge for any letter so registered such rate of postage, in addition to any other rates payable under the post-office acts, as the postmaster-general, with the consent of the Commissioners of her Majesty's Treasury, shall from time to time direct (but such registration shall not render the postmaster-general or the post-office revenue in any manner liable for the loss of any such post-letters or the contents thereof); and all registered letters shall be delivered to the post-office, and also be delivered by the post-office at or between such hours in the day, and under all such regulations, in every respect, as the postmaster-general shall from time to time appoint; and the postmaster-general may therein require such registration rate to be paid on the letter being put into the post-office.

40. And be it enacted, that petitions and addresses forwarded to her Majesty by the post shall be exempt from postage.

41. And be it enacted, that Members of each House of Parliament may receive by the post petitions and addresses to her Majesty, and petitions addressed to either House of Parliament, not exceeding thirty-two ounces in weight, exempt from postage, provided such petitions and addresses be sent without covers, or in covers open at the sides.

42. And be it enacted, that printed newspapers may be sent free of postage according to the regulations and rates herein-after set forth: (that is to say,)

#### PRINTED BRITISH NEWSPAPERS,

By the post, from one town or place to another, within the United Kingdom (except by private ships), free:

By the post of a post town, within the United Kingdom, addressed to a person within the limits of that place or its suburbs, one penny each:

Between places within the United Kingdom by private ships, one penny each:

Between the United Kingdom and her Majesty's Colonies, as follows:

By packet boats to any of her Majesty's Colonies and possessions beyond the seas, (including the East Indies, by packet boats

from the United Kingdom, via Syria or Egypt,) free :

By private ships, one penny each.

**PRINTED COLONIAL NEWSPAPERS,**

Brought from the Colonies to the United Kingdom by packet boats, (including newspapers from the East Indies, by her Majesty's Mediterranean packet boats,) whether directed to a place within the United Kingdom or to any of her Majesty's Colonies beyond the seas, to be forwarded from the United Kingdom by packet boats, free :

Brought from the Colonies to the United Kingdom by private ships, addressed to places within the United Kingdom, and delivered by the master at the post office, one penny each :

Sent by packet boat through the United Kingdom to a foreign state, (subject to the consent of the Lords of the Treasury,) free.

Newspapers between foreign countries and the United Kingdom, as follows :

**PRINTED BRITISH NEWSPAPERS,**

Sent from the United Kingdom to any foreign port, either by packet boats or private ships, two-pence each :

When British newspapers are allowed to pass by post in a foreign country free, then British newspapers addressed to such foreign country may be transmitted to any foreign port by packet boats, free :

If transmitted by private ships, one penny each.

**PRINTED FOREIGN NEWSPAPERS.**

Brought into the United Kingdom by packet boats or private ships, two-pence each :

If British newspapers are allowed to pass by post free in a foreign country, newspapers printed in that country brought by packet boat to the United Kingdom, free :

If brought by private vessels, one penny each.

Foreign newspapers sent by packet boat through the United Kingdom to the Colonies (subject to the consent of the Commissioners of her Majesty's Treasury), free.

13. And be it enacted, that although newspapers may be sent by the post, and thereupon subject to the rate of postage set forth in the following table, it shall not be compulsory to send them by post.

14. And be it enacted, that no printed paper, other newspaper or votes and proceedings in Parliament, or of the Colonial Legislature, shall be sent by the post, either free or at the aforesaid rate of postage, unless the following conditions shall be observed :

First, it shall be sent without a cover, or in a cover open at the sides.

Second, there shall be no word or communication printed on the paper after its publication, or upon the cover thereof, nor any

writing or marks upon it or upon the cover of it, except the name and address of the person to whom sent.

Third, there shall be no paper or thing enclosed in or with any such paper.

Fourth, the said printed papers shall be put into the post office at such hours in the day, and under all such regulations, as the Postmaster General may appoint, including therein the payment of postage on such as are going out of the United Kingdom when put into the post office, if the Postmaster General shall so require.

Fifth, all foreign newspapers brought into the United Kingdom under this Act are to be printed in the language of the country from which they shall have been forwarded, unless the Commissioners of her Majesty's Treasury shall in any case direct that any foreign newspapers shall be exempted from the restriction hereby imposed.

45. And be it enacted, that the Postmaster General may examine any printed paper or any packet which shall be sent by the post, without a cover or in a cover open at the sides, in order to discover whether it is contrary in any respect to the conditions hereby required to be observed, or to any regulations which the Postmaster General, with the consent of the Commissioners of her Majesty's Treasury, may from time to time make in respect of any paper or packet of such a description, and also, in the case of newspapers, to ascertain in what language the newspapers brought into the United Kingdom from any foreign country shall be printed and published ; and also in order to discover whether the newspapers printed and published in the United Kingdom (except those printed in Guernsey, Jersey, Alderney, Sark, or Man, which, for the purposes of this Act, are to be considered as part of the United Kingdom) are duly stamped ; and in case any one of the required conditions has not been fulfilled, the whole of every such paper or packet shall be charged with treble the duty of postage to which it would have been liable as a letter, except as to foreign newspapers not printed in the language of the country from which they shall have been forwarded, which shall be charged with full postage as letters ; and as to every such printed paper going out of the United Kingdom, the Postmaster General may either detain the paper or forward the same by the post, charged with treble the duty of postage to which it would have been liable as a letter ; and in case a newspaper printed in the United Kingdom (except as aforesaid), and transmitted by the post under this Act, shall appear not to have been duly stamped, the same shall be stopped and sent to the Commissioners of Stamps and Taxes.

46. And be it enacted, that in all cases in which a question shall arise whether a printed paper is entitled to the privilege of a newspaper or other printed paper hereby privileged, so far as respects the transmission thereof by the post under the post office Acts, the question shall be referred to the determination of the Postmaster General, whose decision, with the concurrence of the Lords of the Treasury, shall be final.

*To be continued.*

### BANKRUPTCIES IN 1839.

The total number of Bankruptcies in England and Wales, in the last year, was 1083, being an excess over the previous year of 240. Of these there were connected with manufactures, 223; with agriculture, 105; and of other classes, 755. Of the former there were connected with the cotton trade, 51; woollen, 24; silk, 8; and linen, 4; iron wares, 19; building trades, 47; and miscellaneous manufactures, 64. Connected with agriculture there were 5 farmers, 41 corn, hay, and hop dealers, and millers; 23 cattle and wool dealers, 11 dealers in coaches and horses, and 25 brewers, maltsters, and distillers. Of miscellaneous trades there were 114 inn keepers and victuallers, 172 merchants, bankers, warehousemen, agents, and wholesale dealers; 421 shopkeepers, tradesmen, and retail dealers; and 43, not included in any of the above. The greatest number of Bankruptcies, or 259, occurred in *Middlesex*; and the next, or 246, in *Lancashire*. In *Rutlandshire* there were none, and there was but one in the counties of *Huntingdon* and *Westmoreland*. In the whole of *Wales* there were but 17.

### NOTICE TO CORRESPONDENTS.

"E. A."—You are quite right; it is a typographical error: our intention was as you correctly state it ought to be. Answer the Problem as you please.—See the *Errata*.

To your last communication—proceed.

"A Barrister."—Apply to our publishers, who are prepared to give you a satisfactory reply.

"A Subscriber."—Your notice to quit will do—it might be very much shortened; technical terms have no magic in them.—*All notices* should be simple, and confined to merely what is required. You must have been in an office where there was much lack of practical knowledge, or you would not even dream upon asking the question, "should the notice be witnessed?" Mind this, if a notice to quit be attested, no other person than the attesting witness can prove the copy; and suppose that person to be out of the way—of what value is your notice, in evidence?

### DEATH OF HER LATE ROYAL HIGHNESS THE PRINCESS AUGUSTA.

*Supplement to the London Gazette, Tuesday, Sept. 22.*

WHITEHALL, Sept. 23, 1840.

Yesterday evening, at 20 minutes past 9 o'clock, departed this life, at Clarence House, St. James's Palace, after a long and painful illness, HER ROYAL HIGHNESS THE PRINCESS AUGUSTA SOPHIA, AUNT TO HER MOST GRACIOUS MAJESTY, to the great grief of all the Royal Family.

*Second Supplement to the London Gazette, Tuesday, Sept. 22, 1840.*

Friday, Sept. 25th.

Contains an Order of the Earl Marshal for General Mourning, to commence on Sunday next, the 27th inst.

### ERRATA.

Problem 13, Vol. 4.—This Problem is misprinted, and was intended to form *two questions*, as applied to the production of title deeds.—Continue the 2nd line of the Problem from the word title, and place a *word* of interrogation after the word "persons" in the 4th line; omit the word "and" in the 5th line.

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PUBLISHED IN DUBLIN AND EDINBURGH EVERY MONDAY.

# The Legal Guide.

[Vol. IV.]

SATURDAY, OCTOBER 3, 1840.

[No. 23.]

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 350.)

#### VADIUM OR PAWN.

THERE is a distinction between *pawns* and *mortgages*—a *pawn* is confined to personal property—a mortgage is confined to lands, (a) or as described by FLEMING, C. J. : mortgagee has an absolute interest in the land, whereas the other (the pawnee) has but a special property in the goods to retain them for his security (b). This distinction was very fully explained by BURTON, J. in *Ryan v. Rolle*, (c) who, after citing the authority from *Justinian* we have here quoted (d)—*Nam Pignoris appellatione*

*eam proprie rem contineri dicimus, quæ simul etiam traditur creditori maxime si mobilis sit; at eam, quæ sine traditione nuda conventiones tenetur, proprie hypothecæ appellatione contineri dicimus*, observed,—If this passage stood alone, it might go a great way to prove what it was cited for: but when I produce authorities to show that *Pignus* is as valid without a delivery as with one, it must be allowed that these passages have been so interpreted, that *pignus* can only be of goods capable of delivery, and *hypotheca* of goods not capable of delivery (e).

Delivery is then not of the essence of a pawn in the *Roman Law*; and other countries adopting the *Roman Law* have corrected this, that if a pawn be not delivered, it shall not effect a purchaser for a valuable consideration. But if this had been the true distinction, it would have no influence

See Noy, 157—Cro. Jac. 245.

Ratcliffe v. Davies, Yelv. 178.

1 Atk. 166.

(d) Ante, p. 337.

(e) Demat, l. 1, c. 1, s. 1. Wood, lib. 3, c. 2, d. 219. Dig. 50, tit. 16.



unless the *Roman hypotheca* and an *English Mortgage* were of the same nature, which they are not; for an *hypotheca* gave only a lien and no property, with a right to be satisfied on failure of the condition; a mortgage with us is an immediate conveyance, with a power to redeem, and gives a legal property.

If a man gives an *hypotheca* or *pignus* with a condition, that if the money is not paid at a day the pawnee shall enjoy the goods at such a price, that is not in the nature of a pawn, but a sale (*f*). *Si fundum parentes tui ea lege vindiderunt: (ut) sive ipsi, sive hæredes eorum emptori pretium quancunque, vel intra certa tempora obtulissent, restitueretur; teque parato satisfacere conditioni dictæ, hæres emptori non paret, ut contractus fides servetur, actio prescriptis verbis, vel ex vendito tibi dabitur: habita ratione eorum, quæ post oblatam ex pacto quantitatem ex eo fundo adversarium pervenerunt.* This is the description of an English mortgage in the *Roman Law*, and as to the sale of moveables, *Si à te comparavit is, cujus meministi, et convenit, ut si intra certum tempus soluta fuerit data quantitas, sit res inempta, remitti hanc conventionem rescripto nostro non jure petis. Sed si se subtrahat ut jure domini eandem rem retineat: denunciationis et obsignationis depositionisque remedio contra fraudem potes juri tuo consulere.*(*g*)

All that can be argued from the *Roman Law* with regard to pawns will be foreign to the question, and so will what may be argued from the *English Law* with regard to pawns, for *delivery is of the essence of an English pawn* (*h*), and no authority contradicts these resolutions.

There is scarce any book that treats upon pawns, but considers them as in the possession of the pawnee; as where it is debated

whether a pawn may be used, and the difference laid down between a pawn and a distress is, that a distress may not be used because the party in that case comes into possession by act of law, and in the other by the act of the party (*i*).

The delivery is nothing but the bare custody, and it is not like a mortgage; for then he that has interest ought to have the money, but in the case of a pledge, it is only a special property in him that takes it, and the general property continues in the first owner, upon tender of the money secured by the pawn by the pawner, the property is returned constantly to the pawner without claim (*k*).

If after tender of the money to the pawnee and he refuse to return the pledge, the qualified property is determined, and should the pledge be stolen after such tender and refusal the pawner may maintain *trover*, as the tender and refusal amounted to payment; because otherwise no man could again come to his own, since pawns are over the value lent; but after recovery of the pledge by an action of *trover*, the pawnee may, nevertheless, have his action for his debt against the pawner, because though the security ceases, yet the duty remains, inasmuch as the money lent is not paid back to the party from whence it came (*l*).

The pawn is complete by a delivery, but on a conditional or absolute sale, the sale is complete by the contract, and the party is entitled to a delivery of the goods as soon as he has paid the price (*m*).

If the pawner make default in payment at the stipulated time, the pawnee has a right to sell the pledge, and this he may do of his own accord, without any previous application to a court of equity (*n*), or he may

(*f*) Just. l. 4, t. 54, s. 3. (g) Id. s. 7.  
(A) 5 H. 71.—Bro. tit. *Pledges*, pl. 20. Id. tit. *Trepass*, pl. 271; 3 Rep. 429.

(i) Owen 124, 2 Lord Raym. 917, 2 Salk. 532.  
(B) 2 Bulw. 30, S. C.  
(f) Cro. Jac. 243. 2 Salk. 441, see Bro. ad tit. *Assessment*, B. (m) Salk. 113. Dyer 20, 21.  
(n) *Pothener v. Deacon*, Holt 265, *Sticher v. Wilson*, 1 P. Wms. 261. *Lockwood v. Bagg*, 9 Mod. 27.  
*Hartup v. Hoare*, 3 Atk. 62.

the pawner for his debt, retaining the pawn, that being a mere collateral security for the due payment of the debt at the time stipulated. If the pawnee sell the pawn after default made in payment of the money at the time specified, the surplus of the produce after satisfaction of the debt, belongs to the pawner who is liable for any deficiency.

A pawn therefore differs on the one hand from a *lien* which conveys no right to sell, but only a right to *retain* till the debt be satisfied, and on the other hand, it differs from a *mortgage* which conveys the whole legal title conditionally to the mortgagee, and if breach is made in the condition, the title and property in the thing mortgaged becomes absolute at law in the mortgagee, and the mortgagor has only a right in equity to redemption upon payment of the debt, but a *pawn* conveys only a *special* property in the thing pawned, the *general* property is not conveyed, but remains in the owner, (o) and upon default being made in payment of the debt at the time specified, the entire property of the thing pawned does not vest in the pawnee, who only gains by default a right to sell the pawn, accounting to the pawner for the surplus beyond the debt, and if the pawnee neglects to exercise that right, the pawner, in whom the *general* property is vested, may redeem the pawn at any time (p).

Bacon, in observing upon the difference between a pawn and a mortgage, says: There is a great difference between a pawn and mortgage of lands, for if goods be pawned without mention of time for redemption they may be redeemed after the death of the pawnbroker; but if lands are mortgaged without any mention of the time for redemption, they cannot be redeemed after the death of the feoffee in mortgage; for when the feoffment is made to

the mortgagee and his heirs, the limitation is absolute and the condition only goes in derogation of that absolute feoffment; so that as far as the condition doth not extend the absolute words in the feoffment must take place; and from hence it is that a condition must be taken strictly, and can never be extended, because since the condition goes in defeasance of the estate absolutely limited, it absolutely must come in to shut out all extended construction; and therefore in this case where the feoffment is made on condition that the feoffor pay so much money to the feoffee, the money must be paid to the feoffee during his life; for money is not limited to be paid to his heirs, and therefore there the words of the absolute feoffment take place; but where goods are pawned the pawnbroker hath but a qualified property, the absolute ownership is in the person that deposits them; and this property cannot be extended beyond the intent for which it was created; and that is only for securing the money lent. For should the property be thus extended it would be to the injury of him that has the absolute ownership. Now the intent of the parties in not limiting a time of redemption, was plainly in ease of the pledger, and therefore the time of redemption must be during his life, (q) and he cannot be confined to the life of the pawnbroker, for that might fall more to the disadvantage of the person pledging than if a time had been limited; and there are no absolute words to induce such a rigorous construction contrary to the design of the parties; but if the pledger doth not redeem during his own life his executors cannot redeem, for then the words and intent both agree to make an absolute property to the pawnbroker. (r)

(To be continued.)

(q) In such case therefore the statute of Limitations will not attach, 1 Ves. 278.; and if the pledger become bankrupt, his assignee may file a bill in Equity for the redemption of the pledge for being a stranger to what is done, he cannot otherwise ascertain the precise sum he is to tender.—*Id.*

(r) Bacon's Ab. tit. *Bailment B.* See *Cromwell's* case, 2 Co. Rep. 79. Buls. 29.

*Ryall v. Roos*, ante *Lichbarrow v. Mason*, 6

25.

*Kemp v. Westbrook*, 1 Ves. 278, Com. Dig. tit. *gage B.*

## PROBLEM XXIII. VOL. IV.

## SECURITY for COSTS at COMMON LAW.

In what cases will proceedings be stayed until a plaintiff give security for costs?

TO THE EDITOR OF THE LEGAL GUIDE.

## ANSWER TO PROBLEM 9.—VOL. IV.

What acts amount to a private nuisance?

SIR,—A private nuisance is such as only affects or interferes with an individual in his individual capacity. (Holth. L.D.)

In attempting an answer to this problem, I shall consider first; What is such a nuisance, and second, What is not.

The ten following cases may serve to denote sufficiently the rules as applicable to the first class, commencing with which I may observe, that:—

1. It is such a nuisance, where one person so builds a house as to cause it to overhang that of his neighbour, thereby causing the rain to fall from the former upon the latter (*Baten's case*, 9 R. 53. 6.)

2. The same rule prevails where a lessee of an upper room so overcharges that room with weight as to cause its falling in upon the room occupied by another person underneath. (*Edwards v. Halinder*, 2 Leonard. 93.)

3. So is the erection of anything offensive, as a pigstye or limekiln near another person's house, whereby the air in and round the same becomes contaminated. (*Adreas' case*, 9 Rep. 59.)

4. Where a person pulling down a house does so in a wasteful, negligent, and improvident manner, thereby occasioning greater risk to the owner of an adjoining house than in the ordinary course of performing the work he ought to have incurred (*Walters v. Pfeil*, M. & M. 365. et vide *Mussey v. Goyder* 4 C. & P. 161. *Brown v. Windsor*, 1 Crompton and J. 20. *Dodd v. Home*, 1 A. & E. 493. *Trower v. Chadwick*, 3 B. N. C. 334.)

5. Where a person whose land has been excavated to its extremity for mining purposes acquires by lapse of time a right of support from the adjoining land, for a house erected by him on the confines of his own, and the owner of the adjoining land excavates that, whereby the house sinks and becomes endangered. (*Partridge v. Scott*, 3 M. & W. 220.)

6. Where A. negligently constructed a haystack at the extremity of his land by the spontaneous ignition of which B.'s house was burnt. It was held in this case that the judge properly left it to the jury to say whether A. had been guilty of gross negligence, viewing his conduct with reference to the caution that a prudent man

would have observed (*Vaughan v. Menlow*, 3 Bingh. new Ca. 488.)

7. Obstructing the free passage of light and air, as, where the owner of adjoining land obstructs the free passage of light to any part of the space occupied by an ancient window which has been enlarged, although a greater portion of light is admitted by the unobstructed part of the enlarged window than was formerly enjoyed. (*Chandler v. Thompson*, 3 Ca. 80. & see note p. 132.)

8. Where A. disturbed B. in the use of a well, by throwing rubbish into it, whereby the water was shallowed, and the well rendered unfit for use. (*Taylor v. Bennet*, 7 C. & P. 377.)

9. It was also held to be a nuisance where the owner of two adjoining houses granted a lease of one of them to A. and subsequently leased the other, in which there was then certain windows existing, to B., after which the owner granted a new lease to A. who then so altered his tenement as to obstruct windows existing in B.'s house at the time of his lease, although the windows were not 20 years old at the time of the alteration. (*Coutts v. Gorham*, M. & M. 396.)

10. So where a person heightens and builds on a party fence wall, whereby the windows of an adjoining house are darkened, as the Building Act, whilst authorizing the erection of such a wall, did not intend to protect the party from collateral consequences thereof. (*Wells v. Odell*, 1 M. & W. 452.)

Secondly.—The eleven following cases arise where the obstruction or interruption does not amount to a private nuisance.

1. As for such things as merely abridge the gratification of the plaintiff in the enjoyment of his property, as shutting out the prospect from his windows. (*Aldred's Case*, 9 Rep.)

2. Where the defendant kept his dogs so near the plaintiff's house that his family were prevented from sleeping during the night. (*Street v. Tugwell*, S. N. P. 147.)

3. An action cannot be maintained for the reasonable use of one's rights though it be to the annoyance of another, as if a butcher, brewer, &c. use his trade in a convenient place. (Cons. Dig. Act. on case for nuis. (C.))

4. Where the nuisance complained of arises such by the party's own act who complains thereof. (*Lawrence v. Obee*, 3 Camb. 514.)

5. An action does not lie for pulling down a house whereby the adjoining house falls for want of shoring. (*Peyton v. May of London*, 9 R. & C. 775.)

6. Nor for digging away land, whereby a house being on adjoining land falls in, provided such house was not an ancient one, and no negligence appeared. (*Wyat v. Harrison*, 3 B. & Adol. 871. see sup. 1. pl. 5.)

7. The owner of land adjoining other land, on which a house had been built, is not liable if within 20 years from the period the house was erected, he works mines under his own land so near its boundary as to cause the excavated land in which the house stands to sink, and the house to be thereby injured. (*Partridge v. Scott*, ubi sup.)

8. It is no nuisance merely to prevent an excess in the plaintiff's use of his right, as if A. has lights in an ancient house, and rebuilds the house, making lights in other places and larger, (Com. Dig. sup.) as

9. Where E. being owner of a house, enlarged it and inserted a window at one end in the part added, and at another end carried out the side walls, between which two windows had formerly stood in a straight line 5 feet, converting this end into a bow, and inserting two bow windows in the same direction, but not in the same situation as the former. It was held that whatever privilege against obstruction of light the windows of the original house possessed did not apply to the new windows. (*Blanchard v. Bridges*, 4 Adol. & Ell. 176.)

10. Where there is not such a diminution of light and air as renders the premises less fit for occupation. (*Wells v. Oddy*, ubi sup.)

11. Where the effect produced by throwing rubbish, &c. into a well is only to render it muddy for a short time an action will not lie. (*Taylor v. Bennett*, ubi sup.) E. A.

#### TO THE EDITOR OF THE LEGAL GUIDE.

#### CASE OF FROST THE CHARTIST. THE JUSTICE OF HIS SENTENCE CONSIDERED.

Sir,—My letter to you inserted in No. 21 of "the Legal Guide" has, it appears, provoked only two answers, one from "E. H." and another from "*Candidus*," but neither I maintain has removed me from my position.

First then as to E. H.

I admit the length of the argument, and that every thing was said that the very learned counsel who argued the case could address to the court, but still it did not produce an unanimous opinion. What I intended to convey was, that in a case of such very great importance, it behoved the judges to have endeavoured by every possible means to reconcile their opinions, and at least not to have allowed the world to know that they so differed, until they had taken some time to consider every bearing upon which they were at variance, in the hope that the result might have been unanimity; but if that desirable object could not have been attained, then we should all have been more satisfied with the decision of the majority. My great objection was as to the haste with which the opinions were promulgated.

I am perfectly aware that all doubtful points under similar circumstances are settled by a majority.

By a reference to the speech of the *Marquis of Normanby* (see Legal Guide, 3. 235.) E. H. will perceive that "the difference of opinion amongst the judges on the reserved points opened a door to the consideration of certain other points." It was this difference of opinion that saved the lives of men, relative to whom, so far from being a friend of the prisoner, I most decidedly concur in opinion with the noble Marquis, "that there never was an instance in which the lives of the convicts would have been more justly forfeited."

With respect to "*Candidus*," I am sure he could not think me serious as to the judges being locked up. I only intended to draw the distinction between the immediate decision of the judges, and the course pursued by those judges towards juries. I do not attempt to draw a parallel between the trial of an issue of fact and the decision of a point of law, because in my opinion, the former is of less importance than the latter; the one frequently having reference only to two or three parties, while the other affects the whole community. I am sure *Candidus* would not imagine that juries who return unanimous verdicts are always unanimous in opinion; a small minority will give way to a large majority, because they conceive that the many are more likely to be correct than the few. At the same time "I should presume each to be entitled to have a separate common sense opinion of his own." I must still hold, Sir, that in my opinion deliberation is some criterion of wisdom, and even of legal wisdom, as the judges often shew us by taking time to consider a case, when it is evident that at that moment they are not unanimous. Let us recollect that there is a world without the *Inns of Court* who yet take an interest in legal matters, and that every method should be resorted to in order to convince that world of the extreme purity of the judges of our land. I can assure *Candidus* that no man can entertain a higher respect for the judges than myself, and it was from a desire of representing what are the opinions of many that I first addressed you. These are days of wonderful improvement, if not intelligence; nothing falls from the judicial seat which is not commented upon, and if the judges differ upon great points, let some plan be devised by which so lamentable an occurrence may be obviated for the future. (1)

I am, Sir, yours, &c. JUSTITIA.

(1) We have not inserted the letter to us signed "*Candidus*," but we sent it to "*Justitia*." The principal argument in that letter

was the following: — "Surely a parallel was not attempted to be drawn between the trial of an issue of fact, and the decision of a point of law. In the one case unanimity of opinion on the part of the jury is positively enjoined; in the other, (considering the frequent differences of opinion which hourly occur in practical points of law among the most enlightened members of our profession) it could scarcely be expected that on a question, involving such subtle legal intricacies as that under discussion, perfect unanimity should prevail among the fifteen judges, (entitled, I presume, to have each a separate legal opinion of his own,) when the bar and the profession generally were almost to a man divided in opinion on the subject." Here this discussion must end.

EDITOR.

### Law Reports.

#### COURT OF CHANCERY—Feb. 29.

TANNER v. SMITH.

**VENDOR and PURCHASER.**—*Specific performance—Injunction to restrain Action at Law—Time the essence of the Contract—CONDITION of SALE, that Vendor shall be allowed to rescind the Contract upon re-payment of the deposit money without Interest or Costs—an IRRATIONAL STIPULATION.*

This bill was filed by the plaintiff on the 4th June, 1839, for the specific performance of an agreement entered into by the defendant at public auction.

The bill stated that the plaintiff, on the 8th February, 1839, put up for sale by public auction, the absolute reversion to some freehold ground rents and property in Hatfield street, Blackfriars road, subject to a life of seventy years, or thereabouts, and also to the following conditions of sale:—

"That the purchaser should pay to the auctioneer a deposit of £15. per cent. on the amount of the purchase money, and sign an agreement for payment of the remainder on or before Lady day then next, when the purchase should be completed, but if from any cause whatever the completion of the purchase should be delayed beyond that time then the purchaser should pay interest upon the residue of such purchase money after the rate of £5. per cent. from that time without prejudice to the vendor's

right, under the 8th condition to resell the estate.

"That the vendor would within 20 days after the sale deliver to the purchaser, or his solicitor, an abstract of the title, and on or before Lady day then next would execute a proper conveyance to the purchaser, upon payment of the residue of the purchase money, and that all objections to the title which should not be made in writing to the vendor's solicitor within 10 days after delivery of the abstract should be considered to be waived.

"That the title deeds should remain in the hands of the vendor until all the lots should be sold and conveyed, when they were to be delivered to the largest purchaser in amount of the lots to which they related, who should enter into a proper deed of covenant, for producing and furnishing copies of the same; such deeds to be at the expense of the purchaser requiring the same.

"That all expenses attending the getting in and assigning or surrendering any term of years, whether already assigned to attend the inheritance or not, should be borne and paid by the person requiring the same.

"That all covenants for the production of title deeds or otherwise, were to be prepared and the execution thereof obtained, by and at the expense of the purchaser, requiring the same.

"That all attested, official, or other copies or extracts of deeds, wills, or other documents, whether of record or not; and all certificates, affidavits and declarations, and the production or inspection of any deeds, wills, probates, or other evidence of title, not in the vendor's possession, which should be required either for the purpose of verifying the abstract or otherwise, should be procured by and at the expense of the purchaser requiring the same, who should not require evidence of any births, marriages, deaths, times of death, intestacy, heirship, survivorship, matter of pedigree, failure of issue, representation or other fact, where the same should have been stated, taken notice of, or recognised in any deed or document, bearing date upwards of 35 years ago.

"That no purchaser should require any other identity of the different lots than that which the title deeds and documents, in the vendor's possession, should disclose.

"That in case any purchaser should raise objections to the title, not provided for by the conditions, and which the vendor should not be able or willing to remove, and the purchaser should insist upon such objections, the vendor should be at liberty by writing under his hand to rescind the contract, on repaying to such purchaser the deposit money, without interest or costs."

The defendant attended the sale and became the purchaser of several lots at 25s. 3d. He paid

deposit of £496. 10s to the auctioneer, and signed the usual agreement to complete the purchase and abide by the conditions of sale on his part.

On the 27th February, 1839, the plaintiff delivered the abstract of title, and on the 9th March, the defendant considering that the *ten days* was to be computed, *exclusive* of the day of delivery of the abstract, delivered his objections to the title, among these objections were the following: That the abstract was not a perfect and proper abstract, being defective in many very important particulars, and amongst others because various deeds and wills referred to were not abstracted; beside many other defects. That the *conditions of sale* were of a very *improper and depreciating character*, and such as under the trust deed for sale, under which the property was put up to auction, *ought not to have been made*.

That none of the title deeds, writings, or other documents, through or by which the title to the remises is professed to be deduced, nor is any statement furnished where the same are to be respectively seen and may be examined, nor whether they will be delivered up to the purchaser; and if not delivered up who will covenant for their production; and that there is not upon the title any valid covenant for the production of any of them.

That there is no evidence of the identity of the estates sold; and that it does not appear that those mentioned in the abstract are the same as those sold.

That although the purchaser has delivered the above objections within the ten days from the receipt of the abstract, yet that as such abstract is not a proper and perfect abstract, he protests against being considered as admitting himself to be under any obligation to deliver objections within that or any other particular time, and therefore claimed and reserved to himself the full right of taking all other objections to which the title was or might be in any manner open, should it become necessary or advisable for him so to do, after having delivered the above objections, not because he considered himself, under the circumstance, in any manner bound by the condition of title to take objections within ten days from the delivery of the imperfect abstract received.

But from a desire to prevent useless trouble, discussion, and expense, and to satisfy the vendors at once, that they have not delivered a *proper abstract*, or shewn a good title, and that there is little if any probability that they will be able to do so, as indeed *they must have been aware when they sold*; and the purchaser therefore required that his deposit money might be forthwith repaid to him; and that unless it was returned, he would hold the vendors responsible, not only for interest on his

deposit, but also for all his costs, charges, and losses, as well those already incurred; and will consider and treat *the condition and sale by which it was stipulated*, in case of objections being taken and not removed, that *the vendors might rescind the contract* on repaying to the purchaser his deposit money *without interest or costs, as fraudulent and void*. On the 12th March following, the vendors offered to furnish the defendant with an amended abstract of title in a few days, and that from its delivery they would extend the time for making objections to the title to a further ten days. On the 3rd April, the objections made to the title not having been removed by the plaintiff, the defendant brought an action for the recovery of the deposit money. On the 9th May following the plaintiff delivered a further abstract of title to the defendant's solicitors. On the 13th May a plea was put in to the action at law. On the 24th May the defendant replied, and delivered the issue, with notice of trial. The bill charged that the defendant had accepted the title, and that he was not now at liberty to raise objections thereto, and prayed a specific performance of the agreement of sale, and for an injunction to restrain the action at law. On the 15th June, 1839, the defendant put in his answer. On the 12th December following, the plaintiff amended his bill, and prayed a reference of the title to the Master.

The motion for the injunction to restrain the proceedings in the action at law came on to be heard on the 15th January last, when the VICE-CHANCELLOR observed, upon the various proceedings that had taken place, as stated in the bill, and said, that unless the conditions of sale were to be impeached, the injunction must go as a matter of course. The vendors sold under a power of sale in a mortgage deed, and he did not think the condition, in the event of the plaintiff being unwilling or unable to remove any objections made to the title, he should be at liberty to rescind the contract on repaying to the purchaser the deposit money without interest or costs, to be an *unreasonable condition*, or one which the purchaser would object to; and His HONOUR *granted the injunction* as prayed.

The defendant appealed from this order of the VICE-CHANCELLOR.

Mr. Wigram now appeared to support the appeal, and contended that the action ought to proceed, that *time was of the essence of the contract*; (*Doloret v. Rothschild*) (a), and that great injury would otherwise be done to the defendant, as he was liable to pay £5. per cent interest on the purchase-money while the contract continued open. It had been stipulated that an abstract should be delivered

(a) 1 Sim & Stu. 500.

within twenty days, and objections taken within ten days after; but an incomplete abstract had been given, which was equivalent to no abstract at all. He submitted, therefore, that the Court would not upon motion try a question involving the merits of the cause. He cited *Parker v. Frith* (b), *Lloyd v. Collett* (c), *Radcliffe v. Warrington* (d).

Mr. Richards, for the vendor, contended that time was not of the essence of the contract, and that if the abstract, as delivered, was objected to, the plaintiff was at liberty to offer a further one. The injunction as allowed by the VICE-CHANCELLOR ought to stand; and the deposit being in the hands of the auctioneer, he thought the Court would order it to be paid into court.

The LORD CHANCELLOR said, he had repeatedly experienced the inconvenience of arguing the merits of a cause upon motion, and he would do all in his power to discourage the practice. The Court had been occupied during seven hours in discussing whether a deposit should be in the hands of one man or another until the hearing. The conditions of sale were of such a nature as he had not met with before; but he was not about to decide upon the effect of them now; he, however, would not interfere with the action, for one of the conditions seemed very oppressive—namely, that if the objections made to the title were such as could not be got rid of, the vendor was at liberty to rescind the contract, and repay the money without interest or costs. But when, how, or in what circumstances this was to be done the contract did not show. The vendor had reserved this benefit to himself, which seemed so irrational a stipulation, that perhaps the VICE-CHANCELLOR thought the objections should be confined to the original abstract. His Honour might have ordered the money into Court, for in such a contract as this, if the deposit is to be allowed to remain in the hands of the vendor or the auctioneer, much injustice might be done to the purchaser. As to the condition, if the vendor shall be unable or unwilling to remove the objections made to the title, and the purchaser should insist upon such objections, that then the vendor should be at liberty to rescind the contract without payment of interest or costs, the vendor gives himself the power to deal with the purchaser as he pleases; and, surely, nothing can be more unjust. But what is meant by these objections? Are they to apply to the first abstract delivered, or to the second? The condition for the delivery of the abstract states that the vendor will deliver an abstract within twenty days after the sale; and that the objections (if any) made to it are to be delivered

within ten days after such delivery. I think the defendant has a legal right to recover his deposit money, and it would be inequitable for the Court to interfere with his legal rights.

*Injunction dissolved.*

COURT OF EXCHEQUER.—July 25.

*Sittings in Banco.*

HEBBLEWHITE v. M'MORINE.

JOINT STOCK COMPANIES.—*A deed executed in blank void at the Common Law.*

TRANSFERS OF SHARES in blank for the name of a transferee to be inserted after execution void at Law.

We have before reported this case at the misprisus trial under the title of "*Tubblewhite v. M'Morris*" (a) and subsequently corrected. (b) The question in this case turned upon the legal transfer of 50 shares in the London and Brighton Railway Company, which the defendant had contracted to purchase, at the trial the plaintiff had a verdict for the amount claimed. (c)

Mr. Alexander subsequently obtained a rule for a new trial which was argued in Michaelmas term.

The Company had obtained an Act of Parliament, 1 Vict. c. 119, by which they are required from time to time, to cause the names and additions of the several persons who shall from time to time become entitled to shares in the said undertaking, with the number of shares to which they are respectively entitled, and also the proper name by which every share shall be distinguished to be fairly and distinctly entered in a book to be kept by the said company; and after such entry made to cause the common seal to be affixed thereto. And the said company shall from time to time cause a certificate or ticket, with the common seal of the said company affixed thereto, to be delivered to every such proprietor on demand, specifying the share or shares to which he is entitled in the said undertaking, and every such certificate or ticket shall be admitted in all courts whatever, as *prima facie* evidence of the title of such respective proprietors, their successors, executors, administrators, or assigns, to the share or shares therein, but the want of the said tickets shall not hinder or prevent the proprietor of any of the said shares for selling or disposing thereof, and provides that it shall be lawful for the several proprietors of the shares of the said undertaking, and their respective executors, and administrators, and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and regulations there-

(b) Cited *Wright v. Howard*, id. 199, S.C.

(c) 4 Bro. C. C. 469.

(d) 12 Ves. 326.

(a) Ante vol. 2. p. 122.

(b) Ante vol. 2. p. 312.

(c) Ante vol. 2. p. 122.

mentioned, and directs, "that on every such sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said company, or by the secretary or clerk of the said company, who shall enter a memorial of such sale or transfer as above, to be kept for that purpose, and endorse the entry of such memorial of such sale or transfer, and also on demand, make an indorsement of such transfer on the certificate of each share so sold, and deliver the same to the purchaser for his security, and the indorsement shall be considered in every respect the same as a new certificate, and until such memorial shall have been made and entered, the seller of the share shall remain liable to all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such shares paid to him, nor any vote in respect thereof, as a proprietor of the said undertaking." And the 157th section provides "that no person or corporation shall sell or transfer any share, which he or they shall possess in the said undertaking, after any call shall have been made for any sum of money in respect of such share, unless he or they at the time of such sale shall transfer shall have paid the full sum of money which shall have been called for in respect of such share.

The plaintiff and defendant had entered into following contract:—

"Mr. Hebblewhite,

"Sir,—I have this day purchased from you shares in the Brighton Railway Company, to be transferred, delivered, and paid for on or before the 1st day of March, 1839, or at any immediate date that I may require them, by giving you for the said shares, at per share, together with all calls that may have been paid on the same; you hereby binding yourself, your executors, and assigns, to execute to me, or my nominee, or nominees, a legal transfer of the said shares, for which I am to make payment to your order before the 1st day of March, 1839. It is understood and agreed that I shall be entitled to all new shares that may accrue, or be appropriated to the holder of the said 50 shares. It is also agreed, if the payment be not made on the 1st day of March, 1839, that you give full power to resell the said 50 shares at any cost or risk, claiming from me any deficiency, and accounting to me for any surplus that may arise from the re-sale of them.—I am, &c.

"GEO. M'MORINE."

The question left for the jury by GURNEY, B. (who tried the cause) was, whether the plaintiff was a proprietor of the shares, and whether he was such before the transfer.

PARKE, B. now gave the judgment of THE COURT, and observed that three objections were made at the trial of the cause; first, that the

plaintiff was incapable of executing a transfer of the shares on the 1st of March, Mr. Pritchard being on that day the owner of them; secondly, that the calls due not having been paid before the day of the transfer, such transfer was void by the Company's statute (s. 157); thirdly, that the conveyance tendered was void at common law, on the ground that at the time of its execution by Mr. Pritchard, a blank was left for the name of the transferee. The Court confined itself to the last objection, and referred to *Texiera v. Evans*, (d) in which LORD MANSFIELD held, that a bond was valid that was given with the name of the obligee, sum in blank, in opposition to which is *Comyns Dig.* (e) where it is said, if a deed be signed and sealed, and is afterwards written, it is no deed. This in truth was an attempt to make a deed negotiable like a bill of exchange, which the law does not allow. The Company's act requires all transfers to be by deed—this transfer was made in blank for the name of the transferee, to be inserted after it was executed, and is void at the common law. (f)

Rule made absolute for a new trial.

DAVIS v. COLE.

**COSTS.—PRACTICE.—Judges' intention to certify to deprive a plaintiff of Costs under 43 Eliz. c. 6. s. 2.—Whether the Postea should be delivered out before the Certificate is granted.**

Mr. Mansel moved for a rule to shew cause why the two following orders of Mr. BARON GURNEY should not be set aside.

"I order that the plaintiff's attorney forthwith produce before me the *Record of Nisi Prius* and the *Postea* in this cause for the purpose of indorsing thereon my certificate, pursuant to the Statute 43 Eliz. c. 6. s. 2. (a) that the taxation of

(d) 1 Anst. 238.

(e) *Fait*, A. 1 B. 7.

(f) See *Powell v. Duff*, 3 Camp. 181; *Doe dem Lewis v. Bingham*, 4 Barn. & Ald. 672; *Hudson v. Rivett*, 5 Bing. Rep. 368; *Matson v. Booth*, 5 Man. & Selw. 223; *Zouch v. Clay*, 1 Ventr. 185—2 Keb. 872, 881—2 Lev. 35.—EDITOR.

(a) By this statute, if in a personal action, "not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery," it shall be certified by the judge (not the sheriff or judge of an inferior court trying under the 3 & 4 W. 4, c. 42, s. 17). (*Claridge v. Smith*, 4 Dowl. 583). Nor on a writ of inquiry; (*Wardroper v. Richardson*, 1 Ad. & Ell. 75; *Story v. Hodson*, 5 Dowl. 558; *Jones v. Bond*, 2 Mee. & Wels. 813; S.C.) before whom it shall be tried, that the debt or damages to be recovered therein do not amount to 40s., the plaintiff shall have no more costs than damages, but less, at the discretion of the Court. (See *Hullock*, 19, 27; *Walker v. Robinson*, 2 Str. 1232; 1 Will. 93, S.C. *Howard v. Cheshire Say*, 260; *Dand v. Sexton*, 3 T. R. 37). The object of the statute was to confine trifling suits to inferior courts, or, in other terms, to prevent the bringing of actions which, in point of principle, ought not to be commenced at all; (*Py-*



costs, herein be set aside; that is be referred back to the master to review his taxation with reference to the same certificate; that the judgment signed be altered as to the payment of costs, and that the plaintiff refund to the defendant the sum of £29. part of the damages and costs paid under protest."

The other order was to the same effect, with this addition, "that the defendant should pay to the plaintiff such costs as the plaintiff had incurred, by reason of the defendant not having applied to the associate to draw up the order before judgment was signed and the costs taxed."

It appeared that the cause had been tried before Mr. Baron Gurney, when the plaintiff had a verdict for one shilling damages, and his lordship stated (upon application being made for the purpose), his intention to certify to deprive the plaintiff of costs under the Statute 43 Eliz. c. 6. s. 2. That the plaintiff afterwards got the Postea which was indorsed, "Verdict for the plaintiff one shilling, costs 40 shillings," but the judge had not certified. The master taxed the costs in the usual manner, and the defendant paid them under protest.

Mr. Mansel insisted upon his judgment, upon the ground that, there could be no certificate after the final judgment, and cited *Whalley v. Williamson*. (b)

ALDERSON, B.—That case does not apply, it was a decision in the *Common Pleas*, and relates to the power of revoking a certificate once given within a reasonable time (c).

Mr. Mansel then cited *Godson v. Lloyd* (d), and *Redit v. Lucock* (e).

LORD ABINGER, C. B. stopped Mr. Cole, who appeared to shew cause against the rule, and observed, that as the plaintiff had obtained the *postea* without the certificate of the judge, and final judgment had been signed, he did not see how the Court could interfere.

The verdict of the jury must of necessity take its regular course (f).—Rule refused.

*Dunn v. Gibson*, 8 Moore, 450. It has been holden to apply to all personal actions not expressly excepted from it; (*Dand v. Sexton*; *Pyeburn v. Gibson*). Even in actions upon statutes giving the plaintiff "full costs of suit," the judge may certify under this statute, which will have the effect of giving the plaintiff no more costs than damages; (*Irvine v. Reddish*, 6 Barn. & A. 796; 1 D. & R. 418; S. C., see *Simpson v. Hurdie*, 2 M. & W. 85; 5 Dowl. 304; S. C.) see Archbold's Prac. Q. B. by Chitty, 1158.—Edmon.

(b) 5 Bing. N. C. 200.

(c) The certificate under the act may be granted out of Court at any time between verdict and final judgment; *Johnson v. Stanton*, 4 D. & R. 156; 2 Barn. & Cres. 691; *Whalley v. Williamson*, ante. Ed.

(d) 4 Dowl. 157.

(e) 2 Id. 247.

(f) The certificate may be granted at or within a reasonable time after the trial, and before judgment, (*Holland v. Gore*, 3 Term Rep. 88; *Forall v. Banks*, 6 Barn. & A. 796; *Whalley v. Williamson*). It is

## COURT OF REVIEW.—August 1.

FIAT against — FRAMES.

PETITION of the OFFICIAL ASSIGNEE. OFFICIAL ASSIGNEE.—*Their habits—Optional in an official assignee to have his name made use of in an action when an Indemnity.*

This was a petition of Mr. Abbott, the official assignee, for an injunction to restrain the creditors' assignees from proceeding with an action for the recovery of one-third of a sum of £101. The petitioner was appointed official assignee in July, 1838, when Thomas Gern and Henry Phillips were chosen by the creditors, who selected Mr. Hudson as solicitor to the firm. In December following an action was commenced against Thomas Hopper, by direction of the creditors' assignees, to recover certain property. The petitioner, on being named as plaintiff, asked an indemnity, when Mr. Hahn pledged himself by letter to make no personal charge, and he consented. A verdict for the defendant was given on the trial, with costs amounting to £95., for which a levy was made on the goods of the creditors' assignees. On the petitioner's refusing to pay one-third of the sum, an action was brought and declaration delivered. The petitioner had only in hand a sum of £9. 12s. belonging to the bankrupt's estate, which he tendered to the Court on using for its intervention on his behalf.

Mr. Craig opposed the application, upon the signature to the authority and declaration bringing the action by the petitioner himself who became an active party and interfered with the nomination of counsel. The costs to be recovered were not for Mr. Hudson's benefit, but were the costs of the defendant, to which the alleged indemnity could not extend. The creditors' assignees only asked the petitioner to contribute to the extent of his receipts from the bankrupt's estate. As this proposal had not been accepted, and as the petitioner had pledged to the action which stood for trial on the 3rd instant at the Guilford assizes, they relied on the forbearance of the court from interference.

CAWSE, J. said, it was optional in an official assignee to allow the use of his name without indemnity; and it was to be regretted that the petitioner had ventured on that course in the present instance. A court of law would make no distinction between assignees. The petitioner not only appeared to have acquiesced, but

In general, final, if the judge shall order to certify, and the Court will not interfere with the order, except in cases not within the statute, and in which the judge had no power to certify, (*Whalley v. Williamson*, 5 Dowl. 300; *Watts v. Mingo*, 4 Dowl. 300).

have acted voluntarily; whereas, had he appeared in the first instance, the court would have interfered before costs were incurred. He had undertaken to accept short notice for trial, and on that ground alone, he thought it was his duty not to interfere.

Petition dismissed with costs.

#### PREROGATIVE COURT.—July 21.

##### WILL of MARY ROBERTS.

*Will dated and signed in PENCIL.—Whether entitled to Probate, or to be regarded as a deliberative paper merely.*

The deceased Mary Roberts had made her will in her own hand-writing, dated in 1836, which she bequeathed a very large property. The will was dated and signed by the testatrix in pencil. She died in April, 1839, without executing the will, or perfecting the date and signature, and probate was granted to the executor.

Mary Evans, one of the next of kin of the deceased, cited the executor to bring in the probate, and to prove the due execution of the will according to the Statute of Wills.

Dr. Phillimore opposed the paper, and objected, that the only question was, whether the presumption of law against an unfinished paper had been in this case repelled, or whether it was to be regarded as a deliberative paper merely. Decree for the probate to the executor.

**HEARINGS**, at Nisi Prius, appointed to be held in Middlesex and London, before the Right Honourable THOMAS LORD DENMAN, Lord Chief Justice of the Court of Queen's Bench, in and after Michaelmas Term, 1840.

##### IN TERM.

Middlesex.	London.
Monday November 3	
Tuesday November 6	
Wednesday November 23	Tuesday November 24
AFTER TERM.	
Thursday November 26	Friday November 27
	(to adjourn only.)

The Court will sit at eleven o'clock in term, in Middlesex; at twelve in London; and in both at half past nine after term.

**N.B.**—Long causes will probably be posted from the 3d and 6th of November to the 11th; and all other causes on the lists for the 11th and 6th of November, will be taken from day to day until they are tried.

Undefended causes only will be taken on the 11th of November.

Short defended as well as undefended causes are ordered for the sitting on the 24th of November, to be tried on that day, if the plaintiffs wish it, unless there be a satisfactory affidavit of merits.

#### 3 & 4 VICT. Cap. 96.

#### An Act for the Regulation of the Duties of Postage.

(Continued from p. 352.)

47. And for providing for the transmission of newspapers between the United Kingdom and foreign countries free of postage, when satisfactory proof shall be laid before the Postmaster General that British newspapers addressed either to a person or to a place within a foreign country, and also that newspapers addressed to a person or a place in the United Kingdom from such foreign country, are respectively allowed to pass by the post within that country free of postage; be it enacted, that the Postmaster General may, with the consent of the Commissioners of her Majesty's Treasury, transmit by the post British newspapers addressed to a person or to a place in such foreign country from the United Kingdom, to any port out of the United Kingdom, other than her Majesty's Colonies and possessions, free from postage; and he may, with the like consent, receive from such foreign country foreign newspapers free from postage, or he may, with the like consent, charge for every newspaper transmitted to or received from a foreign country a rate of postage which he may consider equivalent to the rates of postage payable in that country on newspapers either transmitted from or received in that country, but in all cases, whether the newspaper be transmitted free or otherwise, subject to a sea postage of one penny, payable on the newspaper being put into the post office, for every newspaper delivered at the post office to be conveyed by vessels not being post office packets, and also to a like postage for every newspaper received by vessels not post office packets, addressed to a person or to a place within the United Kingdom.

48. And whereas by reason of the postage which may be charged on newspapers in foreign countries, or from other circumstances, it may be expedient again to impose the rates of two-pence on newspapers; be it enacted, that the Postmaster General, with the consent of the Lords of the Treasury, may again charge and demand the said respective rates of two-pence on newspapers received from and sent to any foreign country.

49. And be it enacted, that the Postmaster General, with the consent of the Commissioners of her Majesty's Treasury, may allow Colonial newspapers to pass by the post between places within any of her Majesty's Colonies, or by packet boat or private ship, from one colony to another colony, whether through the United Kingdom or not; and also allow foreign newspapers to pass through the United Kingdom

either to her Majesty's Colonies or from one foreign country to another foreign country, by packet boat or private ship; and also allow British newspapers to be sent to the Colonies through a foreign country, and Colonial newspapers to be sent through a foreign country, to the United Kingdom, or through the United Kingdom to a foreign country, free of postage, or subject to such rates of postage and under all such regulations and restrictions as the Postmaster General, with such consent as aforesaid, may think fit.

50. And be it enacted, that every British newspaper sent by the post to places out of the United Kingdom shall in all cases be put into a post office or receiving office in the United Kingdom within seven days next after the day on which the same shall be published, the day of publication to be ascertained by the date of such paper; and in case a paper shall be put into a post office after the expiration of such seven days, the Postmaster General may either detain the paper, or forward it by post charged with full postage as a letter.

51. And be it enacted, that in case any person to whom a printed newspaper brought into the United Kingdom shall be directed shall have removed from the place to which it shall be directed, before the delivery thereof at that place, it may (provided it shall not have been opened) be re-directed and forwarded by post to such person at any other place within the United Kingdom free of charge for such extra conveyance; but if the newspaper shall have been opened, it shall be charged with the same rate as if it were a letter from the place of re-direction to the place at which it shall be ultimately delivered.

52. And be it enacted, that the Postmaster General may allow the masters of vessels, other than packet boats, a sum not exceeding one penny on every printed newspaper, foreign or colonial, brought into the United Kingdom from a port or place out of the United Kingdom, and delivered by them at the post office of the post town at which they shall touch or arrive, and a sum not exceeding one penny on every printed newspaper conveyed by them for or on behalf of the post office from the United Kingdom to any port or place out of the same, in respect of which no gratuity is herein-before authorized to be allowed.

53. And be it enacted, that the following classes of persons may both send and receive letters, not exceeding half an ounce in weight, by the post, on their own private concerns, at a postage of one penny for each letter; (namely,)

Every seaman employed in her Majesty's Navy, whether at home or abroad, whilst such seaman shall be actually employed in her Majesty's service.

Every serjeant, corporal, drummer, trumpeter, fifer, and private soldier in her Majesty's regular forces, militia, fencible regiments, artillery, or royal marines, whether at home or abroad, whilst actually employed in her Majesty's service.

Every serjeant, corporal, drummer, trumpeter, fifer, and private soldier in the service of the East India Company whilst actually employed in the service of the Company.

But the letters of commissioned officers or warrant officers, whether in the army or navy, or midshipmen, or master's mates of the navy, are not included in this provision.

And with respect to letters sent by any such privileged persons, the following conditions shall be observed; (that is to say,) the postage of each letter (unless sent from parts beyond the seas, as herein-after mentioned,) shall be paid (or the letter, if posted within the United Kingdom, shall be duly and properly stamped,) on being put into a post office established under the authority of the Postmaster General; and upon such letter shall be superscribed the name of the writer, and his class or description in the vessel, regiment, corps or detachment to which he shall belong; and upon every such letter there shall be written in the handwriting of and signed by the officer having at the time the command of the vessel, or of the regiment, corps, or detachment to which the privileged person belongs, the name of such officer and the name of such vessel, or of such regiment, corps, or detachment.

And with respect to letters received by any of the said privileged persons, the following conditions shall be observed; the postage of each letter (unless sent from parts beyond the seas as herein-after mentioned) shall be paid (or the letter, if posted within the United Kingdom, shall be duly and properly stamped) upon putting it into a post office established under the authority of the Postmaster General, and it shall be directed to the privileged person, and lying on the superscription thereof the vessel, or the regiment, corps, or detachment to which he shall belong; and the deputy postmaster of the place to which such letter shall be sent to be delivered shall not deliver such letter to any person except the person hereby privileged to whom it shall be directed, or to some person appointed to receive the same, or to some person under the hand of the commanding officer.

And whenever the letter shall be sent by any such privileged person, it shall be sent

from parts beyond the seas without the said postage of one penny being pre-paid, every such letter shall be charged to the party receiving the same with a rate of two-pence; and any letters received by the post under this enactment by any such privileged persons which may have been re-directed, shall not be charged any postage on or in respect of such re-direction.

54. And be it enacted, that any such privileged persons may both send and receive letters, not exceeding half an ounce in weight, by private ships, between the United Kingdom and places beyond the seas, on their own private concerns, at the like postage for each letter, and subject to the like conditions and regulations, in all respects, as are herein-before mentioned in respect of letters sent and received by any such privileged persons by the post; but whenever the letters sent or received by any such privileged persons shall be conveyed, or be intended to be conveyed, by private ships, the gratuities payable by law to the masters of such vessels in respect of such letters shall in all cases be paid to the Post Office in addition to such postage.

55. And be it enacted, that the said privilege shall not extend to any letters liable to any foreign rates of postage.

56. And be it enacted, that, except in the cases herein specified, all privileges whatsoever sending letters by the post free of postage, or at a reduced rate of postage, shall wholly cease and determine.

57. And be it enacted, that the Postmaster General may at any time hereafter charge, for the use of her Majesty, on all letters, newspapers, and other printed papers sent by the post, on which the postage shall not be pre-paid, and which shall not be duly and properly stamped, and also on all letters sent by the post without being duly and properly stamped, although the postage thereon shall be wholly or in part prepaid, such higher rates of postage than would otherwise by law be payable on such letters, newspapers, or other printed papers as the Commissioners of her Majesty's Treasury by warrant under their hands shall from time to time deem expedient, and may also remit any of the rates of British postage or inland postage for the time being payable by law on the transmission of post letters, newspapers, or other printed papers, to such extent as the Lords of the Treasury shall from time to time direct.

58. And whereas communications may from time to time be opened with foreign post offices, which may render an alteration in the rates of postage expedient; be it enacted, that it shall be lawful for the Commissioners of her Majesty's Treasury from time to time, and at any time after the passing of this Act, by warrant under their

hands, to alter and fix any of the rates of British postage or inland postage payable by law on the transmission by the post of foreign or colonial letters or newspapers, or of any other printed papers, and to subject the same to rates of postage according to the weight thereof, and a scale of weight to be contained in such warrant, and from time to time, by warrant as aforesaid, to alter or repeal any such altered rates, and make and establish any new or other rates in lieu thereof, and from time to time, by warrant as aforesaid, to appoint at what time the rates which may be payable are to be paid, and the power hereby given to alter and fix rates of postage shall extend to any increase or reduction, or remission of postage.

59. And be it enacted, that the rates of postage from time to time to become payable under or by virtue of any warrant of the Commissioners of her Majesty's Treasury, under this Act, shall be charged by and be paid to her Majesty's Postmaster General, for the use of her Majesty, on all post letters, newspapers, or other printed papers to which such warrant shall extend; and that in all cases in which any rates of postage shall be made payable under any such warrant, every such warrant shall be published in the London Gazette, and shall, within fourteen days after making the same, be laid before both Houses of Parliament (if then sitting), or otherwise within fourteen days after Parliament shall re-assemble; provided that any rates made payable by any such warrant may be demanded and taken immediately after they shall have been so published in the London Gazette, although the same shall not then have been laid before Parliament.

60. And be it enacted, that in all cases in which the postage of any unstamped letter shall not have been paid by the sender, it shall be paid by the person to whom the letter is addressed, on the delivery thereof to him; but if the letter be refused, or the party to whom it is addressed shall be dead, or cannot be found, the writer or sender shall pay the postage; and this enactment shall apply to every packet, newspaper, and thing whatsoever chargeable with postage, which shall be transmitted by the post.

61. And be it enacted, that it shall be lawful for the Commissioners of Her Majesty's Treasury to make any reduction, or increase, or alteration they may consider expedient, in the gratuities allowed by this Act to masters of vessels for letters and newspapers conveyed by them for or on behalf of the post office, or delivered by them to the post office; and to allow and authorize such gratuities for the conveyance of letters and newspapers to masters of vessels passing to or from, or between any of Her Majesty's colonies or possessions beyond the seas, as they shall think fit.

and also to allow and authorize any gratuities to be paid to pilots, seamen, or others, on the letters and newspapers they may bring to any post office from any vessels.

62. And be it enacted, that no person shall post or cause to be posted, or send or cause to be sent, or tender or deliver in order to be sent by the post, any letter containing any explosive or other dangerous material or substance, and no such letter shall be forwarded by the post.

63. And be it enacted, that all post letters shall be posted, forwarded, conveyed, and delivered, under and subject to all such orders, directions, and regulations, and under and subject to all such conditions, limitations, and restrictions as to the form, size, dimensions, enclosures, or otherwise, as the Postmaster General, with the consent of the Commissioners of Her Majesty's Treasury, shall from time to time direct.

64. And to prevent disputes as to the limits of post towns within which letters are to be delivered by the post; be it enacted, that it shall be lawful for the Postmaster General, from time to time, in all cases in which he shall deem the same expedient, by writing under his hand, to fix and declare the limits of any post town within the United Kingdom or other Her Majesty's dominions, which shall be binding and conclusive on all persons whomsoever.

65. And be it enacted, that it shall be lawful for the Postmaster General, or any of his officers, to detain any post letter suspected to contain any contraband goods, and forward the same to the Commissioners of Her Majesty's Customs, who, in the presence of the person to whom the same may be addressed, or in his absence, in case of non-attendance, after notice in writing from the said Commissioners requiring his attendance, left at or forwarded by the post according to the address on the letter, may open and examine the same; and in case, on any such examination, any contraband goods shall be discovered, the said Commissioners may detain the letter and its contents for the purpose of prosecution; and if no contraband goods shall be discovered in such letter, the same shall, if the party to whom the same is addressed be present, be handed over to him on his paying the postage (if any) charged thereon; or, if he shall not be present, the same shall be returned to the post office, and be forwarded to the place of its address.

66. And for the more effectual prosecution of offences committed against the post office, be it enacted, that in any indictment or criminal letters for any offence committed upon or in respect of any property which may be laid in or stated to belong to the Postmaster General, it shall be sufficient to state any such property to belong to and to lay it in "Her Majesty's Postmaster General;" and it shall not be necessary to specify

the name or addition of any such Postmaster General; and that whenever, in any indictment or criminal letters for any offence committed against the post office Acts, it shall be necessary to mention for any purpose whatever Her Majesty's Postmaster General, it shall be sufficient to describe such Postmaster General as "Her Majesty's Postmaster General," without any further or other name, addition, or description whatsoever.

67. And to enable the Postmaster General for the time being to hold and take conveyances and leases of messuages, tenements, lands, and hereditaments for the service of the post office, and to transmit the same to his successors, be it enacted, that for such purpose Her Majesty's Postmaster General and his successors shall be and is and are hereby made a body corporate, and shall have a seal; and that all messuages, tenements, lands, and hereditaments, of whatsoever nature and tenure, now vested in Her Majesty's present Postmaster General, his heirs, executors, administrators, and assigns, in trust for her Majesty and her successors, shall immediately on the passing of this act become vested in him in his corporate capacity, and his successors for ever, in trust as aforesaid.

68. And be it enacted, that so much of an Act passed in the fifty-ninth year of the reign of his late Majesty King George the Third, intituled "an Act to amend an Act passed in the fifty-fifth year of the reign of his present Majesty, for granting to his Majesty the sum of twenty thousand pounds towards repairing roads between London and Holyhead by Chester, and between London and Bangor by Shrewsbury, and for giving additional powers to the Commissioners therein named to build a bridge over the Menai Straits, and to make a new road from Bangor Ferry to Holyhead in the county of Anglesea," as authorizes and imposes additional rates of postage to be charged and levied on letters and packets conveyed by way of Dublin and Holyhead; and so much of an Act passed in the first and second years of the reign of his late Majesty King George the Fourth, intituled "an Act for applying a certain sum of money out of the consolidated fund of the United Kingdom of Great Britain and Ireland for the purpose of building a bridge over the river Conway in the county of Carnarvon, and for imposing additional rates of postage on letters and packets conveyed by way of the said bridge," as authorizes and imposes additional rates of postage to be charged and levied on letters and packets conveyed by way of any part of Great Britain or Ireland to or from Conway and Chester; and so much of an Act passed in the fourth year of the reign of his late Majesty King George the Fourth,

let for vesting in commissioners the bridges now building over the Menai Straits and the River Conway, the harbours of Howth and Holyhead, and the road from Dublin to Howth, and for the further improvement of the road from London to Holyhead," as enacts that the additional rates of postage granted by the said Act of the fifty-ninth year of the reign of King George the Third shall be continued to be charged and received; and so much of an Act passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled "an Act for granting an additional rate of postage on letters between Great Britain and Ireland by way of Milford and Waterford," as authorizes and requires additional rates of postage to be charged and levied on letters conveyed by post by way of Milford and Waterford; and so much of any other Act or Acts as authorizes or require any additional rates to be charged and levied on letters to and from Ireland by way of Holyhead in respect of Menai Bridge, by way of Conway and Chester in respect of Conway Bridge, and by way of Milford and Waterford; and so much of an Act passed in the first year of the reign of her present Majesty, intituled "an Act for the management of the post office," as directs the respective post office Receivers-general of England and Ireland to distinguish in their accounts respective additional rates of postage granted in respect of the Menai and Conway bridges, on letters conveyed by way of Milford and Waterford, and to the payment of the amount thereof into the Exchequer; and so much of an Act passed in the first year of the reign of her present Majesty, intituled "an Act to repeal the several laws relating to the post office," as repeals that part of an Act passed in the third year of the reign of King George the Fourth, intituled "an Act to amend the general laws now in being relating to turnpike roads in that part of Great Britain called England," and as repeals any part of an Act passed in the fourth year of the reign of King George the Fourth, intituled "an Act to explain and amend an Act passed in the third year of the reign of his present Majesty, to amend the general laws now in being for regulating turnpike roads in that part of Great Britain called England;" and also an Act passed in the first year of the reign of her present Majesty, intituled "an Act for the regulation of the rates of postage;" and an Act passed in the second session of Parliament, intituled "an Act, for regulating the sending and receiving of letters and packets by the post free from the duty of postage;" and so much of any other Act or Acts in force as authorize the sending or receiving of letters and packets by the post free from the duty of postage; and also an Act passed in the first year of the reign of her present Majesty,

intituled "an Act to impose rates of packet postage on East India letters, and to amend certain Acts relating to the post office," excepting so much thereof as authorizes the payment out of the revenue of the post office of any deficiency in the superannuation fund for old and infirm letter carriers; and also an Act passed in the first and second years of the reign of her present Majesty, intituled "an Act for imposing rates of postage on the conveyance of letters by packet boats between places in the Mediterranean and other ports;" and also the hereinbefore recited Act passed in the last session of Parliament, intituled "an Act for the further regulation of the duties on postage until the fifth day of October one thousand eight hundred and forty," and the several treasury warrants issued in pursuance of the said last-mentioned Act, shall be and the same are hereby repealed and rescinded, except as to any act done or performed, or any appointment made, or any power, authority, or consent given or granted under or by virtue of the said recited Acts, or any of them respectively, or by or in pursuance of the said treasury warrants, and except in respect of any postage duties which may have become payable under or by virtue of any of the said Acts or treasury warrants hereby repealed and rescinded, or any proceedings for recovery of such duties, and except also as to any offence committed against the provisions of the said Acts hereby repealed, or any other Acts, and any fine or penalty incurred by reason of any such offence, or any proceeding for recovery of any such fine or penalty, or for the punishment of any offender.

69. Provided always, and he is enacted, that it shall be lawful for the commissioners of her Majesty's Treasury, in their discretion to authorize and empower the Receiver-general of the Post-office in England from time to time to pay to the receipt of her Majesty's Exchequer, out of the revenue of the Post-office, by quarterly, half-yearly, or annual payments, as the commissioners of her Majesty's Treasury may think fit, such an annual sum or sums of money as they may deem equivalent to the annual amount of the additional rates of postage which were payable under the said recited Act passed in the sixth year of the reign of King William the Fourth, up to the time of the suspension of the said rates, which annual sum or sums shall be calculated and fixed on an average of the produce of the said additional rates for three years up to the time at which the same were suspended; and the said sum or sums shall be accordingly for and on account of the National Road fund, and shall be carried to the consolidated fund of the United Kingdom of Great Britain and Ireland, and be applied to the said fund, and no additional rates would have been

by law if the same had not been suspended or repealed.

70. And be it enacted, that wherever the warrant of the commissioners of her Majesty's Treasury is required by this Act, such warrant may be under the hands of the commissioners of her Majesty's Treasury, or any three of them; and that whenever the order, consent, authority, or direction of the commissioners of her Majesty's Treasury is prescribed by this Act, such order, consent, authority, or direction (not being by warrant) may be signified either under the hands of the commissioners of her Majesty's Treasury, or any three of them, or under the hand of one of their secretaries or assistant-secretaries.

(To be continued.)

#### SPOILED STAMPS.

##### *Directions of the COMMISSIONERS of STAMPS and TAXES for the FUTURE ALLOWANCE of SPOILED STAMPS in the COUNTRY.*

These directions were given in consequence of a letter addressed to the *Chancellor of the Exchequer*, complaining of the expense to which persons residing in the country are subjected in obtaining an allowance of spoiled stamps by being required to make the affidavit before a Master extraordinary in Chancery, when a stamp duty of 2s 6d is payable in respect thereof, besides the Master's fees.

"Office for Stamps and Taxes,  
London, Aug 1, 1840.

"I am directed to acquaint you that the Board have determined that in future their *Officers in the Country* who allow spoiled stamps shall be authorised to administer the affidavit, by which means all expense in regard thereto will be avoided, as such affidavits when made before an officer of this department duly authorized to receive the same (a) are exempted from stamp duty.

C. PRESSLY."

#### NOTICE TO CORRESPONDENTS.

E. A.—It is a general rule, that all witnesses interested in the event of a cause, are to be excluded from giving evidence in favour of that party, to which their interest inclines them. They are excluded from a supposed want of integrity; and not as some have supposed that they may be saved from the temptation to commit perjury. If that were the true principle, there would be some inconsistency in excluding witnesses, who

(a) It will be necessary that all stamp distributors in the country obtain a deputation from the Stamp Office for this special purpose.—Ed.

have an interest even to the smallest amount. *Phillipps on Evidence*, 36. Persons liable to the costs of an action, have an immediate interest in the event, and therefore are not competent witnesses, id. 49. The objection to a witness on account of his being interested, is an objection on the *voire dire*, and excludes him from giving any kind of evidence for the party who calls him. If the objection prevails, he cannot be examined at all. The meaning of the rule which declares that an interested person shall not be witness in courts of justice, must be, that he cannot be heard at all as a witness on the side to which his interest inclines him. CHIEF BARON GILBERT lays it down, that he is totally excluded from all attestation, from his supposed want of integrity.

Though in general informers, entitled to part of the penalty, are not competent witnesses, yet where a statute can receive no execution unless a party interested be a witness, he must then be admitted. See *Gilb. Ev.* 128, *Heward v. Shipley*, 4 East. 180.

J. J.—The articles must be stamped before they are engrossed (34 Geo. III. c. 14, s. 12, 11). Occasional indemnity Acts however allow the stamp to be afterwards affixed. See 2 & 3 Vict. cap. 33—also *ante*, Vol. 3, p. 12.

Our numerous other Correspondents during the week shall have attention.

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ADVERTISEMENTS RECEIVED BY BAKER AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 38, FLEET STREET.

PUBLISHED IN DUBLIN AND EDINBURGH EVERY MONDAY.

# The Legal Guide.

VOL. IV.]

SATURDAY, OCTOBER 10, 1840.

[No. 24.

Price Sixpence.

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## ESSAY.

### ON THE ENGLISH LAW OF BAILMENTS.

(Continued from page 355.)

#### VADIUM OR PAWN.

HAVING shewn the various definitions of this contract, we will proceed to consider the ENGLISH LAW upon the subject.

It appears to have been settled that the pawnee is bound to use *ordinary diligence* in the care and safeguard of the pawn, but he is not bound to use more; and therefore, if he be lost notwithstanding such diligence, he will still resort to the pawnor for his debt. (a) We will now consider the rights and duties of the parties. *Blackstone* says, in case of goods pledged or pawned upon condition, whether to repay the money or otherwise, both the pawnor and pledgee have a qualified,

but neither of them an absolute, property in them: the pledgor's property is conditional, and depends upon the performance of the condition of repayment; and so, too, is that of the pledgee, which depends upon its non-performance. (b) In all cases between these parties the contract between them governs their rights, "*Modus et conventio vicunt legem*,"—the pledge is therefore liable only to the *specific* charge, and not to any other debt; but it is liable to all the incidental charges and expenses. (c)

The principal right which the pawnee acquires, after default made in payment by the pawnor at the time stipulated, is the right of sale. The contract of pledge carrying with it an implication that the security shall be made effectual to discharge the obligation: (d)—this distinguishes pawns from liens; the latter, in the absence of any special contract,

(b) 2 Com. 306. see Cro. Jac. 245, *Vanderzee v. Willis*, 3 Bro. C. C. 21.

(c) But see *Kirkman v. Shawcross*, 6 Term Rep. 14, *Denninbray v. Metcalf*, Prec. ch. 410, 2 Vern. 691, 698.

(d) *Pottener v. Dawson*, 1 Holt. N. P. C. 385.

(a) See *Anon.* 2 Salk, 522, *Vers v. Smith*, 1 Vent.



gives only the right of possession and retainers

This leads us to the PAWNBROKER'S Act, 39 and 40 Geo. 3. c. 99, which limits the interest that *Pawnbrokers* are to take, and contains provisions guarding against the facility of putting away stolen goods through *Pawnbrokers*. At the expiration of a year and a day the pledges may be sold by public auction only, unless the pawnor give a notice to the contrary, in which case the sale must be postponed for three months; but if the *Pawnbroker* neglect to sell, the pawnor has a common law right to redeem at any time. A judicial decision was made by the Court of Queen's Bench upon this Act of Parliament, in *Walter v. Smith, (c)* which was an action of *Trover* by the pawnor against the pawnee, for a gold watch: the pawnor did not require the pawnee to restore it, until after the expiration of a year and a day from the time it was pledged; subsequently, and while the pledge remained in the possession of the pawnee, the pawnor tendered the pawnee the amount of the principal and interest due in respect of the loan, and demanded the pledge; the pawnee refused to accept the tender and restore the pledge, asserting that it had become *forfeited*. The pawnee afterwards put up the pledge for sale by public auction, and purchased it himself. LORD TENTERDEN was of opinion, that the pawnee was entitled to recover,—the act not vesting the property absolutely in the pawnbroker after the expiration of a year and a day, but only giving him a *power* to sell, in order to reimburse himself his principal and interest, and so the jury found. Upon motion being made for a new trial—

LORD TENTERDEN said, I think that we cannot give to the word *forfeited*, as used in this Act of Parliament, the effect contended for by the defendant. It is argued that its import is, that the party whose property is

said to be forfeited, has absolutely lost all right to it. Now it is manifest, from the other provisions of this Act of Parliament, that after the time for redeeming the property pledged is expired, the whole interest is not divested out of the original owner. If it were, the sale would be entirely for the benefit of the pawnbroker: but by the 20th section of the Act, it is provided, "that with respect to goods pawned for more than 10s., if they shall be sold for more than the principal money and profit due thereon at the time of such sale, the overplus shall, by the pawnbroker, be paid on demand to the pawnor, in case the demand shall be made within three years after such sale, the necessary costs and charges of such sale being first deducted." The pawnbroker, therefore, is only to derive from the sale so much as will reimburse him for his principal and interest, and the expenses of the sale; and the overplus, if any, is to be returned to the owner. We cannot, therefore, consistently with this provision, give to the word *forfeited*, as used in the 17th section, the sense contended for on the part of the defendant. I am of opinion, that if the pledge be not redeemed at the expiration of a year and day, the pawnbroker has a right to expose it to sale as soon as he can, consistently with the provisions of the Act; but if, at any time before the sale has actually taken place, the owner of the goods tender the principal and interest, and expenses incurred, he has a right to his goods, and the pawnbroker is not injured; for the power of sale is allowed him merely to secure to him the money which he has advanced, together with the high rate of interest which the law allows to him in his character of pawnbroker. BAILEY, J., concurred, and observed—The object of the sale is to enable the pawnbroker to reimburse himself for the amount of the principal money advanced, and the interest due thereon. And if, before any sale takes place, the party pledging pays the

(c) 5 Barn. and Ald. 440.

pawnbroker his principal and interest, and expenses incurred, all the purposes of a sale are answered, and, consequently, the pawnbroker, in such a case, can have no right to sell. The words "deemed forfeited and may be sold," mean not that the things pledged shall become the absolute property of the pawnbroker, but only that they shall be so if forfeited as that the pawnbroker may take steps towards a sale. HOLROYD, J. thought that, by the 17th section, the property is not to be considered forfeited to all intents and purposes, but only for the purpose of enabling a sale to be had, by which the pawnbroker may pay himself his principal, and the profit which the law allows him to make in lieu of interest. Now the sale is for the benefit of the owner as well as of the pawnbroker; for if the property pledged sells for more than the principal and profit allowed to the pawnbroker in lieu of interest, he is accountable to the owner. The latter, therefore, continues to have an interest in the property, and must have a right to redeem it, by paying to the pawnbroker all that he would be entitled to derive out of it by a sale. It is true, that by the 17th section, the goods are forfeited for the purpose of the pawnbroker's being paid the amount of what is due to him upon the pledge. In this case a tender to that amount has been made to him, and therefore he had no right to put the owner to the burdensome and unnecessary expenses of a sale. BEST, J. concurred in opinion with the rest of the Court, and the lease was refused. (f)

This decision, although placing a construction upon the Pawnbroker's Act, was in perfect accordance with the *Anonymous* case in *Salkeld* (g), and with Lord Holt's judgment in *Coggs v. Bernard*.

(To be continued.)

(f) 8 C.

(g) *Ante*.

## PROBLEM XXIV. VOL. IV.

### VENDOR AND PURCHASER.

Shew the Cases in which the right to RESCIND a CONTRACT arises. (1)

(1) LORD ELDON observed that few cases turn on greater niceties than those which involved the question whether a contract ought to be delivered up to be cancelled, or whether the parties should be left to their legal remedy. *Jac.* 172. EDITOR.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XIV.

VOL. 4.

Lessor and Lessee—Covenants—Waiver. What amounts to a Waiver of a Breach of Covenant?

Sir,—A covenant in a lease is a contract entered into between the lessor and lessee, by which the covenantee lays himself under an obligation to do something beneficial to, or to abstain from an act, which, if done, would be prejudicial to the covenantor: If the covenantee does not perform what he has agreed to do, or does an act covenanted not to be done, it is a breach of his covenant: but, if the covenantor, being aware of such breach, and shewing an intention not to take advantage of it, he is waiving his right of forfeiture.

The best plan that I can adopt in answering this problem, will be to give a short account of some of the cases that have been decided between a lessor and lessee, to be an acknowledgment of the tenancy after forfeiture of the lease, and so operate as a waiver of the breach of covenant: after first premising that, where in a lease a power of re-entry for a breach of covenant is reserved to the lessor, a forfeiture may be waived, as the lease thereby is rendered only voidable; but it is otherwise where the lease is declared absolutely void. (*Doe d. Bryan v. Banks*, 4 Barn. and Ald. 401.)—In ejectment by a landlord against his tenant, on a proviso for re-entry for a forfeiture, the whole court held that the lessor bringing covenant for half a year's rent subsequent to the time of the demise laid in the declaration in ejectment, was a waiver of the right of entry for the forfeiture, and an acknowledgment that the covenant then subsisted. (Bull. N. P. p. 96.) In a lease containing a proviso that the lessee, and his executors or administrators, shall not "set, let, or assign over" the whole or part of the premises, without leave in writing, on pain of forfeiting the lease. The administratrix of the lessee committed a forfeiture by underletting part of the estate unknown to the lessor. It was held that though the lessor received rent after the forfei-

ture it was no waiver, because the forfeiture was not known to him at the time: but Ashhurst, J. in his judgment said, "there is no doubt but that such a forfeiture as the present may be waived by a subsequent acceptance of rent; but that only holds in cases where the party, at the time of receiving the rent, is cognizant of the fact of the forfeiture." (*Doe d. Gregson v. Harrison*, 2 Term Rep. 425.) On an action for the breach of condition that the lessee should not underlet, in an agreement amounting to a lease, it appeared in evidence that the lessor of the plaintiff asked the defendant what he would take for his land; and on the defendant naming a price, said, "Then let it, and I shall know what it will produce next year." It was held that this was a waiver of the forfeiture on a breach of such condition. (*Doe d. Henniker v. Watt*, 1 Man. and Ryl. 694.) Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause for re-entry for the breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months: it was held that this was a waiver of the forfeiture incurred by the breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until the expiration of the three months. (*Doe d. Morecroft v. Meux*, 4 Barn. and Cress. 606.) Lessee covenanted that his executors or assigns would insure the demised premises, and keep them insured during the term, and deposit the policy with the lessor. Held, that the construction of this covenant was not that the lessee should effect one policy, and keep that policy on foot, but that he, his executors, administrators, or assigns, should always keep the premises insured by some policy or another; and that it was a breach if they were uninsured at any one time, and a continuing breach for any portion of the time they were uninsured. The lease contained a proviso for re-entry on breach of any of the covenants. The lessee assigned, and the premises were never insured. The lessor distrained on the 30th September for rent then due, and afterwards brought an ejectment on a demise laid on the 24th October. Held, that the distress was an acknowledgment of the tenancy to the 30th September, and a waiver of any forfeiture to that time. (*Doe d. Flower v. Peck*, 1 Barn. and Ald. 428.) But a lessor who has a right of re-entry reserved on breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose right to re-enter on a subsequent underletting. Nor by waiving his right to re-enter on a breach of covenant to repair, does he waive his re-entry on a subsequent want of repairs. (*Doe d. Boscauld v. Bliss*, 4 Taunt. 735.)

### SUPPLEMENTARY ANSWER TO SAME PROBLEM.

If in a lease for years the lessor have power to enter in the event of non-payment of the rent by a specified time, or on non-performance of any of the covenants contained in the lease, and after any such breach, he do any act which may be construed to be a subsequent acknowledgment of an existing tenancy, he shall be deemed to have waived the forfeiture incurred by the breach of covenant, provided he have notice thereof, or it can be shewn that he was acquainted with the fact at the time of his doing such act as a waiver.

We will now see what those acts are which have been decided to amount to a waiver; and first of all, let it be understood that the act with which the particular act, on which it is intended to rely for evidence of the waiver, is done, is a matter to be left to the jury under the circumstances of each particular case (*Doe v. Cheney v. Batten*, Cowp. 243.)

In Green's case, Croke, Eliz. 3. it was held that calling the party tenant in a receipt for some bygone rent was sufficient evidence of a waiver, and that though the receipt of the rent would not be a waiver, yet the calling him tenant in the receipt was.

An absolute unqualified demand of rent after a forfeiture amounts to a waiver, (*Doe d. Birch*, 1 M. & W. 402.) but merely receiving the rent without a demand is an equivocal act (*Doe d. Tarrant v. Helier*, 3 T. R. 170.) if received without any observation being made at the time, it may be considered as a tacit admission of a continuing tenancy.

The receipt of rent accrued after the breach is conclusive of a waiver, (*Arnsby v. Wood*, 6 B. & C. 519.) but there can be no question of waiver unless the forfeiture be complete at the time.

A distress for rent that accrued due after forfeiture waives it, (*Pennant's Case*, 3 C. 64.) but not a distress for rent antecedently due and distrained for within six months after the forfeiture. 1 Hy. Bla. 5.

If the lessor by his conduct misled the tenant, and himself insured, in his own name instead of the tenant, he may be precluded from taking advantage of the forfeiture. (*Doe v. Ehins*, 1 Ry. & M. 29.)

Bringing an action for the rent due at the time of the forfeiture is no waiver of the right to re-enter (*Anon.* 3 Salk. 3); neither is the acceptance of rent after an ejectment brought (*Doe d. Morecroft v. Meux*, ante, 3 C. & P. 346); nor the receiving of rent after a right for forfeiture, by doing so in a prohibited manner, prevents a subsequent action for the rent.

the user in such prohibited manner continued after such receipt of rent; the subsequent user being deemed a continuing breach (*Doe d. Smbler v. Woodbridge*, 9 B. & C. 376.)

A forfeiture incurred by breach of a covenant to repair generally is not waived by notice given under a covenant to repair within three months. (*Roe d. Gratty v. Paine*, 2 Camp. 210); though in a subsequent case where the notice was to repair within three months, it was held that the giving it suspended the right to take advantage of the breach of the general covenant until the expiration of that time, *ante*.

Where by the terms of a lease, the lessee covenanted to repair generally, and then a stipulation followed, that the lessor and his assigns should be at liberty to enter at seasonable times, and view the demised premises, and upon such view to give or leave notice in writing for the tenant of all defects, &c.; and in case he should neglect or refuse to repair the said defects within two calendar months, afterwards it should be lawful for the lessor with workmen, &c. to enter and do such repairs, and that the lessee should repay the money expended therein, with his next half-year's rent, or in default the lessor should have power to distrain for the same as rent, and then also followed a proviso, that if the rent or any such increased rent should be behind for 15 days, or if the lessee should not in all things well and truly perform all the covenants, the lessor should be at liberty to re-enter—the premises being out of repair, the lessor gave a notice requiring certain things to be done, and stating that in case of neglect, the premises would be put in order, and the lessor be charged with the costs. The repairs were not done by either party, and at the expiration of the notice the action was brought, it was holden that by giving such notice, the lessor had waived his right of re-entry, and that his only remedy was to do the repairs himself, and distrain according to the warning, in case the charges were not paid. (*Doe v. Lewis*, 5 Ad. & Ell. 277.)

An agreement to enlarge the time for repairing does not operate as a waiver, but at the expiration of the time the lessor may maintain ejectment, without a fresh notice. (*Doe v. Brindley*, 4 B. & Ad. 84.)

A landlord, by merely lying by and witnessing the exercise of some prohibited trade on the demised premises, even for several years, does not thereby waive the forfeiture unless he receive the rent: some positive act of waiver is necessary; but if the tenant lay out money in improving the premises, with a view to their being so occupied, and the landlord do not object, it would seem that this is evidence to go to the jury, of his consent to the alteration. (*Doe v. Allen*, 3 Taunt. 79.)

The lessor, by advising a person to purchase the term of his lessee after a forfeiture, of which he is cognizant, waives his right to maintain ejectment against such purchaser, but not if the party have a previous interest in the premises, and the lessor's advice be merely "to take to them." (*Doe d. Sore v. Eykins*, 1 C. & P. 154.)

The receipt of rent after forfeiture by alienation, is a waiver, provided the lessor have notice of such alienation at the time. (*Roe d. Gregson v. Harrison*, 2 T. R. 425.) But a lessor who waives his right to re-enter on one under-letting, does not thereby lose his right on a subsequent under-letting. (*Doe d. Boscawen v. Bliss*; 4 Taunt. 735.) And the same rule seems to hold in the case of covenants to repair, where the waiver on one breach is no bar to the lessor's right of entry on a subsequent breach; because, as it is justly observed, a party by waiving his right to enforce a forfeiture, shall not be considered as having given a license to the lessee to do those acts which amount to a forfeiture. But a licence to assign amounts to a perpetual dispensation of a covenant not to assign without licence. (*Dum-por's case*, 4 Co. 120.)

In all cases, although the lease declare in express terms that it shall be void on such a forfeiture, it is now well established that this means voidable only. (*Doe d. Brian v. Bancks*, 4 B. & A. 401. *Arnsby v. Woodward*, 6 B. & C. 519. *Dakin v. Cope*, 2 Russ. 170.) The Court holding, in a case where this point was raised, as an answer to an action for subsequent rent, that it only gave the lessor the option of vacating the lease, but not the lessee; the principle of law being, that a party shall not take advantage of his own wrong. (*Rade v. Farr*, 6 M. & S. 121.)

#### TO THE EDITOR OF THE LEGAL GUIDE.

#### A DISCUSSION UPON CONDITIONS ANNEXED TO GIFTS OR LEGACIES IN RESTRAINT OF MARRIAGE.

(Continued from p. 362.)

SIR.—I endeavoured to show in my last the general principles which govern cases of conditions annexed to gifts or legacies in restraint of marriage. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right, shall not be permitted to avail himself of it for the purpose of its own, or fraud, or oppression, or harsh and vindictive injury. *Newland on Contracts*, c. 17, and as we have seen, so long as the conditions upon do not violate any of these principles, are valid and binding, and equity so far from interfering, will on the contrary uphold and enforce them.

But at the same time the courts have

fluenced much by the civil and canon law, have ever testified an anxious desire to guard against any abuse which the investing one party with so important a control over another might occasion, and in furtherance of such intentions, for the private as well as the public welfare, have on many occasions resorted to *subtleties and artificial distinctions*, in order to escape from the positive directions of the party imposing these conditions. *These distinctions* will be the subject of the present letter; they are

(1.) Between cases, where in default of compliance with the condition, *there is a bequest over*, and cases, where there is *not a bequest over*, upon a like default of the party to comply with the condition.

(2.) Between conditions annexed to a bequest of *personal estate*, and the like conditions annexed to a devise of *real estate*, or, things savouring of the realty.

(3.) Between conditions *precedent* and conditions *subsequent*.

Though this distinction, between conditions precedent and subsequent, is not, strictly speaking, either raised, or created by the courts of equity, being an acknowledged division of the common law, yet, it has been adopted, recognised, and applied by them, both strictly, and with various modifications; and interwoven as it is with the two first mentioned distinctions, and forming as it does (if I may be excused the expression), the *hinge* upon which they turn, or, the *telescope* through which they must be viewed, in order to ascertain their true bearings, I do not think I could do better than classing it as I have done. Though last in rotation, I shall proceed at once to the consideration of the distinction between conditions precedent and subsequent; for as I have just intimated, an examination of the one will necessarily include that of the others also. The general rule of the common law in regard to conditions is, that if they were impossible at the time of their creation, (a) or afterwards became impossible by the act of God, or of the law, or of the party who is entitled to the benefit of them, or, if they are contrary to law, or repugnant to the nature of the estate or grant, they are void. But if they are possible at the time, and become subsequently impossible, by the act of the party who is to perform them, then he is treated as *in delicto*, and the condition is valid and obligatory upon him. Story Eq. J. vol. 1.; Butler's note to Co. Litt., 206 a. Com. Dig. Condons. Conditions

(a) The common law considers a condition impossible, only when it cannot by any human means take effect, and when the obligee should go from London to Rome within three hours, but if it be only highly improbable, though beyond the power of the obligee to effect, it is not deemed impossible. Co. Litt. 206 a. Com. Dig. Condons. D. 2.

*precedent* are those which must be performed *before the estate can vest*. Conditions *subsequent* are those by the non-performance of which an estate *already vested*, may be defeated; if the former, and the condition is read for any of the causes just enumerated, the estate which depends thereon is also void, as no estate vests till the condition is performed; if the latter, the condition being void, then the estate becomes absolute; and though this distinction is strictly adhered to and followed by courts of equity, with respect to conditions annexed to bequests of real estate in restraint of marriage, yet they do not in every case, as we shall see, hold themselves bound by such rigid rules, being accustomed to administer as well as to refuse relief, with regard to many of the rules of the common law concerning conditions and conditional contracts, upon principles peculiar to themselves, sometimes refusing relief and following out the strict doctrines of the common law, and sometimes granting relief upon doctrines wholly at variance with them; as an instance of this diversity in conditions precedent and subsequent, it was said in *Popham v. Bamfield*, 1 Vern. 82. "Precedent conditions must be literally performed, and a court of equity will never vest an estate, where by reason of a condition precedent it will not vest at law; but of conditions subsequent, which are to divest an estate, it is different." And Lord Holt said in *Cary v. Berry* 2 Vern. R. 339. "In cases of conditions subsequent that are to defeat an estate, these are not favoured in law, and if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited; and a court of equity may relieve to prevent the divesting of an estate, but cannot relieve to give an estate that never vested." See also *Livingston v. Tomlinson* 4 John. Ch. R. 431.; 1 Foulb. Eq. B. c. b. 5. *Horsburg v. Baker*, 1 Peters. R. 232, 203. We will now proceed to consider conditions precedent and subsequent in connexion with the other distinctions (numbered 1 & 2) resorted to by the courts of equity. As I have before stated, where the subject of the bequest is *real estate*, or things savouring of the realty, the doctrine of the *common law* as to conditions is strictly applied by courts of equity; where *personal estate*, a different rule mostly prevails, founded upon the canon law; but I can better illustrate this, as well as the other distinctions, by the following examples. A. bequeaths an estate to B. upon his marrying C.; here is a bequest of *real estate*, upon a limited condition precedent, and though there is no bequest over, B. must marry C. before he can receive the estate. But to put a stronger case: If the bequest to B. had been in general restraint of marriage, though the condition be read as contr-

law, yet as it is *precedent*, and annexed to a bequest of *real estate*, it must, as in the former case be strictly complied with, or the estate will never vest in the devisee. But on the other hand, supposing that A. had devised a *sum of money in the funds* to B. upon his marrying C. there is still a limited and lawful condition precedent, but as it is annexed to a bequest of *personal estate*, B. would take the money, even though he were not to comply with the condition, and why? because there is *no bequest over* in default of a compliance with it; and this by reason that the condition is treated as ineffectual, upon the ground that the testator is to be deemed to use it *in terrorem* only, and not to impose a forfeiture, having failed to make any other disposition of the bequest upon default in the condition; now there are authorities which consider that *conditions precedent* as to legacies of this sort, *must be complied with*, in order to entitle the party to the benefit of the devise, *whether there be a bequest over or not*; yet there is the authority of Lord Hardwicke expressed in *Reynish v. Martin*, 3 Atk. 330. Also of Lord Eldon in *Keiley v. Monck*, 3 Rigw. R. 263. and of Sir Thos. Plumer in *Malcolm v. O'Callaghan*, 2 Madd. R. 349, 353, &c. to support the view I have taken, added to which, the civil and ecclesiastical law recognise no distinction between precedent and subsequent conditions, as to this particular subject, see *Harvey v. Aston*, 1 Atk. 375. S. C. Com. Rep. 738. and *Reynish v. Martin*, before cited. Again, if as in the second illustration, the bequest had been in *general restraint of marriage*, but consisted of *personal* instead of *real estate*, the legacy, instead of being void, would be held *good and absolute*, as if no condition whatsoever had been annexed to it.

Thus we see that in conditions precedent, in the cases before us, the law deals differently, between real and personal estate: now if in the former of these illustrations, (where the restraint was limited and lawful,) there had been a *bequest over to D.* upon non-performance of the condition, that is, if B. had married any one but C. In both, as well where the bequest was of *personal*, as where it was of *real estate*, if B. failed in performing the condition, he would never possess, either in the former case *the estate*, or in the latter *the funds*, which in both cases would go to D.; and we have seen the effect of conditions precedent where there is no bequest over. But we have also considered cases where the condition acts in *general and unlawful restraint* upon marriage, which is void. Suppose in such cases there were *bequests over* in default of compliance with the *unlawful condition*. This appears to me a point of some difficulty; we know that with regard to *real estate*, if

there is not a strict compliance with the *condition precedent*, although it may be unlawful and void, the estate will never vest in the devisee; but otherwise on this head the law is obscure and perplexing. But upon an attentive consideration, I think I may safely lay it down as a general rule, that *this distinction in equity*, between cases, where in default of a compliance with the condition, there is a *bequest over*, and cases where, under the same circumstances, there is *no bequest over*, can only be applied, and is only of effect where the *condition* in restraint of marriage is *limited and qualified*, and such as the law deems good and not opposed to public policy. If the condition is reasonable, and the devisee fails to comply with it, it is but just that the will of the testator should be carried out, if he has bequeathed the property to another party in case of such default; but if the condition on the contrary be unreasonable and unlawful, it is certainly right and proper that such obnoxious conditions should be annulled, that the estate of the devisee should be made absolute, and that no further bequest, in default of compliance with the unlawful condition, should be carried out: and it appears to me with a few exceptions, that this principle is carried out, whether the bequest be of real or personal estate, and whether the condition be precedent or subsequent. To the last mentioned we will now turn our attention: With regard to *real estate*, if the condition be *subsequent* instead of being strictly complied with its validity will depend upon its being such as the law will allow to divest an estate, for if the law deems the *condition void* as against its own policy, then the estate will be absolute and free from it, if on the other hand the condition is good, than a non-compliance with it will defeat the estate, in the same manner, as any other condition subsequent will defeat it. Story on Eq. J. vol. 1. Co. Litt. 206, a. & b. *id.* 237. *id.* 217 a. Hay and Butler's note 152. *Bartie v. Faulklund*, 3 Cha. C. 130. And the same rule is observed by the courts of equity as to personal estate. For if the condition in restraint of marriage be *subsequent and general* in its character, then as at law with regard to real estate, the condition is void and a mere nullity, (and this stake is whether *there is a bequest over, or not*,) and the legacy becomes *free and absolute*; to instance this, if A. bequeathed an *estate* and a *sum of money* to B. with a condition that if he married, it was to be void; the condition being subsequent and from its nature void, B. has an absolute property, in both *real and personal property*. But if the condition annexed to the above mentioned bequests were only in *limited and partial restraint of marriage*, if they were to a daughter to be void if she married before 21, with a

*bequest over* upon default, it would of course take effect if she married before 24, and she would lose both real and personal property. But supposing there was *no bequest over* in case of non-compliance, the law is not so clear; as to the personal property the same rule applies here as in like cases of condition precedent, the condition being treated as *in terrorem* only. But as to the real estate a difficulty arises, whether the same rule applies or not, and in the absence of any express rule to the contrary, I should be inclined to think it does, perhaps some of your numerous readers may be able to throw some light upon this head, viz. whether a condition subsequent in *limited and lawful* restraint of marriage, annexed to a devise of *real estate*, where there is *no bequest over* in default, is to be *strictly complied with*, or whether as in the case of personal estate it is to be treated as *in terrorem* only? It only remains for me now to mention that with regard to conditions precedent concerning personal legacies, the courts of equity (according to the doctrine of the civil law) modify the strictness of the common law, where a literal compliance with the conditions becomes impossible from unavoidable circumstances and without any default of the party, when it is sufficient that it is complied with as nearly as it practically can be, or (as it is technically called) *cy. press*. Thus if a legacy upon a condition precedent, should require the consent of three persons to a marriage, and one or more of them should die, the consent of the survivors or survivor, would be deemed a sufficient compliance with the condition, and a portion of this doctrine would be applied to conditions subsequent. Story on Eq. J. vol. 1. and see 1 Roper on Legs. c. 13 & 691. *Peyton v. Bury*, 2 P. W. 626. *Graydon v. Hicks*, 2 Atk. 16. 18.—And now a word to those who may deign to read this and my former letter, that they may discover various oversights and inaccuracies, I do not pretend to doubt or deny. I do not ask that they should anything extenuate, but I trust they will not “set down aught in malice.” I may truly say with Cowel, “no man, no book,” (I might add no human thing) “is void of imperfection, and therefore reprehend who will with meekness and without reproach; so shall he reap hearty thanks at my hands.” I am, Sir, your obedient servant,

H. D. M.

TO THE EDITOR OF THE LEGAL GUIDE.

REFORM ACT.

OBJECTIONS TO VOTERS' CLAUSE.

SIR,—I take the liberty of addressing you a few lines on the 39th section of the Reform Act

2 W. 4. c 45, which as your readers are aware, gives to any person who is on the register a right to object, at will, to any other person whose name is also on the register, without being required to show the slightest ground for so doing.

That some right of objection should exist, I grant, but I submit that the present state of things might be remedied to the advantage of all parties; and that it ought to be remedied, for it is a well known fact, that the majority of objections are merely factious, and given without the least pretence for so doing, except that the party lives at too great a distance to come to the town where the revising Barristers sit, to prove his claims; and consequently, that the vote will be lost to the party in whose interest the voter is known to be.

The decision of the Courts too, that the objector shall not be visited with the expenses incurred by the attennadnee to prove a qualification, after a factious objection, (*Soames v. Rawlins*, 2 C. M. and R. 744, S.C.) enables the objecting gentry to practise their profession with impunity.

Trusting you will give insertion in your valuable Journal to this communication, that some of your enlightened correspondents, may by the time the Parliamentary recess is over, be prepared with some enactment to remedy a glaring evil as that of compelling a voter for the county of Cornwall, residing in London, to appear at Bodmin, or an elector for Cumberland to appear at Carlisle, to defend his vote, merely because he is considered to be of a party, (for I regret to say all parties are alike in this respect); and in the earnest hope that before the next session of Parliament shall have closed its labours some such an enactment may be carried.

I remain, Sir,

Your humble servant,

AN ELECTOR.

3 &amp; 4 VICT. Cap. 96.

### *An Act for the Regulation of the Duties of Postage.*

(Continued from p. 368.)

71. And be it enacted, that the following terms and expressions, whenever used in this or any other Post-office Act, shall have the several interpretations herein-after respectively set forth, unless such interpretations are repugnant to the subject or inconsistent with the context of the provisions in which they may be found; (that is to say,) the term “British newspaper” shall mean newspapers printed and published in the United Kingdom liable to the stamp duty and duly stamped, and also newspapers printed in the Islands of Guernsey, Jersey, Alderney, Sark

Man, although not liable to stamp duties; and the term "inward bound" shall be held to include vessels bound as well to any port in the United Kingdom as to any port in any of her Majesty's colonies; and the term "outward-bound" shall be held to include vessels bound as well from any port in the United Kingdom as from any port in her Majesty's colonies; and at the term "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland, and the Islands of Man, Jersey, Guernsey, Sark, and Alderney; and that the term "her Majesty's colonies" shall include every port and place within the territorial acquisitions now vested in the East India Company in trust for her Majesty, the Cape of Good Hope, the Islands of Saint Helena, the Ionian Islands, and Ponduras, as well as her Majesty's other colonies and possessions beyond the seas (the Islands of Man, Guernsey, Jersey, Alderney, and Sark only excepted); and that the term "by the post" shall extend to and include the transmission of post letters as well by any general or penny or penny or convention post as by packet boat; and the term "post town" shall include every city, town, and place where a post-office is or shall be established; and that the several other terms and expressions used in this Act shall be construed according to the respective interpretations of the terms and expressions contained in the said Act passed in the first year of the reign of her present Majesty, intituled An Act for consolidating the laws relative to the Post-office of the United Kingdom, and for regulating the judicial administration of the Post-office laws, and for explaining certain terms and expressions employed in those laws," so far as those interpretations are not repugnant to the subject or inconsistent with the context of such terms and expressions.

72. And be it enacted, that this Act shall come into operation on the first day of September one thousand eight hundred and forty.

73. And be it enacted, that this Act may be amended or repealed by any Act to be passed during the present Session of Parliament.

THE SCHEDULE TO WHICH THIS ACT REFERS.

On all letters not exceeding half an ounce in weight transmitted by post between the United Kingdom and foreign parts, or between any of the places out of the United Kingdom hereinafter mentioned, there shall be charged and taken the following rates of British postage, that is to say:—

*s. d.*  
By packet-boat between Dover or any other port in the United Kingdom and Calais, or any other port in France, a packet-rate of . . . . . 0 3

Between France and any place in the United Kingdom distant from Dover or other port in the United Kingdom not more than eight miles, a rate (the packet-rate included) of . . . . . 0 5

Between France and any place distant from Dover or other port as aforesaid, more than eight miles, and not more than 15 miles, a rate (the packet-rate included) of . . . . . 0 6

Between France and any place distant from Dover or other port as aforesaid, more than 15 miles, and not more than 20 miles, a rate (the packet-rate included) of . . . . . 0 7

Between France and any place distant from Dover or other port as aforesaid, more than 20 miles, and not more than 30 miles, a rate (the packet-rate included) of . . . . . 0 8

Between France and any place distant from Dover or other port as aforesaid, more than 30 miles, and not more than 60 miles, a rate (the packet-rate included) of . . . . . 0 9

And between France and any place in the United Kingdom distant from Dover or other port as aforesaid more than 60 miles, or between France and London, or any place in the United Kingdom, through London, a uniform rate (the packet-rate included) of . . . . . 0 10

Between any part of the United Kingdom and Spain, otherwise than through France, a uniform rate of . . . . . 2 2

Between a port in the United Kingdom and the kingdom of Greece, or any port in Syria or Egypt, but not including letters transmitted between the United Kingdom and the East Indies . . . . . 2 3

Between Such or Bassora, or any other port in the Red Sea or Persian Gulf, and any port in the East Indies (letters transmitted by her Majesty's Mediterranean packets to or from the United Kingdom only excepted) . . . . . 1 0

Between any of the ports or islands or places situate upon the Mediterranean Sea, the Adriatic Sea, the Archipelago, the Black Sea, in Turkey, in Europe and Asia, in Spain, Portugal, Italy, France, or the Mediterranean, and upon the northern coast of Africa, whether in the Mediterranean or the Straits of Gibraltar (not having been first brought or conveyed from the United Kingdom, or not being intended to be conveyed to the United Kingdom) . . . . . 0 6

Between any of the ports or places last



aforesaid and any port or place in the East Indies, by way of the Red Sea or the Persian Gulf, in addition to the aforesaid Red Sea or Persian Gulf packet-rate	0 6	don, shall be charged as if they had been sent from or to London; and the rates of British postage for every letter not exceeding half an ounce in weight, transmitted by packet-boat, shall be as follows:—
Between a port in the United Kingdom and the island of Madeira	1 8	Between any part of the United Kingdom and the United States of America, a uniform rate of
Between a port in the United Kingdom and any port in the island of Cuba in the West Indies, or any port in Colombia or Mexico	1 0	Between a port in the United Kingdom and Lisbon, or any other port in Portugal
Between any port in the British possessions in the West Indies and any port in Colombia or Mexico	1 0	And in addition to the foregoing rates except on letters between the United Kingdom and Spain, otherwise than by way of France, and between the United Kingdom and the United States of America, there shall be paid on every such letter as aforesaid an inland rate of postage of twopence for the distance any such letter shall be conveyed within the United Kingdom, and on every letter so transmitted as herebefore mentioned, exceeding half an ounce in weight, there shall be charged and taken progressively and additional rates of British postage according to the scale of weight and number of rates in this Act contained as to letters, estimating and charging each additional rate of the amount hereinbefore directed to be charged and taken on every letter so transmitted not exceeding half an ounce in weight, and charging the inland rate as aforesaid, but so that letters herein rated between London and a place abroad shall not be charged any inland rate for the distance between London and the outpost at which the packet-boat conveying the same shall be stationed.
Between any port in the United Kingdom and any port in the island of St. Domingo	1 3	And on every letter between foreign countries or between any foreign country and any of her Majesty's colonies, transmitted through the United Kingdom, there shall be charged and taken for the distance any such letter shall be carried within the United Kingdom (in addition to the packet or ship-letter rates to and from the United Kingdom to which such letter will be liable under this Act) any such inland rate of postage not exceeding one shilling on any letter not being more than half an ounce in weight, as the Commissioners of her Majesty's Treasury may, by warrant under their hand direct; and on any letter exceeding that weight progressive and additional weights of British postage according to the scale of weight and number of rates in this Act contained as to letters, estimating and charging each additional rate at the sum which any such letter should be charged with under this schedule, if not exceeding half an ounce in weight; but so that no letter be transmitted through the United Kingdom, unless the British postage thereon be paid before the letter is sent out of the United Kingdom, or
Between London and the following places, by way of France:—viz., Malta, the Ionian Islands, Greece, Syria, and Egypt, a uniform rate of	0 10	
Between London and Germany, by way of France	1 4	
Between London and Switzerland, by way of France	1 2	
Between London and Spain, by way of France	1 7	
Between London and the following places, by way of France:—viz., Italy, Sicily, Venetian Lombardy, Turkey, the Levant, and the Archipelago	1 7	
Between London and Holland	1 4	
Between London and Belgium	1 4	
Between London and Switzerland	1 8	
Between London and Germany	1 8	
Between London and Denmark	1 8	
Between London and Sweden, and other parts of the north of Europe	1 1	
Between London and the following countries, through Belgium, or Holland, or Germany:—viz., Italy, Sicily, Venetian Lombardy, Malta, the Ionian Islands, Greece, Turkey, the Levant, the Archipelago, Syria, or Egypt	1 8	
Between any part of the United Kingdom and any place in the East Indies, via France, in addition to the Red Sea or Persian Gulf packet-rate, herein-after mentioned	0 10	
Nevertheless, all foreign letters herein rated between London and a place abroad, which shall be sent to or from any place in the United Kingdom without coming to or passing through Lon-		

ween the Postmaster-General and the Post-  
e of the foreign country from which it shall  
e been forwarded, or to which it shall be ad-  
ssed, for collecting and accounting for the  
ish postage on such letters.

### Law Reports.

#### COURT OF CHANCERY.—July 7.

##### APPEAL FROM THE VICE-CHANCELLOR.

##### WALWORTH v. HOLT.

##### JOINT STOCK BANKING COMPANIES.

ACTICE.—PARTIES.—*Whether all the  
Shareholders of a Joint Stock Company,  
however numerous, are necessary parties in  
a suit for winding up the affairs of the  
Company.*

This was an Appeal against an Order of the  
VICE-CHANCELLOR, allowing a demurrer to a  
Bill for want of equity.

The Bill stated that in July, 1836, a number  
of persons, exceeding six in number, agreed to  
enter into partnership for the purpose of carrying  
on the business of Bankers at Manchester and  
elsewhere, pursuant to the provisions of the 7  
of 4. c. 46. and 3 and 4 Will 4. c. 83. A  
Bill of settlement was executed, and the Bank  
opened for business. That previous to April,  
1839, the directors had duly called on the se-  
veral registered shareholders in the company, to  
pay five several sums of £2. per share on their  
several shares,—they having previously paid £8.  
per share in part of £20. That before that time  
the plaintiffs had paid all the calls upon the  
shares held by them. That previous to the 30th  
April, 1839, the partnership had sustained con-  
siderable losses in the course of their trade as  
bankers, and were unable to meet their pay-  
ments, and on the 30th April, 1839, it was re-  
solved by the directors of the partnership, at a  
general meeting, duly convened, that the part-  
nership should suspend its payments; and since  
that time the whole business and dealings of the  
bank have been entirely discontinued. That on  
the 27th May and 30th June, 1839, meetings  
of the directors and shareholders were held, at  
which it was resolved that a further call of £5.  
per share, making, with the calls already made,  
a sum of £15. on each original share of £20.  
should be forthwith made: which call was made,  
and paid by the plaintiffs and the great majority  
of shareholders. That the said banking com-  
pany had, down to the time when it suspended  
its payments, acted as a bank of issue, and at  
the time of its suspension a large number of the  
notes of the bank was in circulation; in res-  
pect of which the partnership was liable to a great  
number of individuals, and to a large amount;  
and the partnership was at the same time indebted

to various individuals in other sums to a large  
amount. That several meetings had been held  
since the suspension of payments, but no ar-  
rangement or agreement whatever had been come  
to; nor any settlement, or plan for the settlement  
of the debts or claims of the several creditors  
and claimants; nor for the dissolution or winding  
up of the affairs of the partnership; nor since  
the month of February last had any proceedings  
been taken for the above purposes. That under  
the last appointment of directors of the said  
partnership, made previous to the time when it  
stopped payment, the defendants, John Holt,  
Samuel Fox, William Marston, William Nichol-  
son, William Nutall, Samuel Waller, and Ni-  
cholas Price Wood, were the directors duly  
appointed of the partnership at the time the  
partnership stopped payment; and since that time  
no new appointment of directors had been made  
by such directors, or by the shareholders of the  
partnership; and that since the time when the  
company stopped payment, fiat in bankruptcy  
had issued against all the said directors, except  
Wm. Nicholson, who was the only remaining  
director who had not been declared bankrupt;  
that under the provisions in the partnership deed  
the directors who have so become bankrupt, are  
disqualified from continuing to act as directors.  
That, notwithstanding the bankruptcy of the  
said directors, they, together with Wm. Nichol-  
son, have continued in possession of the assets  
of the partnership. That three of the direc-  
tors are necessary to transact the business of the  
partnership; and that the trustees will not deal  
in any manner with the property and securities  
vested in them upon the authority of Nicholson  
or the other directors. That under the present  
constitution of the board of directors, sales of  
the partnership property could not be effected,  
and nothing effectual could be done for securing  
the property and effects of the partnership, or  
for applying the same in satisfaction of its debts.  
That no duly qualified shareholder could be found  
to act as director, and the property was in the  
course of being wasted and depreciated. That  
the entire property of every description belonging  
to the partnership, including the amounts due  
from several of the shareholders for unpaid calls  
of £15. purchase, would be wholly insufficient  
to pay and satisfy the full amount of the debts  
and liabilities of the partnership, though of con-  
siderable amount, and could be got in without the  
assistance of the Court. That the number of  
shareholders was too large to make them all par-  
ties, and all were interested in having the assets  
got in and applied under the direction of the  
court, and that the defendants were necessary  
parties. And the Bill charged prayed that an  
account might be taken, under the direction of  
the Court, of all the property, estate, effects, and

assets, of every description, of, or belonging to the partnership or company, including such several amounts as might be due and owing from the shareholders of the partnership or company, or any of them, in respect of unpaid calls upon the several shares held by them respectively, and that some proper person might be appointed by the Court to collect, get in, and receive the said property, estate, and effects, and other assets of the said partnership, including the amount of such unpaid calls; and that the receiver might be at liberty to use the name of the registered public officer of the partnership, as might be necessary in any proceedings, whether at law or otherwise, for recovering or enforcing payment of the said property, estate and effects, and other assets, including such unpaid calls, or any part thereof; and that the defendants, the directing trustees and public officer, might be decreed to deliver up and duly assign, or otherwise assure to the said receiver, all monies, and securities for money, and property, and effects whatever, of, or belonging to the said partnership, now in their respective possession, or under their respective control, and all deeds, evidences of title, books, accounts, papers, documents, and writings, in their respective possession or power in any wise relating thereto; and that such part of the property, estate, and effects of the said partnership, as requires to be sold, might be sold under the direction of the Court, and that all proper parties might be ordered to join in the sale, and all proper directions given for effectuating the same; and that the last mentioned defendants, and other the officers and servants of the partnership, might be restrained by the order and injunction of the Court from collecting, getting in, or receiving, or in any manner possessing themselves of, or intermeddling, or dealing with, the outstanding assets of the partnership, and from assigning or parting with any part thereof; and that an account might be taken, under the direction of the Court, of the several debts and liabilities, due and owing from the said partnership, or to which the said partnership is subject, and that the said property, estate, and effects, and other assets of the said partnership, including the amount of the said unpaid calls, might be duly and properly applied towards payment and satisfaction of the several debts and liabilities, as far as the same would extend for that purpose. To this Bill the defendants, Aspinall and Bateson, demurred,—first, for want of equity; secondly, for want of parties, because “all the partners or shareholders in the partnership or company are necessary parties to the bill, and all such partners or shareholders are not made parties to the bill;” and because it appears by the said bill that the said flats in bankruptcy have been duly awarded and issued; and as assignees of the estates and effects of the bankrupts had been

appointed, they were necessary parties, but not made parties to the bill; and thirdly, because the bill is exhibited against those, and the several other defendants, for several, and distinct, and independent matters and causes, which have no relation to each other, and in which, or the greater of which, those defendants are in no way interested or concerned, and ought not to be implicated.

These demurrers came on to be argued.

The VICE-CHANCELLOR said, that a statutory bar affecting the number of persons who might enter into a banking partnership had only been removed by the 7th of George IV., but no particular favour had been given to partnerships of that nature above any others. Then what was the general law? Some reproach had been cast upon the Court for the narrowness of its principles with respect to banking companies; but it should be considered, if the reproach were just, it ought equally to apply to the legislature, inasmuch as the legislature had not yet made up its mind whether the 1st and 2nd of her present Majesty, which permitted a partner to sue the company, and *vice versa*, should be made perpetual or not; and if the present act, which continued that power only to the 31st of August, 1840, should be permitted to expire without any new enactment, the present state of the law must perish. Under these circumstances the Court might be forgiven if it showed a reluctance to depart from its old-fashioned rules. The general frame of the bill, in his opinion, only sought an auxiliary relief to what was specially prayed, namely, the payment of instalments by debtors, and the application of the assets among the creditors. It did not pray the Court to administer what was in sense and substance the award in every partnership, namely, the funds of each individual partner. The question was, could such a bill be maintained? The cases which had been cited in the course of an ingenious and lengthened argument did not support the proposition that the Court would interfere for the partial management of a partnership, by applying a certain portion of the funds for the general creditors, and there leaving the matter. The Court could not, indeed, grant the limited relief asked by the bill without declaring a dissolution of partnership, and directing the accounts to be taken, to ascertain if it was just and equitable an action should be brought for that purpose for any thing short of that would be an injustice. By allowing the demurrers the Court was not refusing justice, but refusing to do that which would appear to be partial justice, and it would work positive injustice against the parties. And allowed the demurrers.

The present appeal was made from the order of the Vice-Chancellor.

Mr. Richards supported the appeal, and submitted that the Vice-Chancellor's reasons for allowing the demurrer could not be supported. His Honour thought the plaintiffs ought to have prayed a contribution as a part of their relief; and he also thought that all the shareholders ought to be before the Court. If a contribution ought to have formed part of the prayer of the bill, the plaintiffs ought to have had leave to amend instead of being refused all relief; and the decision of his Lordship in the recent cases of *Taylor v. Salmon*, (a) and the very recent case of *Small and Attwood*, (b) clearly proved that the Court of Chancery had relaxed its practice, and would give relief where it became impossible to have all the parties in a company brought before the Court. *Long v. Yunge*, (c) *Jockburn v. Thompson*, (d)

Mr. Jacob, for the defendants, in support of the order of the Vice-Chancellor, contended that the plaintiffs were out of court at once, because they had not regularly averred themselves to be shareholders in the company. With respect to the equity claimed, it would be great injustice to allow a receiver to sue the defendants, when, in point of fact, if the accounts were taken, it might turn out that ten thousand pounds were due from the bank to the man whom they sued for fifteen pounds, and who had no security that he would not be called on still further to make good the deficiency in the assets of the bank. With respect to the want of parties, the case of *Long v. Yunge* was clearly against the plaintiffs, and so also was the case of *Tokes v. Evans*, (e) where the Master of the Rolls refused to interfere with the Brandy Distillery Company unless all the shareholders were before the court.

The LORD CHANCELLOR said the case was one of some importance to the parties from the amount of property involved in it, and also to the public as a matter of principle for the regulation of the practice of the Court hereafter. Several conflicting authorities had been cited, and it became the duty of the Court to ascertain how far they could be reconciled, and some relief afforded to the plaintiff without a violation of principle. To ascertain how that could be done, he was required to look into the authorities, and it was a satisfaction to the Court to know that the property could not suffer by delay, as it was already in the hands of a receiver. Indeed, that fact had come out at the time leave was given to hear the argument, the Court would not have allowed the case to occupy so much of the two last days of the sittings.

(a) 3 Myl. & Cr. 109, 422.

(b) 1 Leg. Guide, 376.

(d) 16 Ves. 521.

(e) 2 Sim. 300.

(f) Keen, 24.

## VICE-CHANCELLOR'S COURT,

July 14.

MILNER v. SINGLETON.

VENDOR AND PURCHASER.—PRINCIPAL AND AGENT.

The plaintiff filed this bill against the Steward and Land Agent of the Dean of York: the defendant claiming the right and interest in a lease, granted in 1836 by the Dean of York to the defendant, of a farm in the plaintiff's occupation, in consideration of £7,200, which lease the plaintiff insisted was granted the defendant as his agent, and on his behalf. That the plaintiff had agreed with the defendant, that he, the defendant, should negotiate with the dean for the lease upon the best terms that could be made, so as the purchase money should not exceed £9000, and that the defendant should advance half the purchase money, the plaintiff paying him for such advance £200 a-year; but that the defendant required £8,500 for it, and refused to part with it on any other terms. The Bill prayed a declaration of the Court, that the defendant, in contracting with the Dean of York for the lease at £7,200, was contracting as the agent for, and on behalf of, the plaintiff: as evidence of this fact, and upon which the plaintiff relied, was the following letter, written by the defendant to the plaintiff:—

"25th April, 1835."

"I have this morning settled the agreement for your farm, and wish you to bring me the names of three or four healthy boys, of from six to ten years old, for the purpose of selecting those to be put in the lease."

And that this fact being ascertained, the defendant might be declared a trustee of the lease and farm thereby claimed for the plaintiff, subject only to a lien thereon for the £7,200 so paid by him to the Dean of York, and on payment by the plaintiff of that sum, with interest, and all reasonable expenses, to the defendant, the lease should be assigned to the plaintiff.

The defendant, by his answer, denied the agency altogether, and stated that he was in communication with the dean upon the subject of the lease so far back as 1833, but no contract was entered into because the dean was not then in a situation to grant the lease. That the plaintiff was a perfect stranger to the defendant up to 1835, and no good reason could be assigned for his taking upon himself so much trouble to advance the plaintiff's interest.

Mr. Jacob, for the plaintiff, said, the case upon the evidence, although it had occupied the greater part of three days, seemed to him to be one material question—viz. whether, in a transaction in which the defendant obtained from the Dean of York a lease of a farm of which the plaintiff was the tenant in possession, the defendant

was acting on behalf of himself or as the agent of the plaintiff. The price contracted with the Dean for the lease was £7,200., and the defendant alleged he bought it for himself at that sum, and afterwards sold it to the plaintiff for £8,500 — The plaintiff contended he had employed the defendant to obtain the lease for him, and that he had done everything in his power to conceal from the plaintiff the real amount he had paid the Dean. Although the defendant denied that anything resembling what was charged in the bill had passed between himself and the plaintiff, evidence was produced, from the defendant's own letters, that much more had taken place that was reconcileable with the plaintiff's story, than defendant admitted. — There was a material distinction between agency and trusteeship. If the lease had been granted to the defendant as the trustee of the plaintiff, then some writing might have been necessary to establish such a relationship; but the plaintiff never intended the defendant to be his trustee, and therefore no memorandum was necessary prior to the lease to the defendant, as the plaintiff's agent, for up to that time *omnia rite acta*, and no objection could be made to his proceedings. The agency has been clearly established.

Mr. *Knight Bruce*, for the defendant, contended that as the defendant had positively denied the agency, the plaintiff must make out an agreement, he is driven therefore to rely upon the letter of the 25th of April 1835, which is deficient in every thing required by the rules of evidence and the statute of frauds. It defines neither estate, interest, price, nor person. *Cooth v. Jackson*, 6 Ves. 12.

The VICE-CHANCELLOR said, that the Statute of Frauds, had nothing to do with the case, and that the only question was simply one of fact, whether it was made out that Singleton undertook to act as the agent of the plaintiff in the manner stated in the bill. The agreement between the parties mentioned by the plaintiff was distinctly met by the defendant's answer; but there was, nevertheless, such strange circumstances connected with the case, that he durst not trust himself (as it was not his duty) to consider how the fact really was. In a case involved in so much obscurity, and where things stated on one side were denied on the other, he could only strike a balance between the statements that were made; and it certainly did appear to his Honour to be a most extraordinary thing that the defendant should have suffered his mind to float about in such a loose state with regard to matters of fact, as with his own hand to make an endorsement of the contents of a letter he had written totally distinct from what they really were. When he found a person of such an extremely flexible mind with regard to

matters of fact, it made him feel disposed to give much less weight to the assertions contained in his answer, than the Court would be otherwise disposed to do. It appeared to him, the terms of the letter were such as to justify him in assuming that something else took place beyond what the defendant stated. He thought, standing to the whole circumstances of the case, it was his duty, as the only fair method of arriving at truth and justice, and to clear the character of the parties, to send both plaintiff and defendant before a jury.

His Honour, therefore, directed two issues: 1st. whether on the 21st of April, 1835, it was agreed and determined that the defendant should negotiate, as stated in the bill, with liberty to indorse special matter on the *postea*; and 2nd. whether it was agreed between the plaintiff and the defendant, that the defendant should purchase of the Dean the lease in question as the agent of the plaintiff. All further directions to be reserved.

#### COURT OF EXCHEQUER—June 3.

*Sittings in Banco.*

JENKIN v. PENCE.

PLEADING PROPERT OF CONVEYANCE by LEASE and RELEASE.

This was an action of trespass, *quare clausum fregit*, for digging mines.

The defendant pleaded a conveyance by lease and release of the lands, except all mines of cannel coal, which mines ultimately became vested in Lord Balcarras, under whose title the defendant claimed the right to dig. The plaintiff demurred by reason that the deeds of release had been pleaded without *profert*.

Mr. *Cowling* appeared in support of the demurrer, he said it was true that the lease for a year had been pleaded to have effect by operation of the statute of uses, in which case no *profert* need be made, but that allegation was so inapplicable to those deeds, and not to the deeds of release, which were set up by the plaintiff, that it would be taken to have operation at common law in the absence of such an allegation, and could therefore be brought within the cognizance of the Court by *profert*. This doctrine was laid down by Mr. *Serjeant Stephens*, (a) though the learned author had in a former edition of his work laid down the contrary rule, and had there stated that *profert* was necessary under such cases.

LORD ABINGER.—That shows the propriety of the rule which excludes the works of living authors from being cited as authorities on points of law.

(a) *Stephens on Pleading*.

Mr. Cowling.—The plaintiff would also rely on earlier books for this position; as 1 Lilly's Entries, 136; 2 Sand. on Uses and Trusts, 61; *Jefferson v. Morton*. (b)

Mr. Addison, for the defendant, argued that must follow necessarily that these deeds did operate under the statute, for the deeds of lease and release were all to be taken to be one conveyance, and the former having been alleged to take effect by the statute, the latter would be included therein. *Banfill v. Leigh*; (c) *Rea-Brookman*; (d) *Bolton v. the Bishop of Carlisle*; (e) *Onslow v. Smith*; (f) *Stockman v. Lampton*. (g)

June 16.

Mr. BARON ALDERSON pronounced the judgment of the Court in this case, and observed that the general principles on the subject of *profert* are laid down in *Dr. Leyfield's case*, 10 Co. 92 a.)—"It is a maxim in the law that he who is party or privy in estate or interest, or who justifies in the right of him who is party or privy, pleads a deed, although he who is privy claims but parcel of the original estate, yet he ought to shew the original deed to the Court; and the reason that deeds being so pleaded shall be shewn to the Court is, that to every deed two things are requisite and necessary, the one that be sufficient in law, and that is called the legal part, because the judgment of that belongs to the judges of the law; the other concerns matter of fact, *scil.* if it be sealed and delivered as a deed, and the trial thereof belongs to the country. And, therefore, every deed ought to approve itself, and to be proved by others: approve itself upon its shewing forth to the Court in two manners; first, as to the composition of the words to be sufficient in law, and the Court shall judge that; secondly, that it be not razed or interlined in material points or places; and upon that also, in antient times the judges did judge upon their view the deed to be void; but of late years, the judges have left that to be tried by the jury, *scil.* if the razing or interlining was before the delivery; thirdly, that it may appear to the Court and to the party, if it was upon condition, limitation, or with a power of revocation, &c. to the intent that if there be a condition, limitation, or power of revocation in the deed, if the deed be null, or if there wants a counterpart of the indenture, the other party may take advantage of the condition, limitation, or power of revocation, and these are the reasons of the law, that deeds pleaded in Court shall be shewed forth to the Court." LORD KENYON, in *Banfill v. Leigh*, (h) maintained, that the law has recognised certain ex-

ceptions to the above rule. His Lordship there said—"Profert is not necessary where a conveyance to uses, or a feoffment is pleaded; and I only mention these two instances to shew that it is not an universal rule: others might be produced." So Mr. JUSTICE HEATH, in *Bolton v. the Bishop of Carlisle*, (i) expressly stated:—"That a *profert* is not necessary of a conveyance deriving its effect from the Statute of Uses." It is contended that the present case falls within one of Lord Kenyon's exceptions. The reasons for dispensing with *profert* in those cases are given in *Stockman v. Hampton*, (k) there the defendant relied on a deed of covenant to stand seised to uses, of which he neglected to make *profert*; but the Court held that the plea was good without making *profert* of the deed. A bargain and sale for a year, or a covenant to stand seised to uses, will operate by the Statute of Uses without *profert*, but a release on the contrary operates at the common law, and the defendant (if he claims under such an instrument) must make *profert* of it.

Leave to the defendant to amend his pleas by making *profert* of the release.

#### COURT OF CHANCERY.

Sittings in Michaelmas Term, 1840.

Monday . . . Nov. 2	{ Appeal Motions and Appeals.
Tuesday . . . 3	{ Petition Day.
Wednesday . . . 4	{ Appeals and Causes.
Thursday . . . 5	
Friday . . . 6	
Saturday . . . 7	
Monday . . . 9	{ Appeal Motions & Ditto.
Tuesday . . . 10	
Wednesday . . . 11	
Thursday . . . 12	
Friday . . . 13	{ Appeals and Causes.
Saturday . . . 14	
Monday . . . 16	
Tuesday . . . 17	
Wednesday . . . 18	{ Appeal Motions & Ditto.
Thursday . . . 19	
Friday . . . 20	
Saturday . . . 21	
Monday . . . 23	{ Appeals and Causes.
Tuesday . . . 24	
Wednesday . . . 25	

#### VICE-CHANCELLOR'S COURT.

Monday . . . Nov. 2	Motions.
Tuesday . . . 3	Petition Day.
Wednesday . . . 4	{ Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Thursday . . . 5	

(i) Ante.

(k) Ante.

(b) 2 Sand. Rep. 6. (c) 2 Hen. Black. 260.  
(c) 8 Term Rep. 571. (f) 1 Bos. & Pull. 384.  
(d) 3 H. 151. (g) Cro. Car. 144. (h) Ante.

Friday . . . . .	6	{ Unopposed Petitions and Short Causes, and Further Directions.
Saturday . . . . .	7	
Monday . . . . .	9	{ Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday . . . . .	10	
Wednesday . . . . .	11	{ Motions.
Thursday . . . . .	12	
Friday . . . . .	13	{ Unopposed Petitions and Short Causes previous to General Paper.
Saturday . . . . .	14	
Monday . . . . .	16	{ Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday . . . . .	17	
Wednesday . . . . .	18	{ Motions.
Thursday . . . . .	19	
Friday . . . . .	20	{ Unopposed Petitions and Short Causes previous to General Paper.
Saturday . . . . .	21	
Monday . . . . .	23	{ Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday . . . . .	24	
Wednesday . . . . .	25	{ Motions.

## ROLLS COURT.

Monday . . . . .	Nov. 2	Motions.
Tuesday . . . . .	3	Petitions in General Paper.
Wednesday . . . . .	4	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Thursday . . . . .	5	
Friday . . . . .	6	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday . . . . .	7	
Monday . . . . .	9	{ Motions.
Tuesday . . . . .	10	
Wednesday . . . . .	11	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Thursday . . . . .	12	
Friday . . . . .	13	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday . . . . .	14	
Monday . . . . .	16	{ Motions.
Tuesday . . . . .	17	
Wednesday . . . . .	18	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Thursday . . . . .	19	
Friday . . . . .	20	{ Pleas, Demurrers, Causes, Further Directions, and Exceptions.
Saturday . . . . .	21	
Monday . . . . .	22	{ Petition in General Paper.
Tuesday . . . . .	24	
Wednesday . . . . .	25	{ Motions.

## AT THE ROLLS.

Thursday, Nov 26	{ Short Causes after swearing in the Solicitors.
Short Causes, Consent Causes, and Consent Petitions, every Tuesday at the Sitting of the Court.	

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We have taken the sense of our Subscribers as to issuing a double number once a month, to get rid of our arrears; the answers we received, though many, would not cover the expenditure. We continue to be importuned for this double

number, and for a *Digest* of our Reports and we have, during the vacation, put our wis to the stretch to find out some other mode of obliging our Subscribers, that will not entail loss upon the proprietor.

We have thought upon one course, which if it meet the approbation of the Subscribers, they are requested to signify their assent by addressing "THE EDITOR."

The course is this: to publish a Quarterly Supplement, to contain sixty-four pages, at the price of 2s; this would not only secure a quarterly digest of the current reports of the day, but would open a wide field to many of our talented correspondents for exercising their abilities, and giving the benefit of them to their numerous brother "labourers in the vineyard"—to which purposes *only* we propose devoting the Supplement.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane; in the Parish of St. Paul, Church-yard, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookseller, 194, Fleet Street, in the Parish of St. Dunstons-in-the-West, in the City of London.—Saturday, Oct. 10, 1831.

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# The Legal Guide.

[Vol. IV.]

SATURDAY, OCTOBER 17, 1840.

[No. 25.]

Price Sixpence.

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\* \* The Editor of this Paper is confined to his bed with severe indisposition, brought on by too close application to business. He lies, therefore, upon the sympathies of his subscribers for not writing them his accustomed Leader this week. It may occur again next week; he hopes not, but we must submit to the mercy of ALMIGHTY GOD, whose hope alone is our strength.

ORIGINAL ESSAY ON LIFE ASSURANCE, AND LIFE ASSURANCE COMPANIES; embracing a REVIEW of ALL the ENGLISH COMPANIES.

SIMPLY PROPRIETARY COMPANIES.  
 PROPRIETARY AND MUTUAL COMPANIES.  
 SIMPLY MUTUAL COMPANIES.  
 INCORPORATED COMPANIES.

By a GENTLEMAN under the BAR.

At this day, when policies of Life Assurance are so very generally effected for all purposes, and in so many cases form a substantial part of the security offered by

borrowers to lenders, it becomes, we think, incumbent on every student of the law, whose duty it may hereafter be to advise with his clients, as to the method or necessity of assuring, and the selection of offices for that purpose, to acquire some general notions as to what Life Assurance is, and of the principles upon which Life Assurance Companies are formed and act; as also, a competent knowledge of the legislative enactments and legal principles which govern courts of law and equity in their decisions relative to the subject of Life Assurance.

In the following pages we purpose to consider this subject under two heads, or divisions. In the first of these we shall attempt to explain the principles of Life Assurance, and Life Assurance Companies, in a popular and general manner, avoiding alike legal and mathematical details, the latter of which we shall, of course, carefully exclude throughout, as not falling within



the province of lawyers to consider, and being therefore unfitted for attention in a publication, which, like the present, is exclusively confined to the legal profession; and secondly, we shall endeavour to state, simply and concisely, the law of Life Assurance.

The great end which every individual, who assures his life in the ordinary manner, has or should have in view, is to provide that his family shall not be unprovided for in the event of his unexpected death—his object is to equalize the duration of his individual life, so far as the savings he can afford to make out of his income are concerned, with the duration of life of the bulk of mankind of the same age as himself, that is, to ensure that those savings, with their accumulated interest, shall, at his death, whether it happen immediately, or at a remote period, amount to the sum, which, were he to attain to the average age of mankind, and always obtain compound interest for his money, be the amount of his accumulated savings at his death.—A Life Assurance Company is a body of men, who form themselves into a society, in order to accomplish this end.

We may at once see, that the benefit of Life Assurance—that is, the making certain that the savings of an individual shall be of the same amount, whether he die sooner or later—cannot be obtained, except by the co-operation of a large body of men: for granting, that with care and labour, an individual may, so long as he lives, and continues to lay by a portion of his property, contrive to make his money yield interest upon interest; yet, as he cannot provide against the abrupt termination of his life, it is impossible for him to ensure for his family a certain amount of provision at his death—the result alone can shew whether they will be competently provided for, or left in a state of destitution.

Should he perchance live to be an old man, the requisite amount might be secured,

but how foolish, nay, how wicked must that man be, who, when there lies open to him a certain and secure, and less troublesome way of warding off the evils of poverty, would rather, by relying on his own health and strength, and by assuming the impossibility of his own early death, risk the chance of leaving his wife and children impoverished and unprovided for.

The benefits of Life Assurance can be attained to by combined numbers in this manner. In a society or body of individuals of the same age, some will be found to live for longer, and others for shorter periods; by observing these periods with attention, the average duration of the lives of all the members of the body may be ascertained; and this being discovered, it follows, that if each member subscribes equally to the general funds of the Society, the exact value at his death (on the assumption that he will live the average period.) of the payments made by him may likewise be ascertained, and the Society may with safety, and without fear of insolvency, undertake to return to his representatives at his death, whenever it may really occur, the amount or value so ascertained.

In addition to this power of ascertaining the average duration of life, which is the foundation-stone of the system of Life Assurance, and can only be relied and acted upon in cases where a large number of persons is concerned, a Society or Company, part of whose professed business it always is to make the most of its funds, has many greater opportunities, both by reason of the amount of property concerned, the absence of delay in making investments, and the entire regularity of its proceedings, of procuring both a high rate of interest and interest upon interest than has a single person, whose savings are usually small, and whose business or pleasure must often be an obstacle to his attending to his private affairs with the requisite care and punctuality.

A Life Assurance Company, then, in its

most primitive form may be considered simply as a species of Savings and Investment society. Each of the members of which places under the controul of certain officers appointed by the body a portion of his property or income, the Society agreeing that its representatives shall at his death, whenever it may occur, receive a sum, which, were he to arrive at the average age of mankind, would be equivalent of the payments made by him, and their accumulations at compound interest. This primitive view of a Life Assurance Company very nearly resembles the plan of some of the Societies of the present day; but, partly in order to avoid the practical difficulties which might occur in a Company of this nature, in the event of the deaths of any of the members before the funds of the Society should be of sufficient amount to satisfy claims upon them, and partly also owing to the speculative motives of projectors of Companies of this kind, we find that a large majority of existing Societies are Joint Stock Companies, possessed of large subscribed capitals, which, although they operate as guarantees for the liquidation of the claims of deceased members, yet, as they at the same time exhaust a large portion of the funds subscribed by the latter, they considerably diminish the amount which the Society could otherwise afford to return to the representatives of those members.

Before considering in a more practical manner the plans upon which Life Assurance Companies are at the present day conducted, it may be as well to mention that members who subscribe to the funds of a Society of this nature for the sake of securing numerous advantages, are usually termed *assured*; the subscriptions paid by them have acquired the technical name of *premiums*; the instrument by which the Society undertakes to restore to the representatives of a deceased member the sum previously paid upon, is the *policy of assurance*; and the sum agreed to be restored is the *assurance sum*, or *sum assured*. In the subsequent

parts of this article we shall make use of these technical words, in lieu of the terms in which we have hitherto spoken. Life Assurance Companies, with reference to the different schemes or methods of their formation and constitution, are threefold. There are three distinct kinds of Companies, which are technically known as *Simply Proprietary Companies*, *Proprietary and Mutual Companies*, and *Simply Mutual Companies*; perhaps a fourth kind might be added to the list, as the three oldest Companies in existence obtained charters of incorporation, and in lieu of having a proprietary body are *Corporations*. To the consideration of each of these kinds of Societies we shall now proceed in its order.

1st. A *Simply Proprietary Company* is a *Joint Stock Company*, created in the ordinary manner by the issue of a large number of shares, the nominal value of which varies in the different Companies from £10. to £100.; it seldom, however, happens that the full value of each share is paid up by the holder of it. In the first instance a deposit only of £2. £5. or £10. is required of him, but in cases of emergency he is liable to be called upon for the full nominal value. The capital or joint stock which is provided in this manner is invested by the managers of the affairs of the Company on some good security, generally in the purchase of stock, which is thenceforth to be the guarantee for the payment to the representatives of deceased policy holders of their claims upon the Society. After a sufficient guarantee fund has thus been provided, the Company proceeds to the actual transaction of assurance business by issuing policies, by which it undertakes in consideration of premiums to be paid by persons assuring their lives, to pay to their representatives stated sums ascertained from the assumed average duration of human life, according to the data of mortality in use by the Company. The leading feature that distinguishes the *Simply Proprietary Companies* from the

kind we shall next consider, is, that the former in no case restore to the representatives of the assured a larger sum than that agreed upon in the policy, not even should the amount of premiums received from all the assured prove by experience to be doubly or trebly too much to answer all claims on the Society. And although it can seldom happen that the exact premiums to be charged can be computed with sufficient precision to avoid the accumulation of a large surplus fund, yet the whole of this surplus is retained by the Company for its own use, and is, together with the interest arising from its capital, divided among the shareholders under the several names of bonus and dividend. In this kind of Company there are two classes, viz.—the proprietors and the assured to be benefited, and it is not unreasonable to expect, as the fact really is, that the proprietors who were the first originators and projectors of the undertaking, and who actually disbursed their money, and ran the risk of losing it entirely in the event of several deaths happening in the class of assured, before the amount of premium paid by them should be sufficient to answer the claims of their representatives, should have contrived to have retained for their exclusive benefit all the surplus remaining after satisfying the exact legal demands of their creditors. Had it not been for competition and the gradual acquisition of knowledge, relative to the subject of Life Assurance, induced by its increasing importance, and aided by past experience, most probably in every case of Proprietary Companies the proprietors would, up to the present time, have continued to retain for their own use the whole of the profits arising from the overcharge which for the sake of security is usually made in the original calculation of premiums. The following Companies, with the exception of the British Commercial, and London Life Association, which by having two rates of premium, are at once Simply Proprietary, and Proprietary and

Mutual, and of the Royal Exchange, and London Assurance, which in lieu of a proprietary body are incorporated, are, we believe, the only Simply Proprietary Companies, viz.—the Pelican, Sun, Globe, Alliance, British Commercial, Asylum, London Life Association, London Assurance, Royal Exchange, Westminster, Promoter, and West of England.

As to the Proprietary and Mutual Companies, the scheme of which we are now to consider, they, like the Simply Proprietary Companies, are Joint Stock Companies, having the guarantee of large subscribed capitals, but they differ from the latter inasmuch as the Proprietors do not retain for their exclusive benefit the whole of the profits arising from the premiums paid by the assured—their plan is to divide a certain proportion of their profits among the class of assured at stated intervals, the amount to be so divided, and the period of making the divisions, vary in different offices, generally speaking, the Proprietary retains two-thirds for itself, and sets apart the other one-third for the assured, by adding to the sum assured by each existing policy a further sum which shall be equal at the death of the assured to the present value of his share in the one-third part of the profits, though some Societies have recently adopted a method of applying the share of profits, or as it is more generally termed the bonus, to each policy holder at his option in the reduction of the amount of premiums to be paid by him in future. The periods at which these divisions of profits are made among the assured are usually at the end of every five, seven, or ten years; so that if a policy holder dies at any time in the interval between two divisions of profits, he is only entitled to share in them up to the day of the last division, and not up to the decease. We could wish that it were practicable to divide profits annually, as thereby justice would be dealt out with a more even hand to all the assured; and save that more trouble

would be incurred by the actuary and other officers of the Company, we cannot admit that the plan of dividing profits or bonuses annually, or at other short intervals, could not be more extensively adopted both with safety and advantage. In the scheme of Proprietary and Mutual Companies, the assured gain many more advantages than they do in the Simply Proprietary Companies, but they are still great losers, for a large portion of their deposits or premiums, or in other words, of their property, is swallowed up in paying the hire of a guarantee, which in no case, that has occurred up to the present day, has been actually required, and which, as past experience goes to prove, must in every case except perhaps at the first formation of the Company, or in the improbable contingency of the occurrence of a devastating plague or pestilence, be a most useless and at the same time most expensive incumbrance. Before proceeding to mention the Simply Mutual Companies which contrive to grant assurances without incurring the expense of a paid Proprietary, we may in furtherance of our object mention that the more important Proprietary and Mutual Companies in existence are the Rock, Union, Economic, Provident, Eagle, Imperial, Atlas, British Commercial, Guardian, Brown, National, University, Clerical, Medical and General, Law Life, Legal and General, York and North of England, Palladium, Australasian, Colonial and General, Alliance, &c. Several more might be added to the list, as most of the recently formed Societies have adopted the Proprietary and Mutual scheme.

A Simply Mutual Company is constructed, and conducts business on principles most assuredly more in accordance with those which a person, having only general notions of the objects to be attained by Life Assurance would lay down as data for the formation of a Life Company than either of the kinds we have hitherto noticed. In a Society of this species there is no Proprietary

and no subscribed capital, the funds of the Company are formed simply and entirely of the premiums received from the assured, and these funds in some manner or other in every case find their way back again into the pockets of deceased policy holders or their representatives, for although in the first instance the Society assures to an individual member an amount which is fixed and specified by the policy, yet all the profits which may arise from the originally too high rate of premium charged, or from other causes, are, after deducting the necessary expences of management, that is the salaries and fees of officers, house rent, &c., returned as bonus to the assured. It has, however, been considered advisable in Companies of this nature to set apart a considerable portion of the gross amount of their receipts as a reserve or guarantee fund to be applied to in cases of emergency only. When this fund has been provided, a Company of this nature, if the divisions of its profits are conducted in a fair and equitable manner, has all the advantages with none of the disadvantages of either of the kinds of Societies to which we have hitherto alluded. The great question which arises in all Mutual Companies is the manner and the times at which its profits shall be divided—the nearer the times of division approach to one another the more fair and equitable will it be for the whole body of the members—and the longer are the intervals that elapse between each period the more will some few of the body be benefited at the expense of the majority, for in the latter case the benefits will not be nearly so equally distributed among the Members; some who have the good luck to live may be only one day longer than others, may, and many cases actually do, for precisely the same amount of premiums paid, secure to their representatives a return doubly or trebly as large. The Equitable Society which stands out prominently from the herd of Life Companies, and is certainly the leading Company of the purely Mutual

kind, has devised a method of dividing its profits, which, however beneficial it may be to a select few, is, we do not hesitate to assert, most inequitable to the entire body; at the same time that this Company, like every Life Society, has the professed object of providing against the uncertainty of human life: the ground-work of its method of dividing profits is the uncertainty of life.

An individual member must, to entitle his representatives to share in any bonuses declared by the Society, overlive a vast number of the other members. He must become one of the 5000 oldest policy holders before he can secure a return of any part of that extra premium which he may for years have been induced to pay, in the hope that his family would ultimately be benefited in a degree proportional to the overcharge made upon himself.

We have already pointed out the practical difficulties which occur in the establishment of a Simply Mutual Company, but at the same time we hope we have made evident how great are the advantages attendant upon a Society of this kind when actually formed, and when a just method of dividing its profits has been incorporated into its scheme. In the case of the Mutual Assurance Company which was established a few years back, the Directors met the want of a subscribed capital by each subscribing a part of his private property to a general fund, which was to constitute a guarantee for the payment of policies falling in before the amount of premiums received should of themselves be sufficient for the purpose. We believe that there has not yet been occasion to apply to this fund, and it is hardly likely that now when the Society has acquired considerable stability, and transacts a fair amount of business, that resort to it will be found necessary. The chief, and, we think, all the Companies of the Mutual kind are the Equitable, Mutual, Norwich Union, and London Life Association. The Amicable is generally classed among Companies of this kind, and

insomuch as all the profits are divided among the assured, it may fairly be considered a Mutual Company, but the constitution of the Amicable, which is the oldest Life Company in existence, is somewhat peculiar; it is a Corporation in which each of the assured becomes, on effecting an assurance, a member of the corporate body, and in that capacity entitled to certain shares in the corporate property, which is formed from the premiums received.

An objection, though of a comparatively trivial nature, is frequently made to Companies of the Mutual kind. It is said, and with truth, we admit, that a Mutual Company is a Partnership, and that an individual, by assuring his life, becomes a partner in the undertaking, and as such incurs partnership liability to the whole amount of his private property. Now, this liability extends only to contracts entered into by the Company with third persons; for putting aside other considerations, it is expressly provided in every well prepared policy, that the assurance-money shall be payable only out of the funds of the Society, that is, in the case of Mutual Companies, out of the premiums and their accumulations, and that in no case the private property of the member shall be liable to satisfy the demands of policyholders. Now, while a Company of this nature is in its mere infancy, and is completing its arrangements for the purchase or renting of a house of business, and entering into engagements of a similar kind, some slight weight might be possibly attached to the objection to which we have alluded, but certainly when a Company is fairly established, and its business is increasing daily, the bugbear of partnership liability may be treated as a phantom and dismissed with contempt.

We lately happened to take up the preliminary prospectus of a Company which, we understand, is now in the course of formation. The Proprietors of this Company state as one of their objects the uniting together

the Proprietary, Proprietary and Mutual, and Mutual schemes of assurance, and anticipate that the amount of business which they expect to transact, by adopting these three methods, will have the effect of diminishing the costs of management on each of these classes of assured. Not knowing the prospects of this Society as to business, we cannot pretend to foretell the result of these anticipations of the founders; but for many reasons we think that the plan of embracing in one Company all the known schemes of Life Assurance is far from bad, and we only feel astonished that it has not before been thought of and adopted. There was another point which we noticed in this prospectus, which we do not recollect to have observed elsewhere. The Company expresses its intention of paying bonuses (which, by the way, are to be declared triennially) in ready money, in cases where the assured are desirous of receiving the amount instead of reserving it for the benefit of their representatives.<sup>(1)</sup> Both these plans, namely, the making triennial divisions and paying bonuses in ready money, instead of calculating their future value and adding reversionary sums to the policies, are we think equitable and advisable, and worthy of the attention of Companies in existence.

The rivalry and emulation which, owing to their increased numbers, have sprung up among Life Assurance Companies, fully account for the various methods of effecting policies, which are at present held out as inducements to assure. We find, by looking cursorily over the prospectuses of the established Companies, that an individual may effect an assurance, either in the usual manner, by paying stated sums annually, or by a large payment in cash, or by payments which are, at his option, to increase or decrease as he advances in life, besides these, other methods of payment of premium have been devised which, although they may be

of avail under particular circumstances, are not ordinarily made use of, and, therefore, need not be mentioned in this place.

We have thus attempted an explanation of the schemes adopted by the various Companies to give effect to the benefits of Life Assurance; but, before quitting this branch of our subject, it may be as well to mention that the greater part of Companies of this nature do not confine their operations simply to the business of Life Assurance. Many of them deserve rather the name of Life Contingency Societies, as, in addition to granting assurances for lives and for terms of years, (i. e. assuring a sum to the representatives of an individual in case of his death occurring within a specified number of years), they also grant Life Annuities, both present and deferred, and endow children. Some few also are Reversionary Interest Companies, purchasing almost every species of property depending upon the duration of human life, and the survivorship of one individual over another. The greater number of Companies of the better class, however, object to granting present Life Annuities, as it has been found that they cannot with safety compete with the Government Tables of Annuities; that is, Government for the same consideration will grant an annuity of larger amount than a private Company can afford to do. In many other respects too present annuity business is considered to be of a hazardous and unprofitable nature. While alluding to Life Annuities in connection with Assurance Companies, we cannot avoid pointing out to those persons, who, to obtain a large return for their money will risk the loss of their capital, the fact, that there is a Company\* in the Metropolis which for every £100. paid by a person aged 30, will grant him a life annuity of £8. while the same individual by assur-

(1) This is no new feature. The "*Guardian*" pays bonuses in ready money.—EDITOR.

\* A (so called) "*Independent Office Westward.*" We understand that this *advantageous method of investment* has been the subject of remark by a contemporary, (the *Quarterly Review*, we think,) but have not seen the article.

ing his life at the rate of 17 15s per cent, may secure to his representatives the return of the consideration money paid for his annuity, that is, he may invest his money at £6. 5s per cent, interest, the only condition being that his capital is not returnable till his death. We leave our readers to draw their own conclusions as to the stability of an office which can hold out such an inducement as this. It would be an insult to their understandings to comment on the facts we have stated.

We cannot conclude this division of our subject without alluding to the custom of allowing commission to solicitors or other agents paying premiums on policies, (a practice with the existence of which doubtless most of our readers are well acquainted), it is customary with almost all the established Companies, (the Amicable, Rock, and Equitable being we believe the only exceptions) to allow to a solicitor a per centage of £5. per cent on the amount of premium he pays to effect or keep up his client's policy, that is, the Company in those cases where an agent is employed, makes a discount of £5. per cent from its published premium, and gives or rather pays this discount to the agent for his loss of time and trouble. This practice has been most universally and energetically decried by writers on the subject of Life Assurance, most of whom by the way are theoretical and not practical men, and have in our opinion considered their subject with hardly sufficient attention to facts. They object that commission being sometimes demanded, and in other cases not: Those of the assured who employ agents pay a lower, and those who act for themselves pay a higher rate of premium for exactly the same benefits, and that persons transacting their own business are virtually made to pay the wages of the servants of other persons, because an overcharge is made on the entire body in order to provide funds for the payment of fees to the agents of a few individuals only. It is

said that were commission to be allowed in no case, but the entire premium charged in its published tables always received by the Company, it would be able to make a large division of profits among the whole body of the assured, and so restore the original overcharge, among all of them in a just and equitable manner.

We admit that there is considerable truth in these objections in *principle*, and we should be the first to oppose the present system, did we consider it to work injustice to any extent in practice; but we submit, 1st, That agents must be paid for their labour in some way or other, and that this having been the recognized method of payment for many years past, clients would grumble, and not without reason, were solicitors to commence the practice of sending in a bill of costs every time they paid a premium: and 2ndly, We say that past experience has proved that the deduction made by any one Company from the entire premiums received by it to pay commission, in cases where it is demanded, does not amount in the whole to more than £1. or at the utmost £2. per cent.; an amount so very trivial, that we think the public would rather put up with the supposed grievances, than allow that their advisers and themselves should suffer from the annoyance and trouble of making out and paying petty bills of costs. However, as it is always our wish to remedy anything which has even the colouring of an abuse, or injustice, we submit to the consideration of the managers of Assurance Companies, whether it might not be advisable to allow commission to every person, whether principal or agent paying in premiums, even if, to do this, it be necessary to increase nominally the amount of premiums in their published tables. It being of course understood, that all agents making payments, are to retain the commission allowed for their own use, and as a recompence for their own labours. It will readily be seen, that the actual injustice (if such it be) of the present plan would thus

be completely avoided, while at the same time, solicitors would receive their due payment, and clients would not be harassed with the continual recurrence of bills of costs.

Our next paper on the subject of Life Insurance will be confined exclusively to legal considerations, more particularly with reference to the statute 14 G. III. c. 48. and the cases decided upon it, and the doctrines of Courts of Law and Equity respecting the transfer of Life Policies.

## PROBLEM XXV. VOL. IV.

### DEVISES.

What is the law upon this subject, as it applies to Wills executed upon or subsequently to the first of January 1838? (1)

#### TO THE EDITOR OF THE LEGAL GUIDE.

Sir,—I beg to forward you a Supplement to A.'s Answer to Problem IX. Vol. 4, hoping it will meet with your approbation.

I have been much pleased with the discussions which have lately appeared in the columns of your very valuable work; and as I sometime since, for my own amusement, wrote one on the husband's liability on his wife's contracts," it is my intention, as soon as convenient, to transcribe it and send to you, in order that you may, you think proper, insert it in the Legal Guide.

I am, Sir, yours, most obediently,  
C. B.

## SUPPLEMENTARY ANSWER TO PROBLEM IX.—VOL. 4.(a)

What acts amount to a private nuisance?

A private nuisance may be defined to be any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another, (3 Bl. Com. 216).

Private nuisances are of two sorts; namely, such as affect corporeal hereditaments; 2. such as affect incorporeal hereditaments, (F. N. B. 184).

1. As to such private nuisances as affect corporeal hereditaments, these are of two sorts, the one operating in such a way as to do actual damage to the hereditaments, as in the 1st, 2nd, 3d, 5th, 6th, and 8th instances put by E. A. ante, p. 356: So if a smelting house for lead be erected so near another's land that the vapour

and smoke kills his corn and grass, and damages his cattle, it will be a nuisance, (Hale, on F. N. B. 427). (b)

So it is a nuisance to stop or divert water that is used to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream; or in short the doing any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour, (3 Bl. Com. 218).

Nor is it necessary that an injury, in order to amount to a nuisance, should be the effect produced by the commission of some act; for a nuisance may result from the omission as well as from the commission of an act. Thus if one man ought to scour his ditch, but he neglects to do so, and in consequence thereof his neighbour's land becomes overflowed, it is a nuisance, (9 Rep. 69; 2 Roll. Ab. 141).

The other sort of private nuisances to corporeal hereditaments are those which operate merely as an annoyance to the occupier, but do not actually damage the property. As in *Adred's* case, (cited by E. A.) where it was held to be a nuisance to contaminate the air in and around another person's premises. Nor does it seem necessary that the smell which contaminates the air should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable, (Per Lord Mansfield, 1 Burr. 337). So the carrying on an offensive trade, as that of a tanner, tallow-chandler, or the like, will be a nuisance, (Cro. Car. 510), notwithstanding they are lawful and necessary trades; but they must be carried on in such places that they will not annoy those who may happen to reside in the neighbourhood.

2. Nuisances may affect incorporeal hereditaments, such as rights of way, franchises, and the like. Thus it is a nuisance for one man to stop the way which another man hath to his land or house, (F. N. B. 183, 184).

So it is a nuisance for one man to set up a fair or market in opposition to another, (ibid. 184); but in order to make this a nuisance, it is necessary, 1. That the fair or market belonging to the person complaining of the nuisance, should have been established before the other, otherwise the nuisance lies at his own door. 2. The new market must be erected within the third part of twenty miles of the old one. For Sir *Matthew Hale* (Hale on F. N. B. 184), construes the *dieta*, or reasonable day's journey mentioned by *Bracton*, (l. 3, ch. 16) to be twenty miles. For it is held reasonable that every man should have a market within one-third of a day's journey from his own home, that the day being divided into three parts he

(1) See 1 Vic. c. 26, s. 24.—Ed.

(a) See ante, p. 356.

(b) See *Williams v. Earl of Jersey*, ante p. 246.—Ed.



may spend one part in going, another part in his necessary business there, and the third part in returning home. If the new market or fair be on the same day as the old one, it is *prima facie* a nuisance to the old one, and there needs no proof of it, but the law will intend it to be so; but if it be on any other day, it may be a nuisance, though *whether it is so or not* cannot be intended or presumed, but it must be proved to the satisfaction of the jury, (3 Bl. Com. 218).

So if a ferry is erected on a river so near to an ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one; because the owner of the ancient ferry is bound to keep it always in repair and readiness for the ease of the king's subjects, (2 Roll. Ab. 140), but the owner of a new ferry is not; and Mr. J. Blackstone, in his admirable Commentaries on the Laws of England, (vol. iii. p. 219,) observes, that therefore it would be extremely hard if a new ferry were suffered to share its profits, which does not also share its burthens. But, continues he, where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a new mill so near an old one as to draw away the custom, unless the miller also intercepts the water.

Again, it is a nuisance illegally to stop the free passage of light and air, as in the 7th, 9th, and 10th instances given by E. A. (ante, p. 356).  
C. B.

TO THE EDITOR OF THE LEGAL GUIDE.  
ANSWER TO PROBLEM XXIII.  
VOL. 4.

In what cases will proceedings be stayed until a plaintiff give security for costs?

Sir,—In attempting to answer this problem, I shall consider first, Those cases in which proceedings will be stayed; and secondly, Those in which they will not be stayed.

The nine following cases may serve to denote sufficiently the rules as applicable to the first class, commencing with which I may observe, that:—

1. In an action brought upon a bond, in the name of an obligee resident abroad, for the benefit of an assignee in this country, the defendant may claim security for costs from the nominal plaintiff, the assignees written undertaking is not sufficient. (*Youde v. Youde*, 3 Adol. and El. 311.)

2. Where the plaintiff, after issue joined, has been convicted of felony, and received sentence of transportation, the Court will compel him or his attorney, to give security for costs retrospective and prospective. (*Harvey v. Jacob*, 1 Barn. & Ald. 159.)

3. If the plaintiff reside abroad, the Court will stay proceedings till he give security for the

costs. (*Pray & others, v. Edie*, 1 T. Rep. 267.)

4. If the plaintiff reside in Ireland, the Court will also stay proceedings till security is given. (*Fitzgerald v. Whitmore*, 1 T. Rep. 362.)

5. If after the time for pleading is out, but before judgment is signed by the defendant, the Court, on his application, stay proceedings till the plaintiff give security for costs, to be approved by the prothonotary, the plaintiff though he give security instant, which is accepted by the defendant, is not at liberty to sign judgment before the opening of the office on the next morning. (*Decker v. Thompson*, 3 Bos. & Pul. Rep. 319.)

6. A plaintiff was compelled to give security for costs, on affidavit of his residing in Ireland, the cause not having been at issue, and the venue laid in Middlesex, and proceedings stayed in the mean time. (*Maloney v. Smith*, 1 McCl. & Y. 213.)

7. Where the plaintiff was discharged under the Insolvent Act, after issue joined, and before notice of trial given, the Court stayed the proceedings until the assignee, or some creditor of the plaintiff should give security for costs. (*Hesford v. Knight*, 4 D. & R. 81, 2 Barn. & Cress. 579.)

8. Where, in trespass against parish officers for distraining for Poor Rates, it appeared that the plaintiff refused to pay the rates by the desire of his landlord, who was also the attorney in the cause, the Court stayed the proceedings until he gave security for costs. (*Tenant v. Brown and Jones v. Brown*, 5 Barn. & Cress. 208.)

9. It is not necessary to make a demand previously to moving for security for costs, unless it is intended to be part of the rule, that proceedings be stayed in the mean time. (*Fountain v. Steele*, 5 Dowl. Rep. 331.)

The six following cases may serve to denote sufficiently the rules as applicable to the second class, commencing with which I may observe, that:—

1. The Court will compel security for costs where plaintiff resides abroad, without a previous application to his attorney, but they will not order a stay of proceedings unless such application has been made. (*Baille v. De Bernaills*, 1 Barn. and Ald. 331.)

2. The Court will not stay proceedings if security is given for the costs in an action by a foreign seaman serving on board an English ship. (*Jacobs v. Stevenson*, 1 Bos. & Pul. 96.)

3. The Court will not stay proceedings if the plaintiff, a foreigner, give security for the costs unless the defendant have put in bail. (*Du Preuve v. the Duc de Biron*, 4 T. Rep. 697.)

4. The Court will not stay proceedings in a *quo warranto* information, until the prosecutor give security for costs, on the ground that it

tor is in insolvent circumstances, where it ears he is a corporator and no fraud is suggested. (*The King, on the relation of Thomas me v. Sir Watkins William Wynne, Bart.* Lau. & Selw. Rep. 346.)

i. Where an insolvent debtor having assigned property under the Insolvent Acts brings an on to recover a debt incurred before the assignment, the assignees having refused to sue; Court will neither set aside the proceedings such action, nor require the insolvent to give nity for the costs. (*Townsend v. Snow,* Marsh, Rep. 477.)

l. A commission of bankrupt having issued inst the plaintiff who was going with his ily to New York, upon the petition of the ndant, who was the only creditor, and had sen himself sole assignee, and the plaintiff ing brought an action against the defendant ry the Commission, the Court refused to stay proceedings till he should give security for costs. (*McCulloch v. Robinson,* 2 Bos. and ll. New Rep. 352.) T. W.

TO THE EDITOR OF THE LEGAL GUIDE.

PPLEMENTARY ANSWER TO THE ABOVE PROBLEM.

SIR,—An application to stay proceedings in action until security for costs has been given the plaintiff, can only successfully be made, st. Where the plaintiff is resident abroad or ond the jurisdiction of the court in which the on is brought. Care must be taken however hew in the affidavit upon which the applica- is grounded, that the plaintiff has gone ad for the purpose of permanently residing e, and is not temporarily absent on a tour or ursion. (*Frodsham v. Myers,* 4 Dowl. l.) And in a recent case it has been held that nity of costs would not be required at the ds of a British officer, engaged abroad in the ice of his country, (*Evelyn v. Chippenhall,* Dowl. 536).

nd. In actions of ejectment where the lessor he plaintiff is an infant, although residing in the jurisdiction of the court, (*Doe dem erts v. Roberts,* 6 Dowl. 556) or, where ction is brought for mesne profits in the name e plaintiff in ejectment, who being only a inal party cannot be responsible for costs.

rd. In actions where a bankrupt or insolvent for the benefit of his assignees. (*Webb v. rd,* 7 T. R. 296), and

th. Where a plaintiff convicted of felony is r sentence of transportation, (*Harvey v. obs,* 1 B. and Al. 159).

may not perhaps be exceeding the limits of problem to add that the application sup- ed by affidavit should be made after appear- and before issue joined, unless under pecu-

liarily special circumstances. A written demand should be previously made on the plaintiff's attorney, as otherwise security will be allowed only on the defendant's paying the costs of the application, (*Bolers v. Sessions,* 2 Dowl. 710.)

I am, Sir, your obedient servant,

R. H.

EXAMINATION OF ARTICLED CLERKS.

TO THE EDITOR OF THE LEGAL GUIDE.

"Immensum gloria calcar habet."

Sir,—Permit me, at a time when the subject is engaging the attention of contemporary legal periodicals, to request your advocacy of the interests of the rising members of our profession, in relation to one of the most important eras of their professional career—their examination for admission, consequent on the expiration of their clerkship. As the examinations are at present conducted, no reward of merit, no honour, no zeal-exciting mark of approbation, greets the studious aspirant for professional distinction. The cold announcement of his admission is all that the most studious and indefatigable legal tyro can, under the present state of affairs, possibly anticipate. But surely it were wise and well, to establish some honourable distinction between one who just escapes rejection, and another whose answers have displayed a depth of knowledge, an elegance of composition, and an accurate acquaintance with the principles and practice of his profession, gratifying and astonishing to those whose duty it is to award the certificate so justly merited.

The effect of an alteration of this kind would, I feel assured, be in every respect beneficial, increased stimuli would be given to exertion, because honourable rewards would be meted to the studious.

The object, then, would not be as it is (among many at any rate) at present, merely to "get through." The desire of ranking equally with, if not of honourably distancing those with whom, during the period of their clerkship, they had been in constant friendly communion, would cheer the despairing, arouse the indifferent, awaken the slumbering, stimulate the industrious, and restrain the presumptuous, increasing the legal attainments of the student, aiding the interests of the master, and elevating the general tone, because adding to the general amount of the knowledge and intelligence of their common profession. In your hands I humbly leave the matter; advocate on this occasion the cause of those whose ready champion you have ever been, and secure the grateful thanks of many, of none more truly, than of, Sir,

Your very obedient humble servant,

ALIVUIS.

ADDENDA TO WALWORTH V. HOLT, ante p. 379.

3 & 4 VICT. CAP. 111.

*An Act to continue until the Thirty-first day of August, one thousand eight hundred and forty-two, and to extend the Provisions of an Act of the First and Second years of Her present Majesty, relating to Legal Proceedings by certain Joint Stock Banking Companies against their own Members, and by such Members against the Companies.* [11th August 1840.

Whereas an Act was passed in the First and Second years of the reign of Her present Majesty, intituled "An Act to extend, until the end of the next Session of Parliament, the Law relative to Legal Proceedings by certain Joint Stock Banking Companies against their own Members, and by such Members against the Companies:" And whereas the said Act has been continued until the Thirty-first day of August, one thousand eight hundred and forty, by an Act passed in the last Session of Parliament, and it is expedient that the same should be further continued: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the said first-recited Act shall be further continued until the Thirty-first day of August, one thousand eight hundred and forty-two.

II. And whereas it is expedient to extend the provisions of the said Act hereby continued in manner herein-after stated; be it enacted, That if any person or persons, being a member or members of any Banking Copartnership within the meaning of the said Act, or of any other Banking Copartnership, consisting of more than six persons, formed under or in pursuance of an Act passed in the Third and Fourth years of the reign of King William the Fourth, intituled "An Act for giving to the Corporation of the Governor and Company of the Bank of England certain Privileges, for a limited period, under certain Conditions," shall steal or embezzle any money, goods, effects, bills, notes, securities, or other property of or belonging to any such Copartnership, or shall commit any fraud, forgery, crime, or offence against or with intent to injure or defraud any such Copartnership, such member or members shall be liable to indictment, information, prosecution, or other proceeding in the name of any of the officers for the time being of any such Copartnership, in whose name any action or suit might be lawfully brought against any member or members of any such Copartnership for every such fraud, forgery, crime, or offence, and may thereupon be lawfully convicted, as if such person or persons had not been or was or were not a member or members of such Copartnership;

any law, usage, or custom to the contrary notwithstanding.

## NEW MARRIAGE ACT.

3 & 4 VICT. CAP. 72.

*An Act to provide for the Solemnization of Marriages in the Districts in or near which the Parties reside.* [7th August 1840.

Whereas by an Act passed in the Fourth year of the reign of King George the Fourth, intituled "An Act for amending the Laws respecting the Solemnization of Marriage in England," it is provided, that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns shall have been published, and in no other place whatsoever: and whereas by an Act passed in the Seventh year of the reign of His late Majesty, intituled "An Act for Marriages in England," provision is made for marriages intended to be solemnized in England, after notice given, according to the forms authorized by the last-recited Act, which Act has been explained and amended by an Act passed in the First year of Her present Majesty: And whereas it is expedient to restrain marriages under the said Act of His late Majesty from being solemnized out of the district in which one of the parties dwells, unless either of the parties dwells in a district within which there is not any registered building, wherein, under the provisions of the said Act of His late Majesty, as explained and amended by the said Act of Her present Majesty, marriage is solemnized according to the form, rite, or ceremony the parties see fit to adopt: Be it therefore declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it is not and shall not be lawful for any Superintendent Registrar to give any certificate of notice of marriage where the building in which the marriage is to be solemnized, as stated in the notice, shall not be within the district wherein one of the parties shall have dwelt for the time required, by the said Act of His late Majesty, except as herein-after is enacted.

II. And be it enacted, That it shall be lawful for any party intending marriage, under the provisions of the said Act of His late Majesty, in addition to the notice required to be given by the Act, to declare at the time of giving such notice, by indorsement thereon, the religious denomination of the body of Christians to which the party professeth to belong, and the form, rite, or ceremony which the parties desire to adopt in solemnizing their marriage, and that, to the best of his knowledge and belief, there is not within the district in which one of the parties dwells any reg-

ed building in which marriage is solemnized according to such form, rite, or ceremony, and the district nearest to the residence of that party in which a building is registered wherein marriage is so solemnized, and the registered building within such district in which it is intended to solemnize their marriage: and after the expiration of seven days or twenty-one days, as the case may require, under the said Act of His late Majesty, it shall be lawful for the Superintendent Registrar, to whom any such notice shall have been given, to issue his certificate, according to the provisions of that Act; and after the issuing of such certificate the parties shall be at liberty to solemnize their marriage in the registered building stated in such notice: Provided always, that after any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the truth of the facts herein authorized to be stated in the notice, nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage.

III. And be it enacted, That the additional notice herein-before authorized to be given may be according to the form in the Schedule to this Act annexed, or to a like effect.

IV. And be it enacted, That every person who shall knowingly and wilfully make any false declaration, under the provisions of this Act, for the purpose of procuring any marriage out of the district in which the parties or one of them dwell, shall suffer the penalties of perjury: Provided always, that no such prosecution shall take place before the expiration of eighteen calendar months from the solemnization of such marriage.

V. Provided always, and be it enacted, That, notwithstanding anything herein or in the said recited Acts or either of them contained, the Society of Friends commonly called Quakers, and also persons professing the Jewish Religion, may lawfully continue to contract and solemnize marriage according to the usages of the said Society and of the said persons respectively, after notice for that purpose duly given, and certificate of certificates duly issued, pursuant to the provision of the said recited Act of his late Majesty, notwithstanding the building or place wherein such marriage may be contracted or solemnized do not situate within the district or either of the districts (as the case may be) in which the parties shall respectively dwell.

VI. And be it further enacted, That this Act may be amended or repealed by any Act to be passed in this present session of Parliament.

#### THE SCHEDULE TO WHICH THE ACT REFERS.

I, the undersigned, and within-named *James Smith*, do hereby declare, that I, being [*here insert, a member of the Church of England, Roman Catholic, Independent, Baptist,*

*Presbyterian, Unitarian, or such other description of the Religion of the party*] and the within-named *Martha Green*, in solemnizing our intended marriage, desire to adopt the form, rite, or ceremony of the [*Roman Catholic Church, Independents, Baptists, Presbyterians, Unitarians, or other description of the form, rite, or ceremony the parties state it to be their desire to adopt*]; and that to the best of my knowledge and belief there is not within the Superintendent Registrar's District in which [*I dwell*], or [*in which the said Martha Green dwells*], any registered building in which marriage is solemnized according to such form, rite, or ceremony; and that the nearest District to [*my dwelling, place*], or to [*the dwelling place of the said Martha Green*] in which a building is registered wherein marriage may be solemnized according to such form, rite, or ceremony, is the [*here insert the name by which the Superintendent Registrar's District is designated*]; and that we intend to solemnize our marriage in the registered building within that district known by the name of [*here insert the name by which the building has been registered*]. Witness my hand this tenth day of August one thousand eight hundred and forty. (Signed) *James Smith*.

[The italics in this schedule to be filled as the case may be.]

#### Law Reports.

##### COURT OF CHANCERY.—July 7.

##### HINDS v PUGH.

WILL—DEVISE of "all the residue of the said PROPERTY to A. B. his Executors, Administrators, or Assigns," the bill having reference to real and personal estate.—CONSTRUCTION of the interest A. B. took.

This bill was filed by a residuary devisee apparently to carry into effect the trusts of the will of *Wm. Machen*, who died in 1798, but in fact to obtain the opinion of the Court as to what interest in the real and personal property the legatee took.

This bill stated that *William Machen*, by his will, (after giving certain pecuniary legacies), gave and devised his freehold and leasehold houses, and all other his real estate, whatsoever and wheresoever, and all monies that were or might be in any of the public funds, or bonds or notes, unto the defendants, their heirs and assigns, upon trust, for the purposes therein mentioned; and he declared that none of his said landed property should be sold or mortgaged, but remain in trust to pay the legacies and annuities, also given by his said will, and subject to the payment of such legacies and annuities, the testator directed his trustees; to

pay the residue of the rents and the dividends and interest of monies arising or accruing from any part of his estate, both real and personal, to his niece, *Rebecca Peacock*, for life, for her separate use, unless she should at any time thereafter intermarry with any kinsman of her late husband, in which case he revoked this bequest, and directed the same should be from thenceforth absolutely void; it being his will, that in that case, she should not take or enjoy any profits, benefits, and advantages whatsoever, under or by virtue of his will; and he gave her 20*l.* in lieu thereof, and declared that the issue of such marriage should not be entitled. And upon the decease of the said *Rebecca Peacock*, leaving issue of her body lawfully begotten, by any husband not a kinsman of her said late husband, then his trustees should stand possessed of the said residue of his estate for all and every such issue of the body of the said *Rebecca Peacock* equally, to be equally divided between and among them, share and share alike, but if any should die under the age of twenty-one years without leaving any issue, then the parts or shares of him or her so dying should go and be paid to the survivors, their executors, administrators, and assigns; but in default of such issue of the said *Rebecca Peacock*, the testator bequeathed certain specific legacies, and subject to their payment, he directed his said trustees to pay and transfer all the remainder of the said property to William Hinds, his executors or administrators, to whom, in default of such issue of the said *Rebecca Peacock*, he gave and bequeathed the same. *Rebecca Peacock* survived the testator, having previously married *Wm. Anderson*; and she was also the heiress at law of the testator. Her marriage did not fall within the restriction imposed upon her by the testator. She died in 1835, without ever having had any issue, leaving her husband surviving.

*Wm. Hinds* claimed the residuary real estate of the testator as residuary legatee.

The LORD CHANCELLOR, after reading the will, said, the whole question turns upon the residuary devise, after default of issue by the testator; and in default of such issue, after payment of some legacies, he gave the remainder to his trustees, "upon trust, to pay and transfer all the remainder of the said property to William Hinds, his executors or administrators, to whom, in default of such issue of the said *Rebecca Peacock*, he gave and bequeathed the same." I can come to no other conclusion than that the remainder of the property is the whole of the estate; and the testator having given it to trustees before, afterwards gives it to *Wm. Hinds*, his executors, or administrators; or, in the terms of the gift, it is to William Hinds, his executors, or administrators, to whom I give

and bequeath the same, that is, the said property so devised as aforesaid. The only question arises, on account of the testator having used words applicable to personal estate, such as "bequest" and "dividends," and the direction to the trustees to transfer the remainder to *Wm. Hinds*, his executors, or administrators. In the will he has used terms in respect to realty, applicable to real estate; and so in the latter part of the will, where he directs the trustees to stand possessed of the residue of the estate for all and every the issue of the body of *Rebecca Peacock*; the gift being one both of real and personal estate; or in the event of any of them dying before he acquires a vested interest, the share of the deceased child is to be transferred to the survivors, their executors, administrators, and assigns. It is plain the testator had a profound ignorance of the subject-matter, though he had got a knowledge of certain technical words, without knowing their meaning. Looking at the will in all its parts, I think it was the intention of the testator, that *Wm. Hinds* should take the residue of the realty in the event which has happened; and if that were his intention, and I cannot think otherwise, then the terms of the gift, although strictly applying to personal property, are sufficient to carry the realty. Decree for the residuary legatee.

#### VICE-CHANCELLOR'S COURT—March 10.

##### BANKS v. LORD LE DESPENCER.

SETTLEMENT.—LIMITATIONS.—*Power of the Court to carry Limitations into effect, where the intention of the parties is only to do that which the Law prescribes for Cases of STRICT SETTLEMENT.*

This suit, which was instituted some time since by the trustees of a settlement made by the late *Thomas Lord Le Despencer* and the Hon. *Thomas Stapleton*, his eldest son and heir at law, dated the 8th August, 1826, whereby the manor or lordship of *Mereworth*, and the castle, messuages, farms, lands, and hereditaments thereto belonging, situate in the County of *Kent*, were conveyed and assured to trustees to the use of *Thomas Lord Le Despencer* for life, with remainder to the use of the said *Thomas Stapleton* for life, and after his decease came the following extraordinary limitation, upon which the opinion of the Court was now required, "in trust, to convey, settle, and assure all and singular the said manors and other hereditaments, to the use of such persons, for such estates, and with under, and subject to such powers, provisions, declarations, and agreements, and in such manner in all respects, consistently with, and in order to effect, the said intent of the said *Thomas Lord Le Despencer* and *Thomas Stapleton*, that the same estates shall, so far as the law will permit,

be strictly settled so as to go along with the dignity of *Le Despencer*, as long as the person possessed of the same dignity should be a lineal descendant of the said *Thomas Lord Le Despencer*, and be held and enjoyed by the person at the time being possessed of the said dignity, being such lineal descendant as aforesaid; and that during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlements, the rents and profits of the same premises shall or may be equally divided amongst the co-heirs *per stripes* of the person or persons respectively, by reason of whose death deaths without issue male such suspension or abeyance shall for the time being be occasioned, by three counsel in the law, whereof the Attorney or Solicitor-General for the time being, whichever will undertake the reference, shall be one, and whereof the others shall be named by him, or as by the majority of such three counsel all be advised and directed; and in case both the Attorney and Solicitor-General for the time being shall decline the reference, or if, upon such reference as aforesaid, no two of the referees shall agree as to the mode of settlement, then in such manner as shall be directed by the high court of chancery, upon a bill to be filed by the said trustees, or the survivors or survivor of them, or their heirs or assigns of such survivor, and which they and he may think proper for the purpose of obtaining such direction of the said court, and for no other use, trust, intent, or purpose whatsoever."

Mr. *Knight Bruce* for Sir F. J. Stapleton contended that the intention was to create an inheritance unknown to the rules of law; the lords had grasped at too much, and in trying to win more than the law permitted, the intention entirely fail. (a.) Suppose the abeyance happened for 200 years, which was very possible, it might, on the happening of certain circumstances, have been impossible to give effect to his limitation in any manner; and the soundness of a subsequent limitation cannot be made to depend upon a limitation, which may in itself fail.

Mr. *Richards* for the trustees, cited *Duke of Newcastle v. The Countess of Lincoln*, (b.) *Woolmore v. Burrows*. (c.)

The VICE-CHANCELLOR said that since the case opened, he had had time to look into the matter, and that his opinion remained the same, that it was from the first—namely, that it was a case in which it was the duty of the Court to give effect to the intention of the testator by making a settlement. The words of the limitation were, that the trustees should, after the decease of the survivor of *Lord Le Despencer* and *Thomas Stapleton*, convey, settle, and assure all the manors, and other here-

ditaments therein-before appointed, granted, and re-leased to the use of such persons, for such estates, and with, under, and subject to such powers, provisions, declarations and agreements, and in such manner in all respects as to effect the intention of the settlors; and that the estates, so far as the law would permit, should be strictly settled, so as to go along with the dignity of *Le Despencer*, as long as the person possessed of the same dignity should be a lineal descendant of the said *Thomas Lord Le Despencer*, and be held and enjoyed by the person for the time being possessed of the dignity and being such lineal descendant. If it had stopped here, there would have been no difficulty in directing a settlement to be framed, though there might have been some difficulty in effectuating that general intention of the parties, the meaning of which no human being could doubt. Many instances might be found in which the court had given effect to such limitations. In *Lady Lincoln's case*, (d) for example, no question was raised that the court could not execute a covenant in a marriage settlement to settle leasehold estates, so far as the law would allow, but the question was how it should be executed? *Lord Eldon* did not in that case object to the House of Lords reforming the decree, but he objected to the proposed reformation by *Lords Erskine* and *Ellenborough*. There was another instance of the court carrying into effect the general intention in the case of *Woolmore and Burrows*. (e) There the direction was, that the residue of the testator's fortune should be laid out in land as contiguous as practicable to other estates in Ireland, to be added, and closely entailed to the family estate then in the possession of *Thomas Burrows*; and by a codicil he added, that if *Thomas Burrows* should die without male issue, or dispose of the estate out of the family line, the residue of his property should go over to some other person. In that case a bill was filed and a decree made, and on further directions it was referred to the Master to make a proper settlement of the estates already and thereafter to be purchased with the testator's residuary estate. The Master did so, and to his report exceptions were taken. Sir *A. Hart's* observations in that case were extremely good, and applicable to the present, and indeed, every other case of this nature. He said—"It often happens that the court is called on to expound a meaning and execute a purpose which the testator himself could not have explained in their detail, and the court is then driven to the necessity of giving such directions as it conceives to be nearest to a probable and rational purpose in the testator's mind." Then he proceeded to remark on the particular words of that will, and said, "If his will had rested

there, I think his purpose might have been executed without assuming great latitude of construction ;" and then, after arguing the question, observed, "such a limitation would effectuate the clear intention of the testator of preventing an alienation of the Stradone estate." The case of *Lord Dorchester v. Lord Effingham*, (f) was another case applicable to the present, and the books were full of instances where the court had interfered to carry into effect the general intention of the parties where only general words were used, and it appeared beyond all doubt, the court could in the present case, direct a settlement. The only question was, whether there was anything in the second part of the limitation which was so illegal as to tie up the first words, and prevent the court making a legal settlement. The limitation went on—"And that during every suspension and abeyance of the dignity within the limits prescribed by law for strict settlements, the rents and profits of the estates should be equally divided among the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death without male issue such suspension or abeyance should be for the time being occasioned, as by three counsel in the law, whereof the Attorney and Solicitor-General for the time being should be one, and whereof the others should be named by him, or as by the majority of such three counsel should be advised and directed, and in case the Attorney and Solicitor-General should decline the reference, or no two of the referees should agree as to the mode of settlement, then in such manner as should be directed by the Court of Chancery upon a bill to be filed by the trustees of the settlement." Suppose that by this settlement a term of 1000 years had been limited to the trustees for the benefit of all the persons then in *esse* capable of taking the dignity at the death of *Lord Le Despencer*, and the term of 21 years after the death of the survivor should so long exist, and that the uses had been to the persons in *esse* successively for life, with remainder to heirs male generally, and then remainder to heirs female generally, in tail. Can there be any doubt that this would not have been good? Suppose also that a declaration of the trust of the term had also been inserted that in the event of their being any abeyance such as here contemplated, the rents and profits should during that time (which could only be the time the law prescribes) go in the manner directed by the settlement, could there be any objection to that? Where the court saw it was the intention to do that which within the law might be done, he thought it was the duty of the court to give effect to that intention, and that it was a case in which a proper settlement ought to be directed. He should, therefore, make a decree referring it to the Master for that purpose.

(f) Coop. 319.

## NOTICE TO COUNTRY SUBSCRIBERS

We have lately received several complaints of the irregular delivery of this paper in distant parts of the country. We could write something smart upon the *safety* of the new paper system, in comparison with the old, but we have not one bright idea left that is not in *prosa*. We request that every Subscriber who has just cause of complaint that he does not receive the paper in *due course* to make immediate complaint to "THE EDITOR." This will insure punctuality, which every Subscriber has the right to demand.

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H. E. R. We think the paper written by your friend has some merit, and we have consequently admitted it.

"D. J. E." "F. W. M." "An Haverwest Subscriber." "Mercator."—next week if possible. See the leading notice.

H. D. M. see "Errata."

### ERRATA.

Page 375, col. 2, line 12 from bottom, for "And this stake is," read "And this I take it."

Page 376, col. 1, line 36 from top, for "And a further doctrine," read "And a further doctrine."

*Wordsworth v. Holt*, p. 381. It was intended by the Editor that the statute inserted in this number relating to JOINT STOCK BANKING COMPANIES which passed since the VICE CHANCELLOR gave his decision upon that case, should have been made an *Addenda* to this Report, but room could not be found for it.

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ADVERTISEMENTS RECEIVED BY BAILEY AND CO., AT THE COUNTRY NEWSPAPER OFFICE, 33, FLEET STREET.

PUBLISHED IN DUBLIN AND EDINBURGH EVERY MONDAY.

# The Legal Guide.

Vol. IV.]

SATURDAY, OCTOBER 24, 1840.

[No. 26.

Price Sixpence.

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THE EDITOR is very grateful for the many letters of condolence he has been honoured with by the Subscribers, upon his present very severe affliction. He trusts that he may soon be among them again, and that by perseverance in the same course he has throughout adopted in the management of his paper, (and it has not been managed without great personal sacrifices,) he may merit a continuance of those good feelings so warmly and kindly expressed for him upon the present unfortunate occasion.

### EXECUTORY DEVISES.

ANSWER TO PROBLEM XIX.—VOL. 4.

What is an Executory Devise?

By J. A. M.

An executory devise is commonly defined to be a devise of a future interest in lands or chattels, not to take effect at the testator's death, but only on some future contingency.

Mr. Fearne defines it thus, "An executory

devise is strictly such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal, it is more properly called an executory bequest,) as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law."

The latter definition is the most precise and accurate; inasmuch, as the former not only includes executory devises, but every kind of contingent executory interest in lands or chattels given by devise: ex. gr. contingent remainders. Such definition is, therefore, too general.

An executory devise was never made good but for the sake of supporting the intention of a testator. *Standring v. Standring*, 2 Wills. 88.; and, therefore, it is a leading rule on this branch of the law, that a limitation in a will is never construed as an executory devise, when by possibility, it can be made good as a contingent remainder; and the intention of the testator thus effectuated. 2 Bos.



& Pull. 298. *Agar v. Agar*, 12 East, 253. 2 Marsh, 161. 6 Taunt. 263. The following case is an example, "where a testator, in case his eldest son should die without leaving issue of his body, then after his decease, gave the lands to his youngest son and his heirs; this was held an estate tail by implication in the eldest son, with a contingent remainder to the younger son." *Waller v. Drew*, Com. Rep. 372.

At the common law no remainder could be limited over after a limitation in fee; a freehold could not be made to commence *in futuro*. Nor could a term of years be given to a person for life with a remainder over. But the courts have dispensed with these rigid rules in order to support the intention of testators in the cases of wills, limitations of uses and declarations of trusts of terms.

There are three kinds of executory devises, two of which relate to freeholds, and the third to chattels real and personal. It shall be my endeavour to lay before your readers a brief account of each.

And *First*. It has been already stated that a fee could not at common law be limited so as to take effect after a fee. But by the first kind of executory devise this may be done; as where a man devises his whole estate in fee simple, but upon some future contingency qualifies the disposition, and limits an estate on that contingency.

A testator devised certain lands to B his son and his heirs for ever, and if he died without issue living A, then A to have those lands to him and his heirs for ever, it was adjudged that B took a vested estate in fee simple, and that the limitation over to A was good as an executory devise to take effect on B's dying without issue in the lifetime of A. *Pells v. Brown*, Cro. Jac. 590. *Phipps v. Williams*, 5 Sim. 44.

Devise of freehold and leasehold estate to A & B, as tenants in common, and if either of them should die without leaving issue, then as to the share of each of them as should so die without issue as aforesaid, to

the use of the survivor of them the said A & B and the heirs of his body. And in case both of them should die without issue of their body or bodies, then to the use of C for life, with remainder to trustees to preserve, &c. and divers remainders over; held that the limitation to the survivor was a good limitation by way of executory devise; that by the word "issue" in the succeeding clause, the testator intended such issue as were to take under the prior limitation; and that subsequently the limitation over to C was not too remote. *Radford v. Radford*, 1 Keen. 486.

Real and personal estate was devised to trustees in trust for his daughter A, absolutely, provided that if she should marry and have no children, the lands and money should go to his son B, or if he were dead in the lifetime of A to his children. B died in the lifetime of A without children; and it was held that as the executory limitation was to have taken effect only for the benefit of B and his children, A's interest on his death became indefeasible. *Jackson v. Noble*, Keen. 597.

And even where there is a limitation over after a devise in fee, though such antecedent devise in fee be not vested but contingent, yet, if the ulterior devise is limited so as to take effect in defeasance of the estate first devised, on an event subsequent to its becoming vested, it has been held to operate as an executory devise. (*Gulliver v. Wickett*, 1 Wils. 105.)

A right to curtesy attaches on the first estate in fee under this kind of executory devise, and is not defeated by its determination. (3 Bos. & Pull. Cruise Dig. Tit. 38; Devise, c. 17.)

*Secondly*. The second kind of executory devise is that of a limitation of a future interest in an estate of inheritance to arise on a contingency, or at a certain period, without any particular estate to support it, (as was necessary at common law.)

As if one devises land to a *joint and*

her heirs upon her day of marriage. This limitation, though it would have been void at common law, is good in a will by way of executory devise, and until the contingency happens the fee descends to the heir at law of the testator; 1 Sid. 153; *Bullock v. Stones*, 2 Ves. Sen. 521. It may be well to mention here, that the Court will not allow timber to be cut down where there is an executory devise *in futuro*. *Stanfield v. Harmergham*, 10 Ves. 278. So where a man devises an estate to the first son or the heir of J. S. when he shall have one. Raym'd. 83.

And it is not necessary that the event on which the future estate is to arise should be contingent. For where, though a testator separates with an immediate estate of freehold, yet the ulterior limitation of it is not so connected with it as to be capable of taking effect as a remainder, the ulterior limitation will be an executory devise arising *in futuro* on the happening of a certain event, *ex. gr.* devise to one for life, and from and after the expiration of one day, (or any other proposed period, not exceeding twenty-one years) next ensuing his decease, then over to another. See *Clarke v. Smyth*, 1 Lutw. 8; 1 Salk. 226.

When an estate is devised to a person on an event which is too remote; a devise over, depending on the same event, is void also. *Procter v. Bishop of Bath*, 2 H. Bl. 355; *Earl of Chatham v. Tothill*, 6 Bro. P. C. 1; 1 Ves. 134.

*Thirdly.* A term of years or other chattels may be limited by will to one man for life, and afterwards to another in remainder, which could not be done by deed, being void at common law, and the whole term would have vested in the first devisee for life; a life estate being esteemed a larger interest in lands than any term of years, however long; 8 Rep. 95; Cro. Car. 346. And a person to whom the first interest is bequeathed has no power to alienate or bar the remainder of the term. Dyer, 358.

Where one possessed of land for years devises it to another for life, and, after his decease, the residue of such term to a third person, this is an executory devise and good.

And the assent of the executor to the first devise is an assent also to the second. *Lampet's Case*, 10 Co. 47, b.; *Manning's Case*, 8 Co. 94, b.; Plowd. 520, 522.

It is not necessary that the ulterior devisee should be in esse, or ascertained. For where a termor for years devised the term to his wife for 18 years, then to the eldest son for life, and after to the eldest issue male of that son for life; though the son had not any issue male at the time of the devise and death of the testator, yet it was held that if he had had any issue male at his death, such issue should have had it as an executory devise, being merely limited to the son for life. *Cotton v. Heath*, 1 Roll. Abr. 612; 1 Eq. Ca. Abr. 191.

A disposition of a term of years, or personality to a person and the heirs of his body, is a disposal of the absolute interest in the term; for a term cannot be entailed. In a modern case, where there was an attempted perpetuity as to personal estate in a will, the Court decreed it a *quasi* entail, and therefore an absolute interest. The case alluded to is *Mackworth v. Hinzman*, Keen, 658. A testator bequeathed personality to trustees to pay the interest to Sir G. A. Bart. for life, and after his decease to his eldest son, for the time being; but if he should die leaving no son, then in trust for the person on whom the baronetcy, which was limited in tail male should devolve, so that each baronet should take the interest for life, and after the extinction of the baronetcy to fall into the residue of the estate. At the death of the testator, Sir G. A. had two brothers, on whom the baronetcy successively devolved: *Held*, on a suit between the representatives of the second brother and the third brother, and to which the representatives of Sir G. A. were

not parties, that in consideration of the general intention of the testator to keep the personal property, with the title, the second brother took a quasi estate tail, and therefore, an absolute interest in it.

That in equity chattels personal may be bequeathed, so as to take effect as executory bequests, the following cases are authorities:

Where there was a devise of £500 to testator's daughter, and in case she died before 30 years of age unmarried, then over. This was decreed in Equity to be valid as an executory bequest; and the daughter having died, after the receipt of the money, but before the 30 years had expired, her executors were decreed to be liable in trust for the legatees over. 2 Freem. 137. Car. 172.

A testatrix bequeathed her whole estate, consisting of personal things, to her sister C. (whom she made executrix) during the term of her natural life; and after her decease, the will was, that £400 should be given to the daughters of D.: it was determined that the said daughters ought to have relief as to the several legacies given them by the will, and for which the said C. was in nature only of a trustee, the money being to be paid after her death. *Catchmay v. Nichols*, 1 P. Wms. 6 in notis.

One-fourth of the personal estate of a testator was bequeathed to his son absolutely, but by a codicil it was directed that the son's share should be only for the life of himself and his wife, provided that they had no issue, and that at their death it should fall into the residuo. *Held*, that the son did not take absolutely, but subject to an executory bequest over, in case no issue of him and his wife was living at the death of the survivor. *Rackstraw v. Vile*, 1 Sim. & Stu. 604.

And now, having considered the several kinds of executory devises, let us see how they are prevented from becoming perpetuities, which would be the consequence of the first devisee's not having the power to destroy

the subsequent contingent interests. For the great distinction between an executory devise (whether of real or personal property) and a contingent remainder is, that the former cannot be barred or destroyed by any alteration of the estate out of which it is limited.

The principles on which the limits have been fixed by our courts for the prevention of perpetuities with regard to executory devises are thus lucidly laid down and commented on by Mr. Hargrave, in his celebrated argument in the *Thelusson Cases*, p. 57.

"Executory devise was not regularly admitted till about two centuries ago. The rules for circumscribing it are consequently not of earlier date; and there are not any statutes for the purpose. It is impossible, therefore, that the rules should be derived from any other source than the discretion of the judges. For general utility and public convenience they admitted executory devises. But it was seen, that if executory devise, or use or trust of a similar nature, was permitted without some restrictions, great abuses might be generated. It was soon settled by the courts of law that executory devise could not be barred by a common recovery, that is, as early as the case of *Pells v. Brown*, supra. Afterwards, though not without much contest, it was further settled, that executory devises might be shaped as to make the devisee uncertain (see the case of *Snow v. Cutler*, 1 Eq. Ca. Abr. 188.) till the very instant appointed for rising of the executory estate. But executory devise, thus unbarrable by recovery or otherwise, and thus uncertain as to the person of the devisee till the moment of taking effect, if some limit had not been prescribed, would have been a shelter for perpetuity. To prevent such an abuse, the judges limited the time for the contingency, on which an executory devise was to operate; holding, that unless the contingency

as such, that if it ever happened, it would necessarily happen within a limited space of time, the executory devise should be deemed legal, and considered as a nullity."

(To be continued.)

## PROBLEM XXVI. VOL. IV.

### VENDOR AND PURCHASER.

In what cases will a Court of Equity decree a specific performance of an agreement.

First, with respect to the Vendor.

Secondly, with respect to the Agreement itself.

TO THE EDITOR OF THE LEGAL GUIDE.

ANSWER TO PROBLEM XV. VOL. 4.

By E. A.

### EJECTMENT.

For what will this action lie?

SIR.—Notwithstanding the doctrine of *damnum absque injuria* prevails in a few instances, yet it is a broad principle, an indisputable and a general rule of the English Law, that "where a right exists there is also a remedy either by action or by suit, whenever that right is lessened in value or enjoyment, or is invaded, destroyed, or interrupted."

The action of ejectment at the present day, forms, in practice, no inconsiderable proportion of the means, whereby wrongs are redressed; and rights demonstrated, and established; inasmuch as, after the legislature had by Stat. 3 & 4 W. 4, c. 27, eased and lightened our juridical system of a burdensome mass of fiction; by the destruction or abolition of real actions, and by abolishing writs of right patent, and an almost infinite variety of antiquated, expensive, and, owing to the improvements and other changes in the laws and numerous other causes, then almost as unused as useless remedies by which in ancient, and occasionally in modern times, claims of right to real property were prosecuted; it left remaining, with the exception of a writ of right of dower, a writ of dower *unde nihil habet* and a *quare impedit*, no real, or mixed action whatsoever, save and except that action which is my present subject, for consideration.

This action of "Ejectment," therefore, is thus become the only remaining general remedy for recovering the possession of premises where and when a right to that possession has accrued to the claimant, or some person through whom he claims within the period of 20 years anterior to the bringing of the action, or within such further period as the law relating to the limitations of actions and suits allows, where the parties have been under some legal disability by

reason of infancy, coverture, or some other of the causes set forth in the statute referred to during any portion of that period.

This action is in form a "mixed" action, and the reason for the application of this denomination to it is, because the plaintiff is in law supposed not only to be seeking the recovery of his possession, but also damages, for the wrong he has sustained by its detraction from him; although, in practice, this is never attended to: as the damages recovered in this action are invariably nominal, and the profits of the premises during such period as they have been illegally withheld from the rightful owner (not exceeding the time limited by law), are recovered in a separate and subsequent action, the form of which is *trespass* for mesne profits; in this latter action, I may state that as a general rule, the judgment obtained by the plaintiff in ejectment is conclusive evidence against the defendant.

Amongst the other advantages of this action (by which, as I shall presently more particularly observe, the title to the premises only collaterally calls for a decision,) is, that by it a speedy and efficacious mode exists of enforcing a rightful claim of title to premises, without augmenting its delay and expence in special pleading and other formalities, too frequently producing both of those evils.

Fiction and fiction alone is the whole and sole origin and foundation of the proceedings in this action. The first notification of its having been brought comes in the shape of a declaration delivered to the tenant in possession of the premises; who, to prevent frauds and to ensure its coming into the hands of the landlord, is required under a heavy penalty to inform his landlord that he is the recipient of such declaration, and which in terms alleges a demise of a term of years by the person claiming title to recover possession of the premises to some nominal party, usually John Doe, of which term in pursuance of such demise, Doe becomes possessed, and of which it further alleges Doe was ousted by some other nominal party, generally Richard Roe, before his term expired. To satisfy the rule of the Common Law requiring entry by a lessee before his title can be considered as perfect, the declaration distinctly alleges an entry, on the premises by Doe. So far are the proceedings carried on in the names of these *actores fabulæ*, but by a "friendly" notice purporting to come from Roe appended to this declaration, the tenant in possession is made acquainted with the fact that Roe (who now styles himself as a "casual ejector" only, and in which character alone he states he is sued,) has no title to the premises, and Roe, in the plenitude of his friendship, advises the party to whom his friendly epistle is addressed, to appear in some court of law (which

he names,) in the following term, and so to cause himself to be made defendant in Roe's stead; otherwise he, (Roe) doubtless, to avoid meddling with his neighbour's business,) will suffer judgment to pass by default; whereupon, the then unfortunate possessor, will be turned out of possession.

If it is intended to defend the action which is brought in the way I have attempted to describe, the party in possession appears to the declaration, pleads the general issue, and enters into the consent rule, whereby he agrees at the trial of the cause to admit the following as facts. (viz.)

1. That such lease as I have mentioned was made to Doe.

2. That Doe entered in pursuance thereof.

3. That he was ousted or amoved from the possession vested in him pursuant to that lease, the consent rule then provides for the payment and recovery of the costs of the action.

When the cause comes on for trial, as it must have been previously observed, the only question calling for a verdict of the jury is, whether the party claiming title to the possession of the premises, had at that time when it was alleged that he demised them to Doe a sufficient legal estate in him, to warrant and authorize the granting of such a lease and Doe's entry thereupon. If he had not the action *ex necessitate* must fall to the ground. If, on the other hand, the verdict of the jury is in effect that he had, then judgment, unless restrained in due course, goes for him, and he recovers possession accordingly.

If no steps are taken by those who, either by themselves, their tenants, or their servants are in the possession of the premises to defend the action, the plaintiff becomes entitled to judgment by default against the "casual ejector," obtainable on motion and rule without further notice to the possessors, and as an inevitable consequence to a writ of possession as well.

I shall decline to enter more fully into the practice of this action referring to 2 Arch. P. by Ch. where I believe, those who are so minded to do, may procure all the information necessary in relation to this action lucidly and perspicuously arranged.

Before concluding these observations I wish most particularly to impress upon those who may not have had the opportunity of watching an action of ejectment through all its stages, that it must be borne in mind that if the substituted defendant refuses or neglects to appear at the trial and confess lease, entry, and ouster pursuant to the terms of the consent rule, the plaintiff will be nonsuited as a matter of course, but he will thereupon be entitled to judgment against the casual ejector, the same as if no one had originally appeared to the declaration.

Having made these preliminary remarks more with a view of introducing my subject with advantage, than with a view of engrossing the columns of your invaluable periodical, and because I flatter myself that those remarks will (if correct) be acceptable to many of your readers, I now proceed with the answer in detail, in doing which I intend, for the sake of convenience, to pursue the following plan of arrangement, viz. :—

First. For what premises, and in what cases an action of ejectment may be brought, where the lessor of the plaintiff claims, for his own bench, distinct from and unconnected with other persons, whether as

1. Disseisee, &c.
2. Landlord.
3. Mortgagee.
4. Vendor of real property.
5. Lessor, as for forfeiture, &c.
6. Tenant by elegit, &c.
7. Lord of a manor, or as
8. Widow for free bench.

Secondly. Other cases in which the action will lie, as where the party claiming claims the premises :

1. *Jure representatione*, as—1, Heir at law; and, 2. Executor or administrator.
2. By devise.
3. As trustee.
4. As guardian.
5. Where there is a connection in title or tenancy with other persons.—1. Joint tenants.—2. Coparceners; and, 3. Tenants in common.
6. As commoner.
7. As a public right of way.
8. As a parson, &c.
9. As husband *jure uxoris*, and
10. As parish officers.

(To be continued.)

3 & 4 VICT. Cap. 97.

An Act for regulating Railways.

[10th August, 1840].

Whereas it is expedient for the safety of the public to provide for the due supervision of Railways: Be it therefore enacted by the Queen's most excellent Majesty, by and with the consent of the Lords spiritual and temporal, and Commons in this present parliament assembled, and by the authority of the same, That after two months from the passing of this Act, no Railway, or portion of any Railway, shall be opened for the public conveyance of passengers or goods until one calendar month after notice in writing of the intention of opening the same shall have been given, by the Company to whom such Railway shall belong, to the Lords of the Committee of her Majesty's Privy Council appointed for Trade and Foreign Plantations.

2. And be it enacted, That if any Railway, or portion of any Railway, shall be opened without due notice as aforesaid, the Company to whom such Railway shall belong shall forfeit to her Majesty the sum of Twenty Pounds for every day during which the same shall continue open, until the expiration of one calendar month after the company shall have given the like notice as is herein before required before the opening of the Railway; and any such Penalty may be recovered in any of her Majesty's Courts of Record.

3. And be it enacted, That the Lords of the said Committee may order and direct every Railway Company to make up and deliver to them Returns, according to a form to be provided by the Lords of the said Committee, of the aggregate traffic in passengers, according to the several classes, and of the aggregate traffic in cattle and goods respectively, on the said Railway, as well as of all accidents which shall have occurred thereon attended with personal injury, and also a table of all Tolls, Rates, and Charges from time to time levied on each class passengers, and on cattle and goods, conveyed on the said Railway; and if the returns herein specified shall not be delivered within thirty days after the same shall have been required, every such Company shall forfeit to her Majesty the sum of Twenty Pounds for every day during which the said Company shall wilfully neglect to deliver the same; and every such penalty may be recovered in her Majesty's Courts of Record: provided always, that such returns shall be required, in like manner and at the same time, from all the said Companies, unless the Lords of the said Committee shall specially exempt any of the said companies, and shall enter the grounds of such Exemption in the minutes of their Proceedings.

4. And be it enacted, That every Officer of any Company who shall wilfully make any false return to the Lords of the said Committee shall be deemed guilty of a misdemeanor.

5. And be it enacted, That it shall be lawful for the Lords of the said Committee, if and when they shall think fit, to authorize any proper person or persons to inspect any Railway; and it shall be lawful for every person so authorized, at all reasonable times, upon producing his authority, if required, to enter upon and examine the said Railway, and the Stations, Works, and Buildings, and the Engines and Carriages belonging thereto: provided always, that no person shall be eligible to the appointment as Inspector as aforesaid who shall within one year of his appointment have been a Director or have held any office of trust or profit under any Railway Company.

6. And be it enacted, That every person

wilfully obstructing any person, duly authorized as aforesaid, in the execution of his duty, shall, on conviction before a Justice of the Peace having jurisdiction in the place where the offence shall have been committed, forfeit and pay for every such offence any sum not exceeding ten pounds; and in default of payment of any penalty so adjudged, immediately or within such time as the said Justice of the Peace shall appoint, the same Justice, or any other Justice having jurisdiction in the place where the offender shall be or reside, may commit the offender to prison for any period not exceeding three calendar months; such commitment to be determined on payment of the amount of the penalty; and every such penalty shall be returned to the next ensuing Court of Quarter Sessions in the usual manner.

7. And whereas many Railway Companies are, or may hereafter be empowered by Act of Parliament to make Bye Laws, Orders, Rules, or Regulations, and to impose penalties for the enforcement thereof, upon persons other than the servants of the said Companies, and it is expedient that such powers should be under proper controul; be it enacted, That true copies of all such Bye Laws, Orders, Rules, and Regulations, made under any such powers by every such Company before the passing of this Act, certified in such manner as the Lords of the said Committee shall from time to time direct, shall, within two calendar months after the passing of this Act, be laid before the Lords of the said Committee; and that every such Bye Law, Order, Rule, or Regulation, not so laid before the Lords of the said Committee within the aforesaid period, shall, from and after that period, cease to have any force or effect, saving in so far as any penalty may have been then already incurred under the same.

8. And be it enacted, That no such Bye Law, Order, Rule, or Regulation made under any such power, and which shall not be in force at the time of the passing of this Act, and no order, Rule or Regulation annulling any such existing Bye Law, Rule, Order, or Regulation which shall be made after the passing of this Act, shall have any force or effect until two calendar months after a copy of such Bye Law, Order, Rule, or Regulation, certified as aforesaid, shall have been laid before the Lords of the said Committee, unless the Lords of the said Committee shall, before such period, signify their approbation thereof.

9. And be it enacted, That it shall be lawful for the Lords of the said Committee, at any time either before or after any Bye Law, Order, Rule or Regulation shall have been laid before them as aforesaid shall have come into operation, to notify to the Company who shall have made

the same their disallowance thereof, and, in case the same shall be in force at the time of such disallowance, the time at which the same shall cease to be in force; and no Bye Law, Order, Rule, or Regulation which shall be so disallowed shall have any force or effect whatsoever, or, if it shall be in force at the time of such disallowance, it shall cease to have any force or effect at the time limited in the notice of such disallowance, saving in so far as any penalty may have been then already incurred under the same.

10. And be it enacted, That so much of every clause, provision, and enactment in any Act of Parliament heretofore passed as may require the approval or concurrence of any Justice of the Peace, Court of Quarter Sessions, or other person or persons, other than the members of the said Companies, to give validity to any Bye Laws, Orders, Rules, or Regulations made by any such Company, shall be repealed.

11. And be it enacted, That whenever it shall appear to the Lords of the said Committee that any of the provisions of the several Acts of Parliament regulating any of the said Companies, or the provisions of this Act, have not been complied with on the part of any of the said Companies, or any of their officers, and that it would be for the public advantage that the due performance of the same should be enforced, the Lords of the said Committee shall certify the same to her Majesty's Attorney General for *England or Ireland*, or to the Lord Advocate for *Scotland*, as the case may require; and thereupon the said Attorney General or Lord Advocate shall, by information, or by action, bill, plaint, suit at law or in equity, or other legal proceedings, as the case may require, proceed to recover such penalties and forfeitures, or otherwise to enforce the performance of the said provisions, by such means as any person aggrieved by such non-compliance, or otherwise authorized to sue for such penalties, might employ under the provisions of the said Acts: provided always, that no such certificate as aforesaid shall be given by the Lords of the said Committee until twenty-one days after they shall have given notice of their intention to give the same to the Company against or in relation to whom they shall intend to give the same.

12. And be it enacted, That no legal proceedings shall commenced under the authority of the Lords of the said Committee against any Railway Company for any offence against this Act, or any of the several Acts of Parliament relating to Railways, except upon such certificate of the Lords of the said Committee as aforesaid, and within one year after such offence shall have been committed.

13. And be it enacted, That it shall be lawful for any officer or agent of the Railway Company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine driver, guard, porter, or other servant in the employ of such company who shall be found drunk while employed upon the Railway, or commit any offence against any of the bye laws, rules or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the Railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains shall be or might be obstructed or impeded, and to convey such engine driver, guard, porter, or other servant so offending, or any person counselling, aiding, or assisting in such offence, with all convenient despatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this Act; and every such person so offending, and every person counselling, aiding, or assisting therein as aforesaid, shall, when convicted before such justice as aforesaid, (who is hereby authorized and required, upon complaint to him made, upon oath, without information in writing, to take cognizance thereof, and to act summarily in the premises,) in the discretion of such justice, be imprisoned, with or without hard labour, for any term not exceeding two calendar months, or, in the like discretion of such justice, shall for every such offence forfeit to her Majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labour as aforesaid, for such period, not exceeding two calendar months, as such justice shall appoint; such commitment to be determined on payment of the amount of the penalty; and every such penalty shall be returned to the next ensuing court of quarter sessions in the usual manner.

14. Provided always, and be it enacted, That (if upon the hearing of any such complaint he shall think fit) it shall be lawful for such Justice, instead of deciding upon the matter of complaint summarily, to commit the person or persons charged with such offence for trial for the same at the Quarter Sessions for the county or place wherein such offence shall have been committed, and to order that any such person so committed shall be imprisoned and detained in any of her Majesty's gaols or houses of correction in the said county or place in the meantime, or to take bail for his appearance, with or without sureties, in his discretion; and every such person so offending, and convicted before such Court of Quarter Sessions as aforesaid (which said Court is hereby

quired to take cognizance of and hear and determine such complaint,) shall be liable in the discretion of such Court, to be imprisoned, without hard labour, for any term not exceeding two years.

15. And be it enacted, That from and after the passing of this Act every person who shall wilfully do or cause to be done any thing in such manner as to obstruct any engine or carriage running any Railway, or to endanger the safety of persons conveyed in or upon the same, or shall do or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court before which he shall have been convicted, to be imprisoned, with or without hard labour, for any term not exceeding two years.

16. And be it enacted, That if any person shall wilfully obstruct or impede any officer or agent of any Railway Company in the execution of his duty upon any Railway, or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass on any Railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said Company, every such person so offending, and all others aiding or assisting therein, shall and may be seized and detained by any such officer or agent, or any person whom he may call to his assistance, until such offender or offenders can be conveniently taken before some Justice of the Peace for the county or place wherein such offence shall be committed, and when convicted before such Justice as aforesaid (who is hereby authorized and required, upon complaint to him upon oath, to take cognizance thereof, and to act summarily in the premises,) shall, in the discretion of such Justice, forfeit to her Majesty any sum not exceeding five pounds, and in default of payment thereof shall or may be imprisoned for any term not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty.

17. And be it enacted, That no proceeding to be had and taken in pursuance of this Act shall be quashed or vacated for want of form, or be removed by certiorari, or by any other writ or process whatsoever, into any of her Majesty's Courts of Record at Westminster or elsewhere, by law or statute to the contrary notwithstanding.

18. And whereas many Railway Companies are bound, by the provisions of the Acts of Parliament by which they are incorporated or regulated, to make, at the expense of the owner or occupier of lands adjoining the Railway, openings in the ledges or flanches thereof (except at certain places on such Railway in the said Acts

specified,) for effecting communications between such Railway and any collateral or branch Railway to be laid down over such lands, and any disagreement or difference which shall arise as to the proper places for making any such openings in the ledges or flanches is by such Acts directed to be referred to the decision of any two Justices within their respective jurisdictions: And whereas it is expedient that so much of every clause, provision, and enactment in any Act of Parliament heretofore passed, as gives to any Justice or Justices the power of hearing or deciding upon any such disagreement or difference as to the proper places for any such openings in the ledges or flanches of any Railway, should be repealed; be it therefore enacted, That so much of every such clause, provision, and enactment as aforesaid shall be repealed.

19. And be it enacted, That in case any disagreement or difference shall arise between any such owner or occupier, or other persons, and any Railway Company, as to the proper places for any such openings in the ledges or flanches of any Railway (except at such places as aforesaid,) for the purpose of such communication, then the same shall be left to the decision of the Lords of the said Committee, who are hereby empowered to hear and determine the same in such way as they shall think fit, and their determination shall be binding on all parties.

20. And be it enacted, That all notices, returns, and other documents required by this Act to be given to or laid before the Lords of the said Committee; and all notices, appointments, requisitions, certificates, or other documents in writing, signed by one of the Secretaries of the said Committee, or by some officer appointed for that purpose by the Lords of the said Committee, and purporting to be made by the Lords of the said Committee, shall, for the purposes of this Act, be deemed to have been made by the Lords of the said Committee; and service of the same upon any one or more of the Directors of any Railway Company, or on the Secretary or clerk of the said Company, or by leaving the same with the clerk or officer at one of the stations belonging to the said Company, shall be deemed good service upon the said Company.

21. And be it enacted, That wherever the word "Railway" is used in this Act it shall be construed to extend to all Railways constructed under the powers of any Act of Parliament, and intended for the conveyance of passengers in or upon any carriages drawn or impelled by the power of steam or by any other mechanical power; and wherever the word "Company" is used in this Act it shall be construed to extend to and include the proprietors for the time being of any such Railway, whether a body corporate or individuals, and their lessees, executors, administrators, and



assigns, unless the subject or context be repugnant to such construction.

22. And be it enacted, That this Act may be amended or repealed by any Act passed in the present Session of Parliament.

## EXTENSION OF THE METROPOLITAN POLICE DISTRICT.

LONDON GAZETTE.—*Tuesday, October 13.*

At the Court at Claremont, the 3rd October, 1840, present, the Queen's most excellent Majesty in Council. Whereas by an Act of Parliament, passed in the fourth year of her Majesty's reign, intituled "An Act for better defining the Powers of Justices within the Metropolitan Police District," it was, amongst other things, enacted, that it should be lawful to her Majesty, with the advice of her Privy Council, from time to time, to constitute, within the metropolitan police district, so many police court divisions as to her Majesty should seem fit, and to define the extent thereof; and, from time to time, to alter the number and extent of such police court divisions, and to assign a division to each of the police courts already established, and to establish a police court for each of the other divisions; and that it should be lawful for her Majesty, if she should think fit, with the advice of her Privy Council, to order that a police magistrate or magistrates shall attend regularly at any police court or courts thereafter to be established, either daily or on such days and times as her Majesty, by the advice aforesaid, should order.

Her Majesty is pleased, with the advice of her Privy Council, to order, and it is hereby ordered accordingly, that the parishes of Greenwich; St. Nicholas, Deptford; that part of St. Paul's, Deptford, which is within the county of Kent; Lewisham and Lea, in the county of Kent; Rotherhithe; that part of St. Paul's, Deptford, which is within the county of Surrey; and the hamlet of Hatcham, in the county of Surrey; shall henceforth be constituted a police court division; and that a police court shall be established for such division, to be holden at Greenwich, in the county of Kent; and that the parishes of Plumstead, Woolwich, Charlton, Eltham, the liberty of Kidbrooke, and the hamlet of Mottingham, in the county of Kent, shall, from henceforth, be constituted a police court division; and that a police court for such division shall be holden at Woolwich in the county of Kent.

And her Majesty is further pleased, with the advice aforesaid, to order, and it is hereby ordered accordingly, that the magistrates to be appointed for these divisions shall attend at the said courts on alternate days, at Greenwich and Woolwich, excepting Sundays, Christmas Day,

Good Friday, or any day appointed for a public fast or thanksgiving; and likewise except on Mondays and Saturdays, on which last-mentioned days a magistrate shall attend at each of the said courts; and that on all days of attendance the magistrates shall sit from ten of the clock in the morning until three of the clock in the afternoon, and longer, if necessary, for the despatch of business.

And the most noble the Marquis of Norwiche, one her of Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly.  
C. C. GREVILLE

At the Court at St. James's, the 3d January, 1840, present the Queen's most excellent Majesty in Council. Whereas by an Act, passed in the tenth year of the reign of his late Majesty King George the Fourth, it was, amongst other things, enacted, that it should be lawful for his Majesty at any time, by the advice of his Privy Council, to order that any parishes, townships, precincts, and places, whether parochial or extra-parochial, in the counties of Middlesex, Surrey, Hertford, Essex, and Kent, of which any part shall be situate within twelve miles of Charing Cross, and the City of Westminster, shall, after a certain day, to be named in such order, be added to, and form part of, the metropolitan police district, and be placed under the charge of a police to be appointed under the said Act; and whereas by an Act, passed in the Parliament held in the second and third years of the reign of her present Majesty, it was enacted, that any place which a part of the Central Criminal Court district, except the City of London and liberties thereof, and such places as are or may be included in an Act already passed, or to be passed, in the next Session of Parliament, intituled "An Act for regulating the Police in the City of London," and also, that any part of any parish, township, precinct, or place, which is not more than five miles distant from Charing Cross, in a straight line, may be added to, and form part of, the metropolitan police district; and whereas it is expedient that the parishes, townships, precincts, and places following; that is to say—

COUNTY OF MIDDLESEX.—Ashford, Bedford (East), Cowley, Cranford, Drayton (West), Edgware (including Whitechurch), Edmonton, Enfield, Finchley, Fryern Barnet, Fekham, Greenford, Harrow, Hendon, Hadley Moor, Hornsey, Hayes, Hanwell, Heston, Hanworth, Hampton (Town and Court), Hampton Wick (Liberty), Harefield, Hillingdon, Harlington, Harmondsworth, Ickinham, Isleworth, Kingston, Laleham, Littleton, Northolt, Norwood (Precinct), Perivale, Pinner, Ruislip, South Mims, Stanmore (Great and Little), Stanwell, Staines, Sunbury, Shepperton, Tottenham, Twickenham,

And the most noble the Marquis of Normanby,  
 of her Majesty's Principal Secretaries of  
 State, is to give such directions herein as his  
 Majesty may judge proper. C. C. GREVILLE.

Mr. Smythe admitted that Mr. Field had received the money, as he had acknowledged by a letter referred to on behalf of the defendant:

COURT OF CHANCERY.—*July 25.*

This bill was filed by the widow and executrix of a Mr. Churchill Field, a solicitor, for the

but the evidence showed he had handed over the whole sum to the trustee of the defendant.

The LORD CHANCELLOR said the case was very clear on the point. The defendant had no proof in support of this charge, except the letter acknowledging the receipt of the money from Mr. Field; but it was abundantly proved by the plaintiff's evidence that her husband had paid over the money to the trustees, one of whom admitted his liability. He had no doubt that if the law had been, with respect to the effect of the statute of limitations, what it was decided to be in this court in the case referred to, the plaintiff would have been entitled to a decree if the cause had come to a hearing before the appeal from this decision to the House of Lords. But the reversal of the decision in *Jones v. Scott* by that house left this court no other course than to dismiss the bill; but in his lordship's opinion, it would not be doing justice between the parties if he were to dismiss the bill with costs generally. He would not allow the costs of the false defence. He regretted that he could not dismiss the bill without any costs.

Bill dismissed accordingly.

#### VICE CHANCELLOR'S COURT--June 11.

**SEDDON v. CONNELL AND OTHERS.**

**JOINT STOCK COMPANIES.** *Whether the public Officer representing the Company, can be sued by a partner in respect of a dispute between the latter and the rest of the Company.*

This bill was filed by the plaintiff, for the purpose of setting aside a purchase made by him in August, 1836, of 500 shares in the "*Northern and Central Joint Stock Banking Company*," which had been originally established at *Manchester* in the year 1834. The plaintiff sought in the first place to have his purchase money refunded by the company, and for that purpose had made the defendant *Connell*, the public officer of the company, a defendant to the suit; and the bill further prayed that, in case the court should be opinion that the company, as a body, was not, through their officer, liable, that then the defendants, *Moult and Evans*, should be held personally responsible to him to the full extent of the purchase-money, paid by him for the shares in question. The grounds upon which the plaintiff rested his claims to the relief he now asked for, were allegations of fraud and misrepresentations as to the prosperous, flourishing, and profitable condition of the company's affairs at the time that he had made the purchase. It appeared by the bill, that at the time the plaintiff made the purchase of those shares, the defendants, *Moult and Evans*, and a person of the name of *Hardie*, since deceased, were, with others, directors of the com-

pany, and that *Evans* was the chief manager of the bank. The capital of the bank to be raised was to be 500,000*l.* in 50,000 shares of 10*l.* each. The plaintiff having some spare capital, was desirous of investing it in some safe and beneficial speculation. The directors of the bank, it was alleged, had, previously to plaintiff's purchase, from time to time published reports, setting forth the prosperous and flourishing state of the company's affairs and they had just previously to the plaintiff purchasing the shares declared a half-yearly dividend of 8*l.* per cent. upon the capital then invested. The plaintiff alleged that upon his applying to *Moult, Evans, and Hardie*, they represented to him that the company's affairs were in such a prosperous and profitable condition, that the investment of his capital in the company's shares would be most advantageous, and he was thereby induced, relying upon their representations to be *bond fide*, to purchase and pay for the 500 shares in question. Subsequently to his obtaining his certificate for the shares, and signing the deed of settlement as a proprietor of the company's shares, he discovered that the representations made to him by *Moult, Hardie, and Evans* were fraudulent and untrue, and that the affairs of the bank were in a most embarrassed state, so much so that the company had to apply to the *Bank of England* for an advance of money. Upon the application to the *Bank of England*, an investigation into the company's affairs took place, the result of which, the plaintiff alleged, was to show that the directors were not, looking at the unprosperous state of the company's affairs at the time, justified in making the statements of its flourishing condition, or in declaring a dividend upon the company's stock. The plaintiff alleged that he had not as yet received any dividend upon his shares. The bill prayed relief, by having the sale of the shares to him set aside, on the ground that he had been alone induced to purchase them by the false and fraudulent representations of the directors, who were the company's agents, and that therefore the company, as a body, were liable.

The defendant, *Mr. Connell*, demurred in want of equity, submitting that under the recent acts of Parliaments regulating joint-stock banks, the public officer, as representing the bank, could not be sued in a dispute between the partners, which this in effect was. *Mr. Moult* demurred on the ground that the prayer for relief against him was only in the alternative; and each of these demurring parties insisted that the representatives of *Hardie* ought to be before the Court. The other defendant, *Evans*, raised a further objection by his demurrer—viz., that he was no shareholder, but a mere agent for the bank.

*Mr. Jacob* appeared in support of *Mr. Connell's* demurrer, and contended that the bill raised

case to make the company, through their officers, liable to the plaintiff in equity. That the s of the 7th of Geo. IV. and the 1st and 2nd Vict. enabling persons to sue Joint Stock companies, through their public officers, applied ly to cases in which strangers had demands on the company, or where partners in a company had demands on the company in any other character than as partners. The plaintiff's remedy s against those persons to whom the fraudulent representations were imputed.

The VICE-CHANCELLOR was of opinion, it is not a case in which the Court could grant relief, and therefore allowed the demurrer of Mr. *Arnell*.

#### BAIL COURT.—June 20.

REGINA v. THE BERKS AND WILTSHIRE CANAL COMPANY.

INCORPORATED JOINT STOCK COMPANIES.—A MANDAMUS will not be granted upon the application of a party claiming compensation, unless there had been a positive refusal on the part of the Company to make it.

Mr. *Erle* had obtained a rule in last Hilary term on behalf of one Mr. *Vines*, to show cause why a *mandamus* should not be issued commanding *The Berks and Wiltshire Canal Company*, through its managing committee to make an offer of compensation to Mr. *Vines*, for damage done to him by the withdrawal from use of the waters by which his mills had been kept in operation. It appeared that the Berks and Wiltshire Canal Company had been incorporated by the 1st & 2d Geo. 4, and was empowered to avail itself of any waters along its line, and that it was made liable to give equitable compensation to all persons whose property should be injured by any such appropriations.

Mr. *Serg. Ludlow*, on the part of the company, now showed cause against the rule. He stated that the affidavit of Mr. *Vines* set forth that from the 7th of April, 1838, down to October, the water from his property, "*The Vest Mills*," had been at intervals withdrawn by the company, to his serious injury; that on the 9th of November last he had made an application to the representative officer of the committee of the company for compensation: that he was then told that a meeting of the committee was announced for the 26th of December, at which, however, it was not usual for any business to be transacted, and that there would be a subsequent meeting in the month of March, in this year, at which his demand might be taken into consideration. The act for incorporating the canal company had directed that, in cases where parties were dissatisfied with proffered compensation, the matter should be referred to a jury, provided

the complainant entered into a bond to pay the costs incurred if the decision of the jury should be adverse. This bond had been executed by Mr. *Vines*, on the 16th of December. No proceeding had been taken on the part of the company towards settling this question of remuneration, and Mr. *Vines*, therefore, thought proper to move the court for this rule in the month of January last. He submitted that, without going further into the case, there was not sufficient ground made out to induce the court to proceed to the extreme proceeding of issuing the *mandamus*. The committee of the company had not, in fact, refused to make compensation; nor could it be said to have neglected the application of Mr. *Vines*. He had been made aware that a really operative meeting of the committee would not take place till the month of March, and had thought proper, instead of waiting for that occurrence, to make the motion for this rule in Hilary term. This was not a mode of proceeding in which he could expect the concurrence of the court.

Mr. *Erle*, in support of the rule, submitted that the committee of the company had acted with an indifference to the claims of that gentleman which proved that they had no intention to remunerate him, if they could avoid doing so. By the act incorporating the company they were bound to make an offer of compensation. Here they had done nothing of the kind. The committee had not acted with fair dealing when they advertised a meeting for the month of December, which they did not intend should at all take place. Again, they could have met at any time, and all the trouble which they would have incurred in regard to this demand would have been simply to make an offer. Had Mr. *Vines* been discontented with that, it would have been for him then to have had recourse to a jury. It did not appear that, at the meeting in the month of March, any notice had been taken of Mr. *Vines*' claim. This appeared from the rule having been drawn up for Easter term after the month of March. No intimation whatever was given to the court to indicate any such conclusion.

COLERIDGE, J. said that following the case of *The King v. the Abergavenny Canal Comp.* (a) he should be compelled to refuse this *mandamus*. There it had been distinctly declared in the judgment of the court that a *mandamus* would not be granted, unless there had been a positive refusal on the part of the company to attend to the application made to it. In this case there had not been a refusal previous to the application to this court, to entertain the application of Mr. *Vines*, either directly or by implication. That person had not called for any special meeting of the committee of the company. In regard to there not having been any notice taken

of Mr. Vines' claim at the meeting in March, it might be said that the committee, finding that hostile proceedings had been resorted to, might consider itself justified in waiting to see the result of that step. The application for the *mandamus* was, in fact, premature, and it could not be acceded to.

Rule refused, but without costs.

### COMMON PLEAS, June .

*Sittings in Banco.*

CURTIS v. RICHARDS.

EVIDENCE.—An I O U for money—without an Address—Whether in the absence of evidence to the contrary the possession of the instrument is sufficient evidence of the holding party representing "U."

STAMP.—Whether such an instrument is a negotiable instrument and requires a Stamp.

Mr. Serjeant Bompas moved for a new trial in this cause, on the grounds of misdirection and for want of sufficient evidence of title in the plaintiff, to the instrument upon which the action was brought, which was to the following effect—

"Jan. 11, 1839.

"I O U £20.

"JAS. RICHARDS."

No payee appeared upon the instrument, the defendant refused to pay it when presented by the plaintiff, in whose possession it was, and the latter thereupon brought his action of *assumpsit* for money lent. The defendant pleaded *non assumpsit*, and the cause was tried at the London sittings after last *Hilary Term*, before MAULE, B. who directed the jury that, without evidence to the contrary, they must presume the I O U as having been given to the plaintiff by the defendant for money lent, of which it was sufficient evidence, and the jury accordingly found for the plaintiff.

Mr. Serjeant Bompas now contended that, if the position in which the learned Baron had put the evidence could be maintained, then the I O U became a negotiable instrument, and should have been stamped before admitted in evidence, and cited *Green v. Davis*. (a)

TINDAL, C. J. said—This is an instrument or contract in which only two persons can be made parties, viz. "U and I." The debtor or party making it represents "I," and the creditor or party presenting it for payment represents "U," and it is mostly given on the spur of the moment for a loan of money. I cannot think but that the case was very properly put to the jury, and that the Stamp Act has nothing to do with it. *Fisher v. Leslie*, (b) was a similar case, where there was no address upon the I O U, and no such objections were taken.—Rule refused.

(a) 4 Barn. & Cress. 242.

(b) 1 Esp. 426.

### CENTRAL CRIMINAL COURT—Oct. 19.

#### CASE OF THE EARL OF CARDIGAN.

OFFENCE OF DURLING.—First class of offences within the Statute 1 & 2 Vict. c. 85.

The RECORDER'S CHARGE to the GRAND JURY.

The RECORDER addressed the grand jury to the following effect:—His lordship observed that on looking over the calendar, he found amongst the parties committed for trial, there were several for cutting and wounding, forgery and uttering forged instruments, three for manslaughter, and one for murder on the high seas. Seven persons were also charged with insubordination on board a vessel on the high seas. Besides these, a number of prisoners were charged with larceny, but none of the cases appeared to be of a character to require any observations from him respecting them. Having so far disposed of the contents of the calendar, it now became his duty to refer to a case, or rather to two cases, in which the parties were not in custody, but had been bailed by the magistrate. The depositions in the case had, however, been returned to the court, and he could, therefore, make the observations that arose upon the facts detailed in them. The charge he alluded to was one where a hostile meeting or duel took place, and shots were exchanged, one of which took effect, and he was not aware that a similar case had ever before been laid before a grand jury, and it would, therefore, not be considered unnecessary that he should make a few observations upon it to them. The charge was framed under an act passed in the first year of the reign of her present Majesty, but up to the present time it had never occurred where fatal consequences did not ensue, that the parties were charged with felony, and such an offence had, consequently, never been made the subject of inquiry in a criminal court of justice. Still, however, it would be their duty, if they thought the facts clearly made out, and that they came within the statute which he should presently more particularly refer to, to return a true bill against the parties, and thus put the case on trial to undergo inquiry before the learned judges. The statute in question was the 1st Victoria, cap. 85, and by various sections different enactments were made. By the second section it was enacted, that whoever should administer poison, or stab, cut, or wound, or by any means whatever cause any bodily injury to any person, with intent to commit murder, shall be guilty of felony, and suffer death. This was the first class of offences, created by the statute. By the word "wound" there could be very little doubt that a shot or injury produced by a bullet was meant, as well as a cut or other description of injury. It was a comprehensive term, and the question here was, whether the case in question came within the letter, spirit, and intention of the legislation.

framing the statute. The next section to which he would call their attention comprehended the case where no wound had been received, but here there was still an attempt to commit murder by pulling the trigger of a pistol or endeavouring to strangle or suffocate any person, and where the party was guilty of felony, subject to transportation for life, or for a period of not less than fifteen years, or to imprisonment for any period not exceeding three years. The fourth section enacted, that any person who shall shoot or pull the trigger of any pistol with intent to aim and disable, or to do any person any grievous bodily harm, shall, on proof of the charge, be liable to transportation for life, or not less than seven years, or imprisonment for not more than three years; and it would be seen that in this section, although the intent was not to commit murder, still the punishment was the same as in the former section. He drew their attention to these sections to show that the offence alleged against these parties was of a most serious character, and subjected them to penalties of the most severe description; and they would therefore feel to be their duty to watch the case very closely, and see whether the facts of the present case really came within the meaning and intention of the statute. The seventh section referred to principals of the second degree. Accessories before the fact were punishable in the same manner as the principals, and accessories after the fact were only liable to a term of imprisonment. Lord Hale seemed to entertain a doubt, whether the second of a party injured in a hostile meeting was liable to punishment in the same manner as the second of his opponent, and he had made some valuable remarks upon the subject. The matter would therefore require to be considered with the greatest and most extreme caution. Still, however, if the facts laid before them clearly brought the case within the spirit and meaning of the sections of the act he had referred to, it would be their duty, however painful, to give effect to the law, and leave the consideration of the consequences entirely out of the question. On looking at the act called the Statute of Stabbing, he found that although the words there made use of were comprehensive enough to include a particular case, the spirit of the act was to be taken into consideration. Sir Michael Forster, in his valuable work on the subject, said that, where a case came within the meaning of the act, the party was charged with murder under the common law, and also under the statute, and where justification was shown, a conviction rarely followed. The Statute of Stabbing was passed to meet the case of persons carrying short daggers, &c., for the purpose of avenging any trivial provocation, and where it was shown that the party had committed the offence in the heat of the moment, he was held to be only guilty of

manslaughter, although the punishment was still of a most severe description. The Recorder then alluded to the work of *Mr. Sergeant Russell*, on crimes and indictable misdemeanors, and read various extracts applying to the case under discussion, and to cases of duels, where an ineffectual exchange of shots had taken place between the parties. The present case, however, differed very materially from the one he had alluded to, because, in the charge now under consideration, one of the parties had received his adversary's bullet. It was, moreover, a strange fact that, down to the present year, notwithstanding the many instances of parties meeting in the manner alluded to, no instance had occurred of the parties being prosecuted in a criminal court where no fatal consequences attended the duel. There was, therefore, no similar case to refer to as a precedent. It was, however, a general rule of law, that if one party should seek the death of another, in a private quarrel, he would be guilty of the crime of murder; if, however, two parties should meet, casually, and a quarrel ensued, and they fought upon the instant, or went into a field and fought at once, in the event of the death of either from the rencontre, the offence would only be manslaughter. In many cases of duel where death ensued, the jury had either only found the party guilty of manslaughter, or acquitted him altogether; but in all such cases it was very material to see whether the duel was a deliberate one, or whether it took place before the blood had time to cool. It appeared upon the depositions in the present case, that the ground was measured, and the parties took their places, and fired. One of the parties appeared to be a peer of the realm, but this did not at all affect them in the discharge of their duty, and if they thought it was clearly made out that it was a deliberate duel, and that there was an intention on the part of each to murder, or to maim and disable the other, then they would return a bill in the same way they would in an ordinary case. With regard to the seconds or accessories, it was his duty to tell them his opinion, that if they found the facts proved, the seconds were equally guilty. A difficulty had been felt in law in cases of this description, when an exchange of shots ineffectually had taken place, as to whether the offence came within the act of parliament, but here it was quite clear that one of the parties had been actually wounded. Having made these remarks he must request them to consider the case with great attention, and to remember that it was the duty of the prosecutor to prove the offence as charged against the parties, and if it did not clearly appear that there was an intention to kill and murder, they ought not to find the bill; and he might at the same time remind them that it did not of necessity follow that because parties went out to fight a duel, that they should intend to kill each other. While

making these remarks, he wished not to be understood as desiring at all to interfere with their privileges, but to impress upon them, in so novel a case, the necessity of a searching inquiry. There could be no doubt that under a false feeling of honour, the practice of duelling had been frequently resorted to, but in many cases solely from such feeling, but it was clearly illegal, and if the grand jury thought the facts were proved in the present case, as applying to the statute, they ought not to let any feeling of sympathy for the motives of the parties operate to prevent them from doing their duty to their country. The Recorder then proceeded to inform the grand jury that if, upon inquiry, they should consider the felony not to be clearly made out, the parties would still be liable to punishment for a breach of the peace.

October 20.

The Grand Jury returned a true bill of indictment against The Right Hon. James Thomas Brudenell, *Earl of Cardigan*, for FELONY, charging him with firing a pistol loaded with gunpowder and a leaden bullet, at and against *Capt. Harvey Garnett Phipps Tuckett*, with intent to murder him, or do him some grievous bodily harm.

The Grand Jury also returned a true bill of indictment against *Capt. John Douglas*, (the second of Lord Cardigan.)

The Grand Jury threw out the bills presented against *Capt. Tuckett*, and *Henry Maxwell Wainwright*, (his second).

October 22.

Mr. *Adolphus*, applied to the Court in reference to the case standing upon the list of parties for trial of *James Thomas Brudenell, Earl of Cardigan*, and said, your lordships are aware that Lord Cardigan, being a peer of the realm, cannot be tried in this court, and I have, therefore, in the first place to move that that name be expunged from the list of this court, as the trial of his lordship must come on before another tribunal.

BOSANQUET, J., the proper course would be to remove the indictment by a writ of *certiorari* to the House of Lords, and I am not aware that any order of this court is necessary.

Mr. *Adolphus*, that would, no doubt, be the course to be adopted, but his lordship was under recognizances to attend this court, and those recognizances ought to be discharged.

BOSANQUET, J.—The writ should issue before the recognizances are discharged.

Mr. *Adolphus*—There is some difficulty in the case, in consequence of the circumstance of the House of Lords not being now sitting.

ERSKINE, J.—The Lord High Steward may at once issue a writ of *certiorari* to remove the case to his court.

Mr. *Adolphus*—Very well, my lord. I also find at No. 8 on the list, the name of *John Douglas*. That gentleman is charged with the same offence as the noble earl, but as he is only a principal in the second degree, I have to suggest to your lordships that it would not be advisable that his trial should come on before that of the principal, and that it would be more convenient that Mr. Douglas's trial should not take place until after that of Lord Cardigan.

BOSANQUET, J.—I agree that it would be inconvenient, but as Mr. Douglas is under recognizances, to appear to take his trial, it will be necessary that something should be done with respect to those recognizances, and it would, perhaps, be better that all the recognizances should be respited until next sessions.

Mr. *Bodkin* for the defendants. Are we to understand, that whether the *certiorari* is issued or not, the recognizances are respited?

BOSANQUET, J.—Yes, I think so.

It was then arranged that the recognizances of both the defendants should be respited until the next session of the court.

#### NOTICE TO CORRESPONDENTS.

H. E. R. We do not pay for contributions (except Reports.) The contributions of our Subscribers (and they are of no common order) are quite sufficient to fill this paper, and an extra sheet besides, every week. We should not have given insertion to your last article had you ever mentioned the word *pay*. The subject we happened to be well acquainted with, and with some slight amendments, we complied with your wish.

E. A. We wish that we were able to thank you in sufficient terms for the great interest you take in this paper. We shall be most happy to adopt your talented suggestion.

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Printed by GEORGE NORMAN, at his Printing Office, 29, Maiden Lane, in the Parish of St. Paul, Covent Garden, in the County of Middlesex; and Published by JOHN RICHARDS, Law Bookbinder, 194, Fleet Street, in the Parish of St. Dunston-in-the-West, in the City of London.—Saturday, Oct. 24, 1844.

# The Legal Guide.

Vol. IV.]

SATURDAY, OCTOBER 31, 1840.

[No. 27.

Price Sixpence.

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## ACTION OF EJECTMENT.

ANSWER TO PROBLEM XV.—VOL. IV. By E. A.

EJECTMENT.—For what will this Action lie?

(Continued from p. 406.)

I. 1. An Action of Ejectment is the common remedy to recover land, manors, messuages, wastes and all other corporeal hereditaments whatever: and, also, all parts shares and estates therein, whether the same be freehold, copyhold, leasehold, or held according to any other tenure or tenancy, provided the action (except in a few instances,) is brought within twenty years next after the time at which the right to bring it first accrued to the person bringing the same: (3 & 4 W. 4. c. 27.) and therefore if a man being in the possession of such land, &c. and, having the legal right therein, be deprived of the enjoyment thereof, by another person who dispossesses or turns him out, and gets into, and obtains the possession, a remedy lies to regain the estate by the former, by means of the action of ejectment, which may be also maintained by a man in the possession of premises merely as tenant from year to year is forcibly expelled therefrom, because the law allows that priority of possession which was in him to be a sufficient title to support this action against a wrong-doer, disseiser, where the latter can shew no title. (*Doe v. Dyeball*, M. & M. 346.) and so

where a person obtains possession of premises by the consent of the rightful owner for a limited purpose, or from his servant in a fraudulent manner, and then excludes the licensor, and claims a title to the premises himself, the person from whom the possession was so obtained may maintain this action on proof of the consent or license only. (*Doe v. Baytop*, 3 Ad. & Ell. 188.) And in a case where one person had been in possession of land for upwards of twenty years, and another person had subsequently been in possession of it for a less time than such number of years, the former was held to be entitled to recover the premises by this action. (*Doe v. Cooke*, 7 Bing, 346.) But though the act 3 & 4 W. 4 c. 27, is retrospective, and attributes to past possession of the species contemplated by its provisions, the character and consequences of adverse possession, yet it must be so far qualified in construction as to exclude from its operation cases, in which the state of circumstances within its perview had existed for the full period requisite to complete the bar, but had ceased to exist before the passing of the act, and in which, therefore, the title had re-assumed its rightful aspect: thus, in 1807, A. seised in fee, put his eldest son B. into possession, which possession B. held as tenant at will to A. without paying any rent till B.'s death in 1831, when, of course, the tenancy determined. A. died in 1833, having devised the estate to trustees. On the trial of



an ejectment brought by the heir of B. who relied on the effect of B.'s possession in gaining a fee by force of the act, (ss. 2. 7.) to recover the possession from B.'s widow, who had held it since his death, a verdict was passed for the defendant, and the court refused to disturb it, observing that the monstrous consequences which would result from the construction insisted upon, shewed that it was not contemplated, for, according to that construction, whenever a party had held, as tenant at will, for a year, and had then continued in possession twenty years without paying any rent, he might at any subsequent time, after giving up the possession, claim title to the premises, and turn out his landlord: that the case would have been quite different if the tenant at will had continued in possession, but that here, after the possession had been long determined, it was contended that a fee simple arose by the passing of the act, which could not be. The result was, that no title whatever was acquired by means of the bygone possession of the tenant at will, (*Doe d. Thompson v. Thompson* 6 Ad. & El. 721. 1 Hayes Convey. 242.)

An ejectment may be maintained against a person who came into the possession lawfully, as under a negotiation for a lease, provided the tenancy at will, which generally in this and similar cases arises by construction of law, is determined by a demand of possession before the action is brought. (*Right v. Beard*, 12. E. 210.) But anything equivalent to a demand of possession will be sufficient to determine these estates at will, so as to entitle the owner of the premises to support an action for their recovery, thus, a threat "to take measures to recover possession," has been deemed sufficient for that purpose. (*Doe v. Price*, 9 Bing. 356.)

Where a man is entitled to the possession of land, &c. after the determination of some partial or prior estate created therein in favour of some other person, and such last mentioned person, or those claiming under him, neglect or refuse to deliver the possession of the premises to the party entitled thereto, after the determination of the prior estate, the latter can enforce his right by means of an action of ejectment. As an instance,—where A. being entitled to land for an estate in fee simple, or for such other estate as will enable him so to do, grants a lease to B. to hold for the term of twenty-one years, or for the term of his natural life. Now, if in the one case, B. himself, or, in the other, B.'s representatives, at the expiration of the term, or at his death, retains the possession from A. the latter will be entitled to recover it by this action. So if A. being entitled as above mentioned, conveys to B. to the use of C. for the term

of twenty-one years, or for the term of his natural life, and after the determination of the estate so conveyed to the use of C. to the use of D. and his heirs, and C. in the first case, or his representatives in the second, refuses to quit the possession when the prior estate shall have been determined, then D. may enforce his right by an action of ejectment.

And, in general, where a man in possession of lands, &c. in his own legal right, is by any means removed therefrom, and kept thereout, by any other person, and no specific statutory or other remedy exists for recovering the possession, this action may be said to lie, as being the only specific general remedy for recovering the possession of land and other hereditaments corporeal.

2. As regards the recovery of possession by a landlord as a general rule, I may observe that in all cases where a tenant from year to year, or for any greater or less period, refuses after the usual or conventional notice to quit has been given, or the tenancy has expired by effluxion of time to deliver up the possession to his landlord, the latter may maintain an action of ejectment for the premises against the tenant, on proof of the tenancy and its determination, by notice to quit or effluxion of time, in which action the tenant cannot dispute his landlord's title to the premises.

If the tenant forfeit his term by the non-payment of rent, the landlord may proceed to recover possession of the premises by ejectment, but in these cases a distinction must be observed: first, where the tenant leaves a sufficient distress upon the premises to answer the amount of the rent due; and, secondly, where there is not such a sufficient distress, because if there is a sufficient distress on the premises before the landlord can bring an action of ejectment, nay, before the forfeiture is incurred, unless there is a mutual understanding to the contrary, a demand of the rent must be made on the premises. For forfeitures are not favoured by the Common Law, and it therefore requires great strictness to be observed in cases of this description. The necessary formalities will be found particularly in 4 Western's Conveyancing, 25. n. (a.) and see also Archb. Pract. by Chitty, Ed. 7. 773. But if, upon search, there is no distress to be found upon the premises, then the landlord may proceed to recover the possession by an action of ejectment, under 4 G. 2. c. 28. which enacts that in all cases between landlord and tenant as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right by law to enter for the non-payment thereof, and where, by the express terms of the lease, a right of entry has been reserved, such land

lessor may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the premises, and recover them therein, provided no sufficient distress was to be found on the premises, and unless the tenant pays the rent and costs within six calendar months, he is to be deprived of all relief at law, or equity, and the tenancy is absolutely determined; although the lease expressly requires lawful demand, no demand is necessary to proceed under this act, the service of the declaration being substituted for such demand. Arch. 774. See *Doe d. Mayhew v. Ashly*, 9. reported ante vol. 2. p. 40.

For enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants, an act was passed in the first year of the reign of Geo. 4. (c. 87.) which enacts that where the term or interest of any tenant holding under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years, certain, or from year to year, shall have expired, or been terminated by the landlord or tenant by regular notice to quit, and such tenant, or any one claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made thereof, the landlord may thereupon proceed by Action of Ejectment for recovering the possession, addressing a notice to the tenant at the foot of the declaration, requiring him to appear on the first day of the next term—to be made defendant—I find bail if ordered, as mentioned in the rule.

If the tenant appears at the day prescribed, neglecting to appear then, after affidavit of service of the declaration and notice: on producing the lease or agreement, or a counter-let or duplicate thereof, and proving its execution, and on proof of the enjoyment of the premises under the lease or agreement by affidavit—that the tenant's interest has expired or is determined—and, that the possession has not been demanded, the landlord may move for a writ *nisi* why the tenant should not besides entering into the common consent rule, under which that in case judgment shall pass for the plaintiff, to allow judgment to be entered up against him, as of the term next preceding the day of trial, and also why he should not enter into cognizance with two sufficient sureties to pay costs and damages. If cause is not shewn against the rule, or on cause being shewn it is made absolute, then if the tenant conforms thereto the landlord will be entitled to judgment. On the trial of an action under this act, the consent rule is evidence of lease, entry, and ouster, and in case of the tenant's default, the jury may give the plaintiff damages

for mesne profits down to the time of verdict, or to some preceding day, but the judge may stay execution until the fifth day of the next term absolutely, if he considers the verdict contrary to evidence.

If the landlord, proceeding under the statute, gets non-suited, or a verdict passes against him, he will be liable to double costs.

It would be beside my present purpose to notice the decisions of the Courts on this statute other than by referring to the last edition of Arch. Pract. where the most material of them will, I believe, be found. I therefore proceed to notice another Act passed by the Legislature in favour of landlords, (viz.) the 1st W. 4. c. 70. before the passing of which, if the tenancy expired, and the right of entry accrued on or after the first day of Hilary term, or on or after the first day of Trinity term, the cause could not be tried at the following assizes, this was occasioned by the necessity of serving the declaration prior to the commencement of the term, and owing to this, landlords were frequently kept out of their property some time: but this statute, in substance, enacts that in Actions of Ejectment by landlord against tenant, or persons claiming under him, where the tenancy expired, or right of entry accrued in or after Hilary or Trinity term, the lessor of the plaintiff, within ten days after such expiration or accrual, may serve a declaration entitled of the day (whether in term or vacation,) next after the day of the demise in such declaration, and subscribe a notice thereto, requiring the tenant to appear and plead within ten days, and proceedings may be had as if the declaration had been served before the preceding term. The statute, however, contains a proviso that no judgment shall be signed against the casual ejector, until default of appearance and plea within such ten days, and that six clear days notice of trial shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried. And that at any time before the trial a Judge may, on summons and order, give further time to plead, stay, or set aside proceedings, or postpone the trial till the next assizes, (sec. 39, see Arch. Pr.)

A landlord may waive his peculiar privilege of proceeding to recover possession of premises under these acts, and may proceed as in common cases of ejectment.

As to the maintaining of this action against a tenant for forfeiture, vide infra subdivision 5.

3. A mortgagee having the legal estate, may, without prejudice to his other remedies, as soon as the mortgaged estate becomes absolute at law, maintain an action of ejectment against the mortgagor in possession, in which the only proof required will be the execution of the

mortgage deed, a previous demand of possession being unnecessary: but, if the mortgagee treats the occupier under a demise made since the mortgage, as his tenant, it will be advisable to give him a notice. A stipulation under which the mortgagor would be entitled to hold until a day certain, as in the common case of a covenant by the mortgagee that the mortgagor shall hold until default in payment of the mortgage money, at the expiration of the six months, operates as an actual demise to the mortgagor by the mortgagee until that day. A mortgagee bringing an action of ejectment against a third person claiming under a pre-existing title to the mortgage, must shew a legal right to oust him, as in the case where a person held as tenant from year to year, at the time of the mortgage; here, before the mortgagee can recover the possession from the tenant, he must shew the tenancy to have determined by notice to quit, and if circumstances concur whereby the tenant becomes tenant to the mortgagee, as by a continual payment of rent to him, the mortgagee will *ipso facto* become the landlord of the premises, and be entitled to pursue the special remedies I have previously noticed. (See Rosc. Ev. N. P. 457.)

4. A vendor of real property, who permits the assumption of the possession thereof by the purchaser or vendee, prior to the completion of the contract whereby the purchaser becomes tenant at will to the seller, the latter may be ejected by the former, but it will only be on a demand of the possession, unless when the purchaser entered into possession he agreed to quit it if he should not pay the purchase money on a given day, or the like, in which cases an Action of Ejectment will lie without notice, or a demand of possession on non-performance of the agreement, which operates as a clause of re-entry on breach of a covenant in a lease. (See 1 Sug. V. & P. 378.) On this principle, if possession be given to a vendee upon payment of part of the purchase money, and interest is paid on the remainder, twenty years possession by the purchaser is no bar to the action, because the rule construing such a possession as a tenancy prevails, and where a purchaser whom the vendee lets into possession refuses to complete the purchase, and assigns his interest, the assignment determines the will without demand, (see *Ib.*)

Possessions under agreements for leases, &c. being purchases, *pro tanto*, are reducible to the same rules, and so of cases of possession under a void or imperfect conveyance or lease, or during a negotiation for a new lease, by an original termor. In cases of this and the like description, where a party comes into the possession lawfully, he cannot be ejected until such possession is determined by demand thereof, by the breaking off the treaty, or in some other manner;

and the letting into possession, not the agreement, constitutes, in these cases, the making a tenancy at will, in preference to considering the party as trespasser, which he would otherwise be. Where the vendor of a term before all the purchase money was paid, agreed with the vendee that he should have possession of the premises till a given day, paying the reserved rent in the mean time, and that in case he did not pay the residue of the purchase money on that day, he should forfeit the portion he had already paid, and not be entitled to an assignment of the lease. Lord Ellenborough held that the agreement operated like a clause of re-entry in a lease on a breach of covenant, and that the residue of the purchase money not being paid at the appointed day, the vendee's interest ceased and he might be ejected without any notice. (*Doe v. Sayer* 3. Camp. 8.) And if a third person under such circumstances has come in as tenant to the vendee, ejectment may be maintained against him without notice. (*Doe v. Boulton*, 6 M. & S. 148.) So where a man gets into possession of a house without the privity of the landlord, and the parties afterwards entered into a negotiation for a lease, but disagreed about the value of the fixtures, the same learned Judge was of opinion that if this was a tenancy of any sort, it was a tenancy at sufferance, and a notice to quit was unnecessary. (*Doe v. Quigly*, 2. Camp. 505. Et vide *Doe v. Lawder*, 1 Stark. 308. 2. B. N. C. 749. Rosc. Ev. N. P. 436 et. Seq.) But the opinion does not seem at all to harmonize with the received definition of a tenancy by sufferance. In the principal case, the party evidently entered into possession adversely, and without any title whatsoever. He, therefore, it would seem, could not come within Blackstone's definition of a tenant at sufferance. "Where one comes into possession of land by lawful title, but keeps it afterwards without any title at all" (2. com. 150, and see also Watk. Conv. 2. 8 ed.) it would seem more proper if he had been treated as a trespasser under these circumstances *ab initio*.

5. The rights and privileges of a lessor in bringing an action of ejectment have been partially considered under some of the previous subdivisions which I have adopted in my answer. What, therefore, I am now more particularly to direct my attention to, is the maintenance of this action by a lessor for forfeiture, &c.

Disclaimer confers on the landlord an immediate right of ejecting the lessee or tenant from the premises, which he refuses to acknowledge as the property of the landlord, and so will breach of covenants or conditions, but the forfeiture in these cases is waived in a variety of means, and clauses conferring a right of re-entry superadded.

forfeiture express or implied, are generally on account of the averseness of the law to forfeitures, construed strictly, and in these cases of ejectment the tenant or lessee may obtain particulars of the breaches which are to be laid to his charge.

6. A tenant, by elegit, or, in other words, an execution creditor, obtains from the sheriff, in the first instance, legal possession of his debtor's lands only, (or rather a right of entry,) and not actual possession. If, therefore, the execution creditor cannot obtain the actual and sought for possession of their lands without force, he should proceed with the ordinary remedy by ejectment, Arch. P. 447,) which he will be entitled to maintain on proof of the judgment. The elegit taken out upon it, and the inquisition and return thereupon, (B. N. P. 104); and in case of his victory before the debt be wholly levied, he may recover the premises again by ejectment.

7. A lord of a manor being disseised thereof, may have recourse to the common remedy by ejectment to recover it, and an action of ejectment lies as well for a moiety of a manor as for the whole, (Woolrych on Commons. 199.)

Waste is an injury to the Lord for which this remedy by ejectment will lie at his suit to recover the *locus vastatus*, (*Doe v. Clement*, 2 M. & S. 68.) And as a wrong without a remedy is abhorrent to the laws of England, a remedy by ejectment lies for the lord of a manor to enforce and uphold his customary right of reassuming the estate on its escheating or becoming forfeited by some of the long list of tenurial offences incident to this species of property, and which will be found detailed in 1 Wat. Co. 390, *et seq.*, and are in the eye of the law wrongs to the Lord.

8. The widow of a copyhold tenant may maintain ejectment for her free bench, where the custom of the manor acknowledges and permits that estate, and then to such extent only as the special custom of the manor warrants, and she may maintain this action anterior to admittance unless her claim be made in the nature of dower, for in the latter case the ejectment will not lie before assignment in case of a refusal, to which end she must levy a plaint in the nature of a writ of dower in the Lord's Court, (2 Wat. Co. 59)

II.—1. Parties claiming lands, &c., *jure representationis*, as heirs at law, and executors or administrators may maintain this action for the premises, which, in default or account of the defective nature of a testamentary disposition by the last proprietor, devolves upon them as the persons marked out by the known rules of law as successors to the property. And first, of the heir at law. He may by this action recover the possession of such property as the law transmits to him, not only in cases of abatement, but in all other cases where the premises, of which his ancestor

had been seised, or of which he had had what was equivalent thereto in those instances wherein seisin was unnecessary, were withheld from such ancestor. But the late Act for amending the law of inheritance has abolished the maxim *non jus sed seisinam facit stipitem* from the 31st December, 1833, by enacting, that in future, descent shall be traced from the purchaser as defined in the interpretation clause of the Act. Secondly, of an executor or administrator. All terms for years being personal estate, vest in the executor or administrator of a deceased proprietor immediately on his death, and this class of representatives may maintain an action of ejectment for the recovery of the leasehold estates of their testator or intestate, when he is ejected in his lifetime, or where the possession has been wrongfully detained from them since his decease, on proof of the testator or intestate's title and death, and their admission to administration of his goods, chattels, and effects. It also seems that an executor may maintain an action of ejectment for an ouster of the testator, although he were seised in fee, because in such a case the executor may proceed in this form of action for damages only, in the same manner as a lessee, whose lease expires *pendente lite*. (See Comyn's Dig. Administrator, B. 10; Toller on Executors. 158, 434.)

2. A devisee of freehold property may maintain this action to gain possession of the premises devised to him in case the heir at law or any other person after the devisor's death intrudes or remains in the premises adversely to the possession of the devisee, and in an action of ejectment, by such devisee, he will be required to prove in cases where the devisor died, previously to the first day of January, 1838, the title of the devisor, his seisin in fee both at the time of making the will, and at the time of his death, unless being disseised previous to the execution of the will, he re-entered between the date thereof and the time of his decease. He will also have to prove the regular and due execution of the will, and that by production of the will itself, unless it be lost: the death of the testator and the determination of prior estates (if any) were limited to take effect previous to the interest devised to him. In actions of ejectment, however, by devisees, where the devisor died subsequently to the first of January, 1838, instead of proving that he was seised in fee, it will be sufficient to prove that he was *entitled* to the estate devised, that is, to the property in dispute, either at law or in equity, at the time of his decease; 7 W. 4, & 1 V. c. 26, s. 3.

Where a devisee was also heir at law to the devisor, and elected to take the property in the latter character, it was held that this was not such a disclaimer as prevented him from afterwards main-

taining this action as devisee. (*Doe v. Smith*, 6 Barn. & Cres. 112.)

A devisee of copyhold lands claiming under a will made antecedent to the first January, 1838, can maintain an action of ejectment to recover the possession on proof of seisin in the devisor, a surrender to the use of will when necessary, and the will itself, which it is said was not before the late statute necessarily reducible into writing. (1 Wat. Co. 130.)

3. Trustees, when the requirements of the trusts conferred upon them, renders it necessary for them to take the legal estate for certain definite purposes, may maintain an action of ejectment to recover the possession of that estate in case it is withheld from them, and they will be considered as the proprietors of the estate at law, according to the quantity of the estate conferred upon them in respect of such trusts, and as a plaintiff in this action must prove a legal title, it is always when the equitable owner of an estate seeks its recovery thereby, to use name of the trustee in whom the legal estate is vested.

Under this division it remains to be noticed, first, that the assignees of bankrupts and insolvents are invested with the same remedies, by action, for all civil injuries with respect to property or estates which has passed to them by virtue of their appointment, as the bankrupt or insolvent had in case they had not become such. See Arch. B. by Flather, 354; Arch. Ab. of Imp. for Debt Act, 76: it, therefore, I apprehend follows, that in such cases these assignees may as well bring an action of ejectment to recover possession of real estates to which the bankrupt or insolvent is entitled, as of such as are withheld from them; and, second, that a corporation may also sue in ejectment, the declaration necessarily alleging a devise by deed, proof of which is not however required. (*Furley v. Wood*, 1 Es. 198.)

4. A guardian in socage may maintain an action of ejectment to recover possession of premises to which his ward is entitled, and from the possession of which he is deformed by a person having no title thereto. (*Osborn v. Carden*, Plow. R. 293; *Wade v. Baker*, 1 Lord R. 131.) and so may a guardian appointed by deed or will under the Statute 12 Car. II. c. 24, ss. 8, 9, and to enable a guardian of an infant copyhold tenant to perform the duties relating to the customary estate, it seems reasonable that amongst the other powers with which he is by custom invested that of bringing an action of ejectment should now exist. (See 2 Wat. Co. 2. 76. *et seq.*)

5. An action of ejectment is sometimes necessary by or against a number of persons bearing a relation by unity of possession at the least to each other, and it is occasionally a means of litigation

between persons themselves having a connection in title or tenancy in the very premises to obtain some interest in which their judicial contest is directed. These cases are divisible into three classes, and first, of joint tenants. In actions by joint tenants against strangers, they may allege the fictitious demise to have been joint or several, and will be entitled to recover on the same title as persons *sui juris* individually. One joint tenant may maintain this action against another when his partner keeps him out or deprives him of his share of the possession or profits; second,

Of coparceners, these may maintain ejectment under precisely the same circumstances as joint tenants may, whom they most resemble; but, thirdly, there is a distinction between these two and

Tenants in common, inasmuch as the fictitious demise by this species of owners must be several. (*Doe v. Errington*, 1 Ad. & Ell. 750) in other respects except the instance which I am about to notice, the action is governed by similar principles. It is, however, to be borne in mind that in an action of ejectment by one joint tenant or coparcener against another, a judge will, on application, order that the defendant be only called upon to admit by the consent rule the fictitious demise and entry. Thus leaving the plaintiff to prove an actual ouster, but this privilege extends not to tenants in common, and is moreover subject to a proviso that the plaintiff's title as joint tenant or coparcener is not disputed. (*Doe Ginger v. Roe*, 7 Taunt. 397. See *Doe v. Cuff*, 1 Camp. 173; *Anon.* 7, Mod. 39; *Doe v. Roe*, 4 Dnt. 628.)

6. A Commoner lawfully seized of an appurtenant or appurtenant common is in a situation to proceed against all parties who molest him in the enjoyment of his rights, and where he is dispossessed or ousted from such a common, his remedy (*inter alia*) is by an action of ejectment, which is now the usual proceeding where the mischief has accrued within twenty years; but if the common be a common in gross, an ejectment will not lie because the sheriff can give no possession of it. (See Woolrych on rights of Common, 224, *et seq.*)

Another possessory action, and the one most usually resorted to in questions relating to common rights, is an action on the case for disturbance of common. (See Ros. Ev. 357.)

7. An obstruction to a highway is generally a public nuisance, and as such remediable by indictment or information; but it is also a grievance, for which, upon some occasions an action will lie. For instance, the owner of the soil of a way has a right to all above and under ground save only the right of passage for the king and his people. If, therefore, a nuisance be erected upon the road, the owner may maintain a posses-

ry action to recover his rights, and accordingly where an encroachment had been made by building a wall, the plaintiff was allowed to maintain ejectment, and the difficulty presented to the court, that the sheriff could not give possession of the highway, was answered by their observation, that he would give it subject to the easement. Woolrych on Ways, citing *Goodtitle v. Sher*, 1 Burr. 133.

8. A parson may maintain an ejectment to cover possession of the parsonage house, glebe, and tithes on proof of presentation, institution, and induction; he may also maintain an action of ejectment against a tenant of the glebe land, in the same manner as other landlords, and possession of a church is recoverable in this action under the term messuage. See Ros. Ev. N. P. 59; Salk. 256.

9. The possession of property belonging to a  *feme covert*  is, of course, recoverable in the same manner, and subject to the same remedies as that of other persons; but as she cannot, except in certain instances, sue alone, it follows that her husband must be joined with her in nearly all actions brought in respect of his wife's property. But if the husband and wife are ejected for a term, and the husband bring an ejectment in his own name only, the term on his recovery of it will vest in the husband, and he may thenceforth treat it as his own. (See Toller on Executors, 215.)

10. Parish officers are entitled to hold lands as a corporation, by virtue of the 59 Geo. III. c. 12, s. 17, which enacts, "That all buildings, lands, and tenements purchased and hired by churchwardens and overseers for the purposes of the Act, shall vest in such officers for the time being as a corporation;" it, therefore, results that these officers maintain ejectment for such property as vests in them by virtue of the Act, in much the same manner as other individuals as respects title, &c.

That this act is not confined to lands held merely for the benefit of the poor, appears from a judgment of Lord Tenterden, in a case where the demises were in the names of the parish officers; and where the tenements were certainly held for *parish* purposes: and, as contended by the officers vested in them by this act. But the defendants contended that the statute was inapplicable, and urged two reasons in support of their objection; the first was because the persons in whom the legal estate was vested were trustees only: and second, that they were held for the benefit of the Church and not of the poor. Lord Tenterden observed, that as to the first of these objections, we are of opinion that there is nothing in the act of parliament to limit the right of persons who fill the situation of parish officers; and it would be highly inconvenient to

give the act so limited a construction. It is often difficult for persons who claim under an ancient trust (where the trustees are numerous,) to show who was the survivor of those trustees; and if they should succeed in ascertaining that fact, it will not be less difficult to show who is the heir at law of that survivor. Upon the second point, his lordship thought that the safest course would be, to give full effect to the generality of expression used in the 17 sect. and nothing appearing to show that that which was held for the benefit of the church under these circumstances did not require the assistance of the act as well as that which was held for the benefit of the poor, and the difficulty in both cases being the same, the Court saw no reason to doubt that the operation of the act was intended to be co-extensive with the mischief. *Doe d. Jackson v. Hiley*, K. B. 1830. Vide other cases on this act in 1 Ch. Col. H. n. (9) et vide *Doe d. Higgs et al. (P. O.) v. Terry*, et al. 3 Nev. and Man. M. C. 385, and same *v. Cockell et ux.* Id. 583.

In concluding this brief outline of the remedy by an ejectment, it remains only to be observed, that an action of ejectment may be brought again and again virtually, by the same person claiming by force of the same right, for the foundation of the action being in modern practice, an imaginary lease entry and ouster, which may all be feigned at the pleasure of the litigant; (1 Hay. Int. Con. 229.) and it may, therefore, be found expedient to provide some check more efficient than the dilatory and discretionary interference of the Court of Chancery, or the peril of costs upon litigation between opposing claimants, which, if it commence early in the period of limitation, may from malice, obstinacy, or other motives, be pursued to a ruinous extent. (Id. 238.) But upon the application of a defendant in ejectment, the Court or a Judge will stay the proceedings until the costs of a former action are paid; although the first action was not between the same parties, but by the father of the present lessor of the plaintiff against the present defendant's father; or by an insolvent, the present ejectment being by his assignees: and even although the present action be not for the same premises, provided it be upon the same title. (Arch. Pr. 990. et seq.)

The consequence of the abolition of real actions without substituting any other mode of specifically enforcing a legal title to real property is, that this country is the only part of the civilized world, in which no direct means exist of recovering this important species of property. (1 Hayes Int. Con. 229. n.)

I am, Mr. Editor,

Your's most obediently,  
E. A.

## EXECUTORY DEVISES.

## ANSWER TO PROBLEM 19, VOL. IV.

*What is an Executory Devise?*

BY J. A. M.

(Continued from page 405.)

It is now finally settled that a limitation by way of Executory Devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person, is a valid limitation. *Secus*, if to the term in gross of twenty-one years be added the number of months equal to the period of gestation, but such period of gestation is to be allowed in those cases in which the gestation exists. 10 Bing. 140. In the House of Lords; and see *Bengough v. Edrige*, 1 Sim. 173.

When once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations became void, and the whole interest is then become vested. *Fearne's Exec. Dev.* 4 Edition, 415.

The number of contingencies for an Executory Devise is not material, if they are to happen within the limits above mentioned. *Thelusson v. Woodford*, 4 Ves. 319, affirmed 11 Ves. 112, for in such a case all the candles are lighted, and burning out at the same time. Per Twisden. But a bare possibility that an estate may vest within such prescribed period is not sufficient. In *Griffiths v. Vere*, 9 Ves. 134, the Court held that an Executory Devise, which may postpone the vesting beyond lives in being, and twenty-one years, &c. cannot be supported on possibility that the estate may vest sooner.

In the great case of *Thelusson v. Woodford*, *supra*, it was held, that a testator might direct the rents and profits of an estate whereof an Executory Devise is made, so that they should accumulate till the time when such estate becomes vested, and that the period within which executory interest must vest was applicable to a trust for accumulation. In this case it was calculated that before any part of this property could be touched under the trusts of the will, it would have accumulated to the amount of above £30,000,000? The Judges nevertheless, held, that the will was good, the period of accumulation being within the limits prescribed for the vesting of Executory Devises. To prevent wills of so singular and improper a kind being made in future, the Legislature passed the statute 39 & 40 G. 3, by which it is

enacted, that a testator may create a trust for accumulation, to last during the following periods.

1st.—During his own life.

2ndly.—For twenty-one years from his own death.

3rdly.—During the minority of any person living at his death, or then in ventre sa mere.

4thly.—During the minority of any person who for the time being would be entitled to the rents, &c. if of age.

A testator may adopt any or each of these periods if such is his wish.

The statute excepts from its operation—1st. Provisions for payment of debts—2ndly. Provisions for raising portions—3rdly. Provisions touching the produce of timber.

It has been decided that the time for accumulation may be apportioned. So that a part of a trust may be sustained, though part is void as contrary to the statute. *Griffiths v. Vere*, 9 Ves. 127; 12 Ves. 295. *Vide* observations on this act by Mr. Preston, in the notes to *Fearne's Cont. Rem.* by Butler, p. 238.

A consequence of thus circumscribing the limits of Executory Devises is, that it is not lawful to limit an Executory Devise on a general and indefinite failure of issue. 1 Salk. 232. If however, the failure of issue is restrained to the death of any person or persons actually living, or to any period not beyond a life or lives in being, and twenty-one years, with few months beyond, then the contingency is good, and the Executory Devise has its lawful effect.

The words "dying without issue," (with certain exceptions) as to a freehold were held to mean a general failure of issue. Therefore an Executory Devise to the heirs of A.'s body by a second husband, on failure of issue by the first now living, was too remote a contingency and therefore void. *Goodman v. Goodright*, 2 Burr. 870; 1 W. Black, 183.

A devise over to J. W. &c. and their heirs each in due succession as named with usual limitations in failure of issue, in and on the decease of A. B. does not import an indefinite failure of issue in A. B., but the limitation over to J. W. &c. is good by way of Executory Devise, these words meaning issue living at the death of A. B. the first taker. *Stratford v. Powell*, 1 Ball. & B. 1.

But though in general a devise after a general failure of heirs or issue is void, yet this rule admits of some exceptions.

First.—Where a person who is entitled to a reversion expectant on the determination of an estate-tail, devises the lands to another after failure of issue of tenant-in-tail; this is held an immediate devise of the rever-

sion, and therefore good. *Badger v. Lloyd*, 1 Ld. Raym. 523; 1 Salk. 232.

*Secondly*.—A devise in default of issue of the devisor, which has been construed to be a conditional devise, to take effect at the death of the testator, and has therefore been held to be executory. *Willington v. Willington*, 1 Bl. Rep. 645; *French v. Cadell*, 3 Bro. P. C. 257.

*Thirdly*.—A devise over for life to a person in *esse*, to take effect on failure of the issue of a first devisee, may be good; because the future limitation being only for the life of a person *in esse* it must necessarily take place during that life or not at all; and therefore the failure of issue in that case is confined to the compass of a life in being, Fear. Ex. Dev. 279; *Doe v. Lyde*, 1 T. R. 593.

*Fourthly*. That an estate tail is raised by implication in the person on the failure of whose heirs or issue the estate is devised over: in which case the second devise is supported as a remainder, expectant on the determination of such prior estate tail. *Walter v. Drew*, Com. Rep. 672.

But with respect to executory devises of terms of years, or other personal estate, the Court of Chancery, before the passing of the act mentioned in the next paragraphs used to lay hold of any words in the will, so as to construe the words "dying without issue" to mean such issue as were living at the time of the first devisee's decease, the reason of which difference in the case of personalty was, in order to support the devise over which would be otherwise too remote. *Forth v. Chapman*, 1 P. Wms. 48. 3 P. Wms. 261. 2 Ves. 616. Ibid. 180.

Innumerable questions have arisen on the meaning of the above words, and it will be sufficient at this time to mention some of the cases in which they have arisen. *Tilbury v. Tarbut*, 3 Atk. 617. *Bennett v. Tankerville*, 19 Ves. 178. *Walter v. Drew*, supra. *Dansey v. Griffith*, 4 M. & S. 61. *Alcalm v. Taylor*, R. & M. 416. *Pepine Ferard*, R. & M. 378. But now by the 4 Wm. 4 & 1 Vic. c. 26. s. 29. it is enacted "that in any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure, unless a contrary intention shall appear by the will, by reason of some

person having a prior estate tail, or of a preceding gift being without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise. *Provided* that this act shall not extend to cases where such words as aforesaid, import, if no issue described in a preceding gift shall be born, or if there be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Under an executory devise of the residue of real and personal estate, the intermediate rents and profits of the real estate, pass as well as the interest of the personalty, *Geary v. Fitzgerald*, 1 Jac. 468.

Where there is a bequest over of chattels personal, the mode of preserving them to the second legatee was formerly by compelling the first legatee to give security for the safe forthcoming of the property at the time of his decease, but the present practice is to procure an inventory signed by the first legatee, which is deposited with one of the Masters in Chancery.

Contingent and executory interests in freehold terms of years, and other chattels, are devisable, *Seaven v. Blunt*, 7 Ves. 294. *Veary v. Pinwell*, 44. assignable; *Kimpland v. Courtenay*, 2 Freem. 250. 2 P. Wms. 608. may be released, 10 Co. Rep. 46. b.; and are descendible and transmissible to heirs and executors, *Gurnel v. Wood*, 8 Vin. Abr. 112. *Goodright v. Searle*, 2 Wils. 29. J. A. M.

#### PROBLEM XXVII. VOL. IV.

##### VENDOR AND PURCHASER.

In what cases will Equity enforce the specific performance of a Contract, with a compensation for misdescription, and where not?

#### NOTICE TO SUBSCRIBERS.

THE EDITOR being enabled to leave his bed will resume his Editorial duties in the ensuing week.

#### Law Reports.

##### ROLLS' COURT.—June 1.

THE SOCIETY FOR THE ILLUSTRATION AND ENCOURAGEMENT OF PRACTICAL SCIENCE v.

ABBOTT.

JOINT STOCK CORPORATION.—DEMURRER for want of Equity and want of parties overruled.

This Bill was filed by the Incorporated So-



*ciety for the Illustration and Encouragement of Practical Science* against Peter Harris Abbott, John Strettell Buckwood, John Shaw, and Ann Charlotte Watson, the three former of whom, in conjunction with Ralph Watson, deceased, were the original projectors of the institution. The Bill stated that it was at first intended to be a commercial speculation, and it was contemplated to form a partnership, which was to consist of themselves and such other persons as should be desirous of joining them. Accordingly, in 1832, the projectors of the institution obtained from William Herbert a lease of the premises now known by the name of the Adelaide Gallery; and after the opening of the gallery to the public, the projectors were desirous that Thomas Telford, deceased, and Francis Giles, should become partners, which they refused to do, unless they were secured from all liability on account of the undertaking, beyond the amount of their interests. To effect this, on the 13th of October, 1834, a charter of incorporation was granted to the projectors, and also to Thomas Telford and Francis Giles, together with such other persons as had become or should at any time thereafter become subscribers to the capital or stock of the society thereafter mentioned, or possessed of or entitled to any share thereof, by the name of "The Society for the Illustration and Encouragement of Practical Science," by which name it was declared the Society should sue and be sued, and that it should have perpetual succession and a common seal.—It further declared that the capital of the society was to be £20,000. which was to be divided into 400 shares of £50. each. These shares were to be transferable, and a power was reserved to the Society of increasing this capital to £40,000, in similar shares. The charter then provided for the general meetings of the Society; and for the appointment of managers, who were to possess five shares at least, and declared that three of them should be a quorum; and that Telford, Abbott, Brickwood, Shaw, Watson, and Giles should be the first managers; and that the managers should hold councils, for the purpose of directing the affairs of the Society; and that such councils should have power to enter into all contracts on behalf of the Society, and generally to do all acts to which the corporate seal was required to be affixed, which should be as binding upon the Society as if the same were done by the whole corporation. The bill then alleged that at the time when the charter was granted, neither Telford nor Giles were proprietors of any shares, though they had each agreed to take five on the granting of the charter; but that Abbott, Brickwood, Shaw, and Watson were then the only persons interested therein. That shortly after the grant of the charter, the last four named persons agreed to appropriate amongst themselves

the whole of the 400 shares into which the capital of the Society was to be divided, and to resell the same for their private benefit, charging themselves with the whole capital of £20,000; and, as the managers of the Society, they adopted, on behalf of the Society, the purchases and expenditure previously made by them in establishing the institution, and credited themselves in account with the Society for the sum of £16,000. in respect thereof, and paid £4,000. cash into the hands of the bankers of the Society, (Messrs. Smith, Payne, and Smith;) that, until February, 1835, Abbott, Brickwood, Shaw, and Watson exclusively managed the affairs of the Society; and that no council of managers was held before the latter part of January, 1835, nor any general meeting until the 18th Feb. 1835, previous to which latter period about 160 shares had been sold, besides a certain number of shares which were entered in the books of the Society in the names of the wives of Abbott and Brickwood; that at this general meeting Brickwood made a statement to the shareholders, to the effect that he and the three other original members of the Society had expended £16,000. in establishing the Society, and in the purchase of models, philosophical and other instruments and effects, and that there remained £4,000. in the bankers' hands. That a resolution was passed approving of what had been done; and that a statement to the above effect had also been afterwards caused by Brickwood to be entered in the journal and ledger of the Society by its secretary. That the Society continued to flourish, and considerable dividends were paid until 1839, when it was discovered that no further dividend could be made, and the funds of the Society in the hands of the bankers were much reduced; and that in consequence thereof inquiries were made, and the plaintiffs alleged they discovered that the £16,000., alleged to have been invested in establishing the Society, was never in fact so invested; and that no more than £8,000. at the most was so invested; and that the defendants, in stating £16,000. to have been invested, were guilty of a false and fraudulent representation, under cover of which they converted to their own use the sum of £8,000. part of the capital of the Society, as the property stated to be purchased for £16,000. was not then worth more than £8,000. The bill also contained an allegation, that the defendants had sold and transferred a great number of shares, and appropriated the purchase-moneys to their own use. It also stated, that on the death of Watson in February, 1835, Abbott, Brickwood, and Shaw appropriated to themselves his shares, in satisfaction of an alleged debt due from him to them.—The bill prayed an account of the number of shares in the capital of the society which were appropriated by the defendants Abbott, Brick-

wood, Shaw, and Watson respectively, and of the amount of capital which, at the time of the appropriation of such respective shares, and in consideration thereof, ought to have been paid or subscribed by them respectively to the funds of the Society, and of the sums which were at any time paid or subscribed or otherwise satisfied to the Society by them respectively, in respect of the capital sum due from them or any of them, upon such their respective shares; and that, in asking such accounts, credit might be allowed to them for all sums properly advanced or properly expended on behalf of the Society before the incorporation thereof; and that it might be declared that the Society was *not bound* by the resolution passed at the said general meeting of the society, held on the 18th February, 1835; and that the balance found due from Abbott, Brickwood, and Shaw, and from the estate of Watson, might be paid, with interest, to the plaintiffs; and, if necessary, that an account might be taken of the shares of Watson appropriated on his oath by the defendants Abbott, Brickwood, and Shaw, and sold by them, and of the proceeds thereof, and that the same might be applied to make good to the plaintiffs what the personal estate of Watson was unable to satisfy of the sum found due from him. To this bill a demurrer was put in for want of equity, and also for want of parties, and alleging that in particular the lives of the defendants Abbott and Brickwood, and the other original shareholders in the bill mentioned, were necessary parties.

Mr. *Tinney*, in support of the demurrer, said, at the questions for the consideration of the Court, were, first, whether Abbott, Brickwood, Shaw, and Watson, being then the only members and only managers of the corporation, no other person but themselves having at that time any shares therein, were not competent to appropriate to themselves all the shares of the Society on the terms on which they did so; and, by that transaction, to bind the future members of the corporation, and effectually to discharge themselves from all responsibility in respect thereof; secondly, whether the confirmation of that transaction at the general meeting of the shareholders on February, 1835, did not preclude the plaintiffs from the relief now asked for; and, thirdly, whether all the original shareholders of the Society ought not to be before the Court, as they were interested in the accounts required by the bill. He insisted that the defendants were the managers and sole representatives of the Society, and that the plaintiffs now stood in their place, and were bound by what had been done by them and their predecessors, and by the resolution which had been passed; that they were bound to pay the value of the shares, but it was to themselves only, they were not trustees for any body of persons except themselves. The appropri-

tion of the 400 shares was made in their own corporate capacity, and was confirmed by the resolution of the whole body.

Mr. *Pemberton* denied that the plaintiffs were bound, inasmuch as the defendants had not paid up the amount of their shares, and had been guilty of fraud in selling at £16,000 what had not cost £8,000. The defendants, as managers, were trustees of the Society, and had no right to seek individual advantage at the expense of the Society generally; that all the members of the corporation were before the Court, and the corporate officers represented all the individual shareholders, and that consequently it was unnecessary to bring the latter before the Court, as between them and the defendants there may be also a right of account. *Hichens v. Congreve*(a), *Charitable Corporation v. Sutton*(b).

LORD LANGDALE observed, that the only question he had to determine was, whether the defendants must answer the bill. I have no means of knowing if the £16,000 had been advanced on account of the Society; it might have been done, and there were many ways in which it might have been expended. The allegations in the bill charge the defendants with fraud. Whether there is any such fraud, I have no means of knowing at present, and I may, therefore, conclude that the £16,000 was fairly laid out. The real question in dispute is this: the plaintiffs say the defendants might, if they pleased, pay the full value of all the 400 shares, and become the owners of them; but, if the corporation was to continue, they were bound to give to the funds of the corporation the value of those shares, which they had not done. The defendants say, we laid out £16,000 in purchasing models of various machines and instruments, and in making alterations in the premises, and in furnishing, which being added to £4,000 paid by us into the Bank, together made up £20,000, and became the property of the corporation, such being the value of all the shares into which the property of the Society was required to be divided, we were the purchasers and owners of all those shares. If the facts were so, it is not disputed by the plaintiffs that what was done was quite right. But what is said by the plaintiffs is, that the expenditure of the defendants did not amount to £16,000; and if so, that such a sum as was actually expended and the sum paid into the Bank was the sum paid by these four persons for all the 400 shares; and that they thus got these shares from the corporation, as individual members of it, without paying the full value for them. It is also alleged, that credit ought to have been given by the defendants for the profits received by them from the exhibition. It is also to be observed, that the transactions sought to be im-

(a) 4 Sim. 562. (b) 2 Atk. 405. 9 Mod. 349.

peached are between the corporation and individuals who were formerly managers of the corporation, and not transactions between them and the individuals who purchased shares from them. I do not, therefore, think that the shareholders who purchased shares from the defendants are necessary parties, but looking at all the circumstances I think the defendants ought to answer the bill.

*Both demurrers overruled.*

*Defendants to have two months time to answer.*

June 6th & 10th.

ROBERTON AND ANOTHER v. CRAWFORD AND OTHERS.

**LAW of SCOTLAND.—WIDOWS PENSION in INDIA.—***Whether the Widow of a Civil Servant of the East India Company and as such entitled to a Pension during her Widowhood, only afterwards residing with and passing as the Wife of a Scotchman in Scotland, shall thereby forfeit her Pension.*

This was a bill filed by Mr. R. Robertson and Harriet Bouchier passing as his wife, against the Agents in England of the *Bombay Civil Fund*.

The bill stated that the defendant, Harriet Robertson, was formerly the widow of *Samuel Bouchier*, who held a civil situation under the East India Company. In his life-time he was a subscriber to the *Bombay Civil Fund*, which, upon his death, entitled his widow to a pension of £300 a year; but by the regulations of the society this was limited to *so long as she remained the widow of Mr. Bouchier*. Upon his death, in 1815, Mrs. Bouchier returned to England, where, in 1817, she became acquainted with the plaintiff, *Robert Robertson*, with whom she lived, acting in all respects as his wife. They afterwards went to reside in Scotland, where they still continued to reside together, and Mrs. Bouchier was received in society as Mrs. Robertson. The annuity was paid to Mrs. Bouchier regularly by the defendants, till 1821, when it was discontinued for a short period, but was again renewed upon the declaration of Mrs. Bouchier that she had not contracted any marriage, and that she was still the widow of Mr. Bouchier. On the 5th of June, 1828, a resolution was passed by the members of the Bombay Civil Fund removing the restriction upon the widows of members of the fund who should marry subsequently to the date of the resolution. Upon receiving this information, Mr. Robertson and Mrs. Bouchier immediately entered into a contract to marry, which, on the 5th of March, 1830, was solemnized and formally carried into effect according to the forms of the Scotch law, by a minister of the Church of Scotland, who, after certifying the marriage between the parties, added the words "*they*

*having been previously irregularly wed."* A copy of this certificate was sent by the parties to the defendants, who transmitted it to India, and the members of the fund, from the words added, conceiving that it afforded evidence of a marriage having been contracted previous to the rescinding the restrictive resolution, directed the defendants to discontinue the payments to Mrs. Bouchier. This was communicated to Mr. and Mrs. Robertson in November, 1832, and in consequence thereof, in order to establish their claim and obtain payment of the pension, instituted the present suit. Upon the hearing a reference was made to the master to inquire if any marriage had taken place before the 5th of June, 1828, and he reported that there was no valid marriage.

Mr. Tinsley said the cause now came on upon an exception to the master's report, and insisted that according to the law of Scotland, the acts of the parties were tantamount to a marriage.

Mr. Pemberton said that for seventeen years this pension had been the sole means of the subsistence of the plaintiffs; for seven years it had been withdrawn. The position of the parties was painful; he did not stand there to justify their conduct, but they had suffered intensely and severely. He thought, however, with regard to the legal rights of the parties there was no question or controversy; the defendants had come there to enforce a penalty and they could only do it on the strictest proof. He thought, however, it would have been better if they had adopted the Scotch adage, that it was better to give bygone for bygone.

Lord LANGDALE observed that a contract marriage could only be made by the mutual consent of the parties; and, considering the whole of the circumstances, the facts deduced were in favour of the master's finding. The parties had so far succeeded as to induce many persons to believe that they were married, and the habit and repute which they had gained was for appearances only; that, however, according to the opinions before him, and to which he had referred by the mutual consent of the parties, was not of itself, according to the law of Scotland, sufficient to constitute a marriage; the parties therefore had succeeded in preserving their title to the annuity, and the exception must be overruled. The arrears of the annuity must be paid, but, in order to obviate any future difficulty, receipts must be signed by both parties during the life of the husband. The costs of the suit must also be paid out of the fund to which the plaintiffs were entitled.

July 20.

WELFORD v. BELL AND OTHERS.  
AMENDMENT of BILL after time expired.  
PRACTICE.

Mr. Pemberton moved that the plaintiff's bill

at liberty to amend his bill, notwithstanding the time allowed by the rules of the court had elapsed, on payment of 20s. The original bill was filed in October last: the answers of all the defendants were not put in until the 12th of March last; they were forwarded to the plaintiff in Northumberland on the 18th of March, and it was not until the 4th of June that the plaintiff's solicitor was enabled to obtain the information from the plaintiff that rendered the amendment of the bill necessary. Application was then made to the defendants' solicitors, but they refused to consent to the bill being amended.

Mr. Purvis, for the defendants, opposed the motion, as the plaintiff's affidavits were not sufficient. The plaintiff had not shown that he had used due diligence, or given any reason why his Lordship should be called upon to depart from the usual course. The suit related to mines in Northumberland; the solicitor there made no affidavit, the motion was made upon the clerk's affidavit in London. The bill was filed in October, 1839, amended a few days afterwards; the answer had been put in, and exceptions were taken to it in April last, and overruled by the Master in May. The bill stated that John Mulcaster, a partner in the mines, had a son named James. John had two shares; James desired to hold other shares himself, but he enjoyed a situation in Greenwich Hospital, and the governors were the landlords of the mine, and James therefore did not wish his name to appear as owner. The shares of James were therefore conveyed to the father, John, and he died intestate, leaving three children, James and two married daughters, the defendants, Mrs. Ann Bell and Mrs. Hannah Nicholson, for whom he appeared. James was in debt; and there had been a sale by the sheriff under a writ of execution at which the plaintiff Walford was the purchaser. The two sisters alleged that James, their brother, was not the purchaser of the shares conveyed to their father, but that their father, John, was. The affidavit on which the plaintiff founded his motion stated that it was necessary to make inquiries on this matter at the mine, and so at York; but by whom were these inquiries to be made? Surely not by the London solicitor. They were to be made on the spot, and the deponent could not tell whether they were or were not made. It was sworn that the counsel for the plaintiff, thought it necessary to amend the bill to state these facts, but the amendments were not made before the 20th of June, and the time expired on the 15th of June.—he submitted that it was not such a case as entitled the plaintiff to his motion.

Lord LANGDALE. — It was a case in which considerable inquiries were necessary. The plaintiff as a purchaser from the sheriff of such interest

as James Mulcaster had. John, the late father, had two shares of his own, and two other shares, and the parties to whom those two other shares would belong seemed to him to be a case of resulting trusts.

Mr. Pemberton contended that it was ridiculous in the defendants to oppose the amendments, the result of which would only be that a new bill would be filed, and further time lost.

Lord LANGDALE.—The delay was not much, the time expired on the 15th of June; the application was made on the 20th, and notice given on the 30th of June. He concurred in a portion of Mr. Purvis's argument, but the refusal of the motion would create further unnecessary expense. The order must be granted, but on payment of costs by the plaintiff.

#### COURT OF COMMON PLEAS.—June 11.

##### *Sittings in Banco.*

##### PATERNOSTER v. KING AND ANOTHER.

##### JOINT AND SEVERAL ACTIONS.—PRACTICE.—

*Satisfaction of an injury as to one defendant, is satisfaction as to all.*

Mr. Hoggins obtained a rule last term calling on the plaintiff to show cause why the proceedings in this cause should not be stayed, in obedience to a rule of Court founded on an order of *nisi prius*, in a cause of *Paternoster v. Finch and others*, by which it was ordered by consent of all parties, that in consideration of an annuity of £150 a year settled upon the plaintiff, all actions and causes of action between the parties or any of them should be stayed and considered settled, and that the plaintiff was in future to abstain from annoying his father and mother, and other members of his family.

Mr. Serjeant Channel now showed cause against the rule, and contended, that whatever might be the effect of the rule as regarded the defendant *Wing*, who was a party to the cause in which the order of *nisi prius* was made, it could not operate as a stay of proceedings against the defendant *Gardiner*, who was no party to that cause.

SIR N. C. TINDAL, C. J., said the Court decided that the settlement of the annuity on the plaintiff having been accepted in the nature of a satisfaction of all causes of action then subsisting against any of the parties to the cause of *Paternoster v. Finch and others*, and the defendant *Wing* being one of those parties, the cause of action against him was satisfied; where there was a joint and several trespass, satisfaction of the injury as to one defendant was satisfaction as to all, and consequently the rule for staying the proceedings in the present cause must be made absolute.

## COURT OF EXCHEQUER.—June 11.

*Sittings in Banco.*

## METCALFE v. FOWLER.

VENDOR AND PURCHASER.—BREACH OF CONTRACT—PURCHASER'S RIGHT *to interest at £4. per cent. on purchase-money lying idle*—PRACTICE—PLEADING.

This was an action brought to recover compensation from the defendant for the loss of interest incurred by the plaintiff, in consequence of the non-performance of an agreement for the sale of an estate in Lincolnshire. The declaration set forth the contract, whereby the defendant contracted and agreed to sell and convey to the plaintiff, on the 25th of March, 1838, certain property in the county of Lincoln, in consideration of the sum of £2,115.; and it was agreed between the parties, that in case the sale could not be completed on the day mentioned in the contract, the plaintiff should be allowed interest at the rate of two per cent. per annum on the above mentioned sum from thence; and alleged, that though the plaintiff was ready and willing on that day to perform his part of the bargain, by the payment of the money and acceptance of a conveyance, with a good title, yet that the defendant did not then, or at any other time whatsoever, perform his part, by making such conveyance, but wholly failed therein, by reason of which the plaintiff lost the interest upon the purchase-money till the day when the contract was finally abandoned. The defendant paid £20. into court, denying that the plaintiff had incurred any damage beyond that sum, upon which issue was joined.

It appeared that the defendant was unable to make out a good title to the property on the 25th March, 1838, but the negotiations between the parties continued until the month of January, 1839, when the contract was finally broken off, and the plaintiff brought this action to recover the amount of the difference between the interest at the rate of two per cent. per annum, and that at four per cent.—the latter being the rate which he could have received, as he alleged, had he put the money out to use instead of keeping it idle to await the completion of the contract. The action was tried before Lord Abinger, at Guildhall, when a verdict for £41. was returned for the plaintiff, with liberty to move the Court above to enter a non-suit upon an objection made by the defendant's counsel to the averment in the declaration, under the form of which it was contended the plaintiff could not recover damages for the loss of interest beyond the 25th of March.

Mr. R. V. Richards, last term obtained a rule nisi to set aside this verdict and to have a nonsuit entered, on the ground that the plaintiff had not

averred in his declaration that he had been ready and willing at all times, since the 25th of March, 1838, to perform his part of the contract; and it was contended that he was not entitled to recover for any damages he might have sustained after the day on which the breach took place.

Mr. Bayley, in support of the verdict, argued, that time not being the essence of the contract, the plaintiff was not limited to the day on which the breach of it occurred, but was at liberty to sue for damages subsequently incurred by reason of the pendency of negotiations for the completion of the sale, which ultimately proving futile, only ended in increasing the plaintiff's claim for damages.

The Court, however, without calling on Mr. Richards, at once decided in favour of the rule. The contract was broken on the 25th of March, and though negotiations were carried on after that day, the plaintiff could not recover for loss of interest during their continuance, without averring in his declaration a readiness on his part, after the day originally named, to perform the contract, or alleging that by a subsequent agreement the contract had been enlarged to a reasonable time within which a further breach had been committed. As it was, it was clear that the damage must be limited to the 25th of March, and as the payment into court satisfied that claim, the rule must be made absolute for a nonsuit.

*Rule absolute for a nonsuit.*

## SITTINGS.

## COURT OF COMMON PLEAS.

*In and after Michaelmas Term, 1840.*

*In Term.*

## MIDDLESEX.

Wednesday	. . . . .	Nov. 11
Wednesday	. . . . .	15

## LONDON.

Friday	. . . . .	Nov. 13
Friday	. . . . .	20

*After Term.*

## MIDDLESEX.

Thursday	. . . . .	Nov. 25
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## LONDON.

Friday	. . . . .	Nov. 27
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The Court will sit at ten o'clock in the forenoon on each of the days in Term, and at half past nine precisely on each of the days after Term.—The causes in the list for each of the above sitting days in Term, if not disposed of on those days, will be tried by adjournment on the days following each of such sitting days.—On Friday, Nov. 27th, no causes will be tried, but the Court will adjourn to a future day.

## COURT OF EXCHEQUER.

*In and after Michaelmas Term, 1840.*

## MIDDLESEX.

Monday	Nov. 2
Tuesday	3
Wednesday	4
1st Sitting . . . Thursday	5
Friday (by Adjournment)	6
Saturday (by Adjournment)	7
Monday (by Adjournment)	9
Tuesday (by Adjournment)	10

## LONDON.

1st Sitting . . . Wednesday	Nov. 11
Thursday	12
Friday	13
Saturday	14

## MIDDLESEX.

2nd Sitting . . . Monday	Nov. 16
Tuesday (by Adjournment)	17
Wednesday (by Adjournment)	18
Thursday (by Adjournment)	19

## LONDON.

2nd Sitting . . . Friday	Nov. 20
Saturday (by Adjournment)	21
Monday (by Adjournment)	23
Tuesday (by Adjournment)	24
Wednesday (by Adjournment)	25

*After Term.*

## MIDDLESEX.

Thursday	Nov. 26
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## LONDON.

Friday (to Adjourn only)	Nov. 27
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The Court will sit, during Term, at ten o'clock.

## 3 &amp; 4 VICT. Cap. 55.

*An Act to enable the Owners of Settled Estates to defray the Expence of draining the same by way of Mortgage.*

[4th August, 1840.]

Whereas much of the land in *England* and *Ireland* would be rendered permanently more productive by improved draining, and nevertheless, by reason of the great expence thereof, proprietors having a limited interest in such land are enabled to execute such draining: And whereas it is expedient, as well for the more abundant production of food as for the increased employment of farming labourers, and the extended investment of capital in the permanent improvement of the soil, that such proprietors should be relieved from this disability, due regard being had to the interests of those entitled remainder: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this

Act, it shall and may be lawful for any tenant for life, or for a term determinable on his or her life, under any will, settlement, or other like disposition, entitled in possession at law or in equity to any lands in *England* or *Ireland*, (or the guardian or guardians of any infant, on the behalf of such infant so entitled as aforesaid,) to apply by petition to her Majesty's Court of Chancery or Exchequer in *England* or *Ireland* for leave to make any permanent improvements in the lands to which he or she shall be so entitled, or any part thereof, by draining the same with tiles, stones, or other durable materials in a permanent manner; and in every such petition shall be specified the improvements proposed to be made, and the estimated cost thereof, and of all matters incidental thereto; and every such petition shall be referred to a Master of the said Court of Chancery, or to a Master, or in *Ireland* to the Chief or Second Remembrancer of the Court of Exchequer, to inquire into and ascertain the propriety of such improvements being effected; and such Master or Chief or Second Remembrancer shall and he is hereby required to call for such plans and estimates and specifications in relation to the said proposed improvements as he shall think fit; and the Master or Remembrancer shall make his report respecting such proposal; and the Court to which any such application shall be made shall make such order upon such petition and report as such Court shall think fit.

2. Provided always, and be it enacted, That a copy of every such petition shall be served twenty-one days at the least before the hearing thereof upon the person or persons beneficially entitled at law or in equity to the first vested estate of freehold of inheritance in remainder after the estate of the tenant for life, but if any such persons shall be of unsound mind, or under the age of twenty-one years, or under any other legal disability, or beyond the limits of the United Kingdom of *Great Britain* and *Ireland*, then a copy of such petition shall be served, on his, her, or their behalf, upon such person or persons respectively as the said Court of Chancery or Court of Exchequer to which the said petition shall be preferred shall appoint for that purpose; and every person upon whom a copy of any such petition shall be so served shall be at liberty to attend before the Master or Remembrancer to whom such petition shall be referred, and to consent or object to the proposal contained in such petition; and any person appearing before the Master or Remembrancer on any such petition may also appear before the Master or Remembrancer, previously to his signing any such certificate as after mentioned, for the purpose of producing any objection to the mode in which any such improvements as after mentioned may have been executed; and all the costs attending

any such application, and of the party so served, shall be paid by the party making such application as aforesaid.

3. And be it enacted, That if it shall appear to the satisfaction of such Master or Remembrancer, on the report of one or more surveyors to be appointed or approved of by the said Master or Remembrancer, that it will be for the benefit of such lands that they should be so drained, and such report shall be confirmed by the said Court, then it shall be lawful for the tenant for life, or such guardian or guardians as aforesaid, who shall have presented such petition, to make and execute such improvements accordingly.

4. And be it enacted, That in every case where the said Court of Chancery or Exchequer shall have made an order sanctioning the execution of any such improvements of any lands, and such improvements or any part thereof shall have been made accordingly, it shall be lawful for the Master or Remembrancer whose report shall be so confirmed by the said Court, by a certificate under his hand to be filed in the said Court, on having satisfaction that the money had been properly expended, to authorize any such person so entitled as aforesaid, or the executors or administrators of such person, or such guardian or guardians of such Infant as aforesaid, by deed in writing, to charge all or any part of the lands so drained as aforesaid, or any other land subject to the like uses or trusts as the lands so drained, with the payment to any person or persons willing to advance the same of the amount of the money which may have been so expended, and so from time to time as any money shall be so expended, together with interest thereon after any rate not exceeding five pounds *per centum per annum* from the time of making the charge, but so nevertheless that in any such charge it shall be so provided that the principal sum charged shall be paid off by equal yearly instalments, such instalments not to be less than twelve nor more than eighteen, the number of such instalments to be determined and recommended by the said Master or Remembrancer in his report, and such number of the said instalments to be diminished or increased at the discretion of the said Master, according to the greater or less improvement shewn to have been made by such draining; and for the purpose of securing such monies to be so charged it shall be lawful for the person making such charge to demise the hereditaments to be charged for any term or number of years, by reason whereof the rents and profits of the said hereditaments shall be applicable to the payment of the said monies so to be charged as aforesaid, but so as such term be made to cease on the payment of the monies charged: provided nevertheless, that such person making such charge, and every succeeding tenant

for life, or tenant for term of years determinable on his or her life, shall be bound to keep down the interest and instalments to be charged, or any rent-charge to be charged as after mentioned; and the lands charged shall not (except as against any tenant for life or other person liable to pay such instalments and interest or keep down such rent-charge) be liable to pay more than six months of any interest, and one half of any instalment, or pay more than half a year's rent-charge, which is hereby directed to be kept down as aforesaid: provided nevertheless, that if any person shall be willing to advance to any person hereby authorized to make such charge as aforesaid the amount he or she may be so authorised to charge in consideration of a rent-charge for a term of not less than twelve nor more than eighteen years, then such person so authorized to charge, instead of charging the said hereditaments with such instalments and interest as aforesaid, may charge the same with a rent-charge for any such period as aforesaid, so as that the said Master or Remembrancer shall in his said report approve of the substitution of a rent-charge, and of the amount to be charged, and shall ascertain and determine the number of years for which the same shall be granted (such number of years to be ascertained in the same manner as is before directed with respect to the ascertaining the amount of such instalments as aforesaid:) provided also, that no person shall be entitled to make any such charge as aforesaid unless it shall be stated in the report of such Master or Remembrancer that he hath been made to appear to him by the report of such Surveyor that the annual value of the lands so drained is increased by such draining to an amount equal to seven pounds *per centum* at least on the sum to be charged.

5. And be it enacted, That this act may be amended or repealed by any act to be passed during the present session of Parliament.

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# A D I G E S T,

OF ALL THE

REPORTED CASES AND GENERAL ORDERS,

WITH A TABLE OF STATUTES,

IN THE FIRST FOUR VOLUMES OF

**The Legal Guide,**

(3D NOVEMBER 1838, TO 31ST OCTOBER, 1840.)

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L O N D O N :

JOHN RICHARDS AND CO., 194, FLEET STREET.

MDCCCXLI.



LONDON :  
PRINTED BY STEWART AND MURRAY,  
OLD BAILEY.

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## ERRATA IN THE DIGEST.

- Page 2, col. 1, De Hourmelin v. Sheldon, add II. 84.  
 — 5, col. 1, (w), for Smith v. Hanley, read Smith v. Stanley.  
 — 7, Title BAILMENTS 2, line 4, instead of "A was held responsible," read "A was not held responsible."  
 — 15, col. 2, for Baddington v. Wordley, read Boddington v. Woodley.  
 — 17, col. 2, line 11 from bottom, for p. 247, read p. 244.  
 — 19, col. 2, No. 9, for "Luik" v. Stallard, read "Link" v. Stallard.  
 — 22, col. 2, line 3 from top, for III. 57, read III. 56.  
 — 23, col. 1, No. 8, Re Mrs. Taylor, add III. 22, 103. IV. 262, 292.  
 — 24, col. 2, No. 2, Guy v. Martin, for III. 383, read 382.  
 — 26, "JOINT STOCK COMPANIES," Prefixed Titles, 5, et seq. are incorrectly arranged.  
 — 27, col. 1, No. 2, add nom. Walworth v. Holt, IV. 379, instead of IV. 380.  
 — 29, col. 2, 1st line, for II. 328, read III. 328.  
 — 30, col. 2, for Rex v. Boston, read Rix v. Boston.  
 — 31, col. 1, line 4, for IV. 327, read IV. 237.  
 — 48, col. 1, No. 7, Robinson v. Evans, for III. 191, read IV. 191.  
 Where tit. "CONFESSION" is referred to, read "MAGISTRATES."

# A DIGEST

OF ALL THE  
CASES, STATUTES, AND GENERAL ORDERS IN THE FOUR FIRST VOLUMES OF  
"THE LEGAL GUIDE."

**ABATEMENT OF PURCHASE-MONEY.**  
*See* VENDOR AND PURCHASER, 3.

**ABATEMENT, PLEA IN.**  
*See* ATTORNIES, (s l.)

**ABROAD, SERVICE.**  
*See* PRACTICE, 7.

**ABSTRACT.**  
*See* VENDOR AND PURCHASER, 1.

**ACCEPTANCE.**  
*See* BILL OF EXCHANGE, 2, 4, 6.

**ACCEPTANCE, ALTERATION IN.**  
*See* BILL OF EXCHANGE, 2.

**ACCESS TO CHILDREN.**  
*See* HUSBAND AND WIFE, 5 a. INFANTS, 1.

**ACCOUNTS OF BANKRUPT.**  
*See* BANKRUPTCY, 27, 33.

**ACCOUNTS OF EXECUTORS.**  
*See* EXECUTORS, 2.

**ACCOUNTS, SUITS FOR WINDING UP.**  
*See* JOINT STOCK COMPANIES.

**ACQUIESCENCE.**  
*See* ATTORNIES, (b b.) (d d.)—NUISANCE, 2.  
—SETTLEMENT, 3.

**ACT OF BANKRUPTCY.**  
*See* BANKRUPTCY, 6, 7, 8, 9, 34.

**ACT OF PARLIAMENT.**  
*See* STATUTES.

**ACT FOR ABOLISHING IMPRISONMENT FOR DEBT.**  
*See* DEBT.

**ACTIONS-AT-LAW, COMMENCEMENT OF.**  
An action is considered to have commenced at the time the writ is sued out, without relation to the time of its service on a defendant. *Anon. Ex. 1, 47.*

**ACTIONS-AT-LAW, ANSWER TO.**  
*See* ATTORNIES, (a a).

**ACTIONS-AT-LAW, DISCOVERY OF.**  
*See* BILL OF DISCOVERY, 3.

**ACTIONS-AT-LAW, FORM OF.**  
*See* MUNICIPAL REFORM ACT, 2.

**ACTIONS-AT-LAW, INJUNCTION TO RESTRAIN.**  
*See* NUISANCE, 2.

**ACTIONS-AT-LAW, JOINT AND SEVERAL.**  
*See* JOINT AND SEVERAL ACTIONS.

**ACTIONS-AT-LAW, NOTICE OF.**  
*See* POLICE—POOR-RATE, 2.

**ACTIONS-AT-LAW, SATISFACTION OF, CAUSES OF.**  
*See* JOINT AND SEVERAL ACTIONS.

**ACTIONS-AT-LAW, SETTLEMENT OF BY PARTIES.**  
*See* ATTORNIES, k k, m m.

**ADEMPITION.**  
*See* LEGACY, 2.

**ADJOURNMENT.**  
*See* INSOLVENT DEBTORS, 16.

**ADJUDICATION, ANNULLING.**  
*See* Id. 19.

**ADMINISTRATION.**  
A Bill was filed by a person entitled to administration of an intestate's effects, before letters of administration were obtained: held, that such letters, although obtained pending the suit, nevertheless referred to the time of filing the bills, so as to enable the plaintiff to sustain it. But if a defendant in such a case has a substantial defence, and desires an opportunity of putting in an answer, he will not be precluded from so doing, because he originally filed a plea to the bill alleging the want of such administration. *Davies v. Coleman, II. 276.*

**ADMISSIBILITY OF EVIDENCE.**  
*See* EVIDENCE.—STAMP.

**ADMISSION.**  
*See* ATTORNIES, d. k. l. m. n. o.

**ADMISSION, AMENDING NOTICE OF.**  
*See* Id. n.

**ADULTERY.**  
*See* DOWER.—HUSBAND AND WIFE, 3.

**ADVENTURE.**  
*See* MINING ADVENTURE.

**ADVERSE POSSESSION.**  
*See* LIMITATIONS, STATUTE OF, 1.

**ADVOWSON.**  
A protestant tenant in common of an advowson is solely entitled to present thereto when his co-tenant is a Roman catholic. *Edwards v. Bp. of Exeter, C. P. II. 88.*

**AFFIDAVIT.**  
An affidavit sworn before a commissioner for taking affidavits in Ireland, cannot be read as evidence in a court of law in England. *Griffin v. Smith, B. C. IV. 188.*

**AFFIDAVIT OF EXISTENCE.**  
*See* ALIVE.

**AFFIDAVIT, ANSWER TO.**  
*See* ATTORNIES, l l. — BELIEF. — BILL, AMENDING, 1.

**AFFIDAVIT OF DEBT.**  
*See* BANKRUPTCY, 6, 8, 34.—DISTINGUAS, 1.—EJECTMENT.—NEW TRIAL.—PEACE, ARTICLES OF.—PRACTICE, 7.—PROCESS.—SUSPENA, 5.—ALIVE.



## AFFILIATIONS, ORDER OF.

See BASTARDY.

## AGENT, LIABILITY OF.

A mercantile agent is liable to damages for not implicitly obeying the orders given by his principals, if they sustain loss, or damage by his disobedience. *Blain v. Daniel*, N. P. II. 268.

## AGENT, POSSESSION BY.

See BANKRUPTCY, 10.—ATTORNEYS, *j. j.*—CONTRACTS BY AGENTS.—FRAUDS.—STATUTE OF, 2.—PARTNERSHIP, 2.—PRINCIPAL AND AGENT.—VENDOR AND PURCHASER, 4, 9.

## AGREEMENT.

1. The court will carry into effect a meritorious and voluntary agreement by a *feme covert*, charging funds in the hands of a trustee for her benefit, which her husband has disclaimed being interested in. And such a disclaimer will operate to confirm the *feme's* agreement. *Rycraft v. Christy*, M. R. IV. 344.

2. Agreement to sell a crop of potatoes growing in a certain close, which the purchaser was to have at digging time, providing for the labor, is not an agreement for an interest in land or within the statute of frauds. *Saintsbury v. Matthews*, Ex. I. 107.

See CONTRACTS.—EVIDENCE, 3, 4, 6, 8.—HUSBAND AND WIFE, 2 *a.* 4 *g.*—JOINT STOCK COMPANIES, 7.—LESSEE AND LESSOR, 2, *et seq.*—FRAUDS, STATUTE OF, 1.

## AGREEMENT, PAROL, PROOF OF.

See LESSOR AND LESSEE, 4.

## AGREEMENT, WILFUL INCAPACITY OF PERFORMING.

See *Id.* 5.

## ALIBI.

See LARCENY.

## ALIENS.

A devise of real estate to trustees, English subjects, upon trust to sell and invest the produce in the funds, and to stand possessed thereof in trust for children, some of whom had married Frenchmen, and were domiciled in France and had children: held, that a good title could be made to the real estate, and that the crown was not entitled to the alien's shares of the estate or of the produce. *De Hourmetin v. Sheldon*, M. R. I. 42. 218, affirmed L. C. 6th Nov. 1839.

See HUSBAND AND WIFE, 4.—VENDOR AND PURCHASER, 11.

## ALIVE, PROOF OF BEING.

In order to prove that a defendant was alive on a certain day, a deponent swore that he "saw him on that day:" held, that the affidavit ought to have stated that deponent saw defendant "alive" on the day in question, and it was directed to be amended accordingly. *Lee v. Holland*, Ex. III. 87.

## ALLOWANCE TO INSOLVENT.

See INSOLVENT DEBTORS, 20.

## ALTERATION IN FORM.

See WRITS AND COPIES.

## AMEND, LEAVE TO.

See BILL, AMENDING, 2, 4.—LEASE AND RELEASE.

## AMEND, ORDER TO.

See LACHES, 2.

## AMENDED BILL.

See ANSWER TO BILL, 1.

## AMENDING BILL.

See BILL AMENDING, 1, 2.—PRACTICE, 15.

## AMENDING RETURN.

See Fieri Facias.

## AMENDMENT OF BILL.

See BILL, AMENDING.

## AMENDMENT.

See WRITS AND COPIES.

## ANNOYANCE.

See NUISANCES.

## ANNUITANTS.

See CESTUIS QUE VIES.

## ANNUITY.

1. By a private act of Parliament the rector of A was empowered to erect a new rectory-house, and to supply the necessary funds for that purpose he was authorized to sell the old one and to borrow, with the consent of the bishop of B, a sum not exceeding 2000*l.*, by selling an annuity for two lives. The new rectory-house was to be built to the satisfaction of the bishop, whose signature and seal to a declaration to that effect to an account of the monies expended, was declared to be a sufficient discharge to the trustees appointed for the purposes of the act, who were also, in case any surplus remained, to apply it, with the consent of the bishop, to permanent improvements upon and about the rectory-house. The rector advertised to grant an annuity for 2000*l.* by tender, and received one offer, which the bishop thought too high, and ultimately he advanced the money himself, but in the name of a trustee to whom an annuity of 170*l.* was (nominally) secured. Subsequently this trustee executed a declaration of trust to the bishop, who assigned the annuity to his son, and it was paid to the latter during the life of the said rector, who constantly paid it for twenty-four years, but on his death his successor refused to continue the payment: held, that the grant of this annuity was void, and could not be enforced, because the interests of the rectory being entrusted to the bishop's care, and he being placed in a fiduciary situation as regarded the expenditure of the 2000*l.*, and the grant of the annuity could not be allowed to contract for his own benefit, however fair the transaction might outwardly appear to be. *Greenlaw v. King*, M. R. IV. 326.—See Western's Conveyancing, 174. *n. i.*

2. An annuity, through the defendant's neglect, became void for want of due enrolment of a memorial. Whereupon assumpsit was brought for the consideration money, to which the statute of limitations was pleaded as a defence, because the original debt accrued above six years before: held, that a payment in respect of the annuity within six years took the case out of the statute. *Middleton v. Middleton*, N. P. II. 221.

See CESTUIS QUE VIES.

## ANNULING ADJUDICATION.

See INSOLVENT DEBTORS, 19.

## ANNULING FIAT.

See BANKRUPTCY, 8.

## ANSWER TO BILL.

1. After a plaintiff has amended his bill, the defendant may set forth another schedule in addition to that set out in his answer to the original bill. *Berlin v. Smith*, V. C. III. 165.

2. A bill charged securities to have been given for money lent at play, and interrogated respecting the consideration given. The defendant's answers merely stated the securities to have been given for money lent at different times. Answer held insufficient. *Stowen v. Kelly*, Ex. Eq. III. 166.

## ANSWER TO BILL, AMENDMENT BEFORE.

See BILL, AMENDING, 3.

## ANSWER TO BILL, EXCEPTIONS TO.

See EXCEPTIONS.

See PARTNERSHIP, 3.—PRACTICE, 8, 11, 12, 14.

## APOTHECARIES.

An assistant surgeon in the militia from 1809 to 1815, when he was discharged, and no evidence was given that he continued to practice till 1818, when he was again appointed to the militia, is entitled to sue for drugs, although not practising as an apothecary on and previous to the 1st August, 1815, so as to entitle him to maintain the action under the 55 Geo. 3. c. 194. s. 21, nor having obtained a certificate required by that act. *Milbank v. Oldrey*, IV. 315.—See *Svensson v. Oliver*, V. 408.

## APPEALS.

See BANKRUPTCY, 3.—JURISDICTION.

## APPOINTMENT OF ASSIGNEES.

See ASSIGNEES OF INSOLVENTS.

## APPOINTMENT, POWER OF.

A joint power of appointment by husband and wife is suspended or destroyed by the bankruptcy of the husband; but a separate power of appointment in the wife surviving the husband, and becoming vested on his death, is susceptible of an execution, although a limitation to children in default of appointment was contingent, and there was no particular estate of freehold upon the death of the husband to support it. *Hole v. Escott*, L. C. I. 71. See the Editor's review of the judgment in this case. See also the Bankrupt Act, 6 G. 4. s. 77. *Long v. Rankin*, Sug. Pow. 6. Id. App. No. 2. 12 B. & A. 93. 17 Ves. 388. 7 Bing. 695. 1 Myl. & K. 32. 3 Myl. & Cr. 187. 2 Hayes' Introd. to Conv. 116.

See BANKRUPTCY, 31.

## APPOINTMENT OF RECEIVER.

See CREDITOR'S BILL.

## APPORTIONMENT.

The word "Lease," in the Apportionment Act, 4 & 5 W. 4. c. 22. s. 2. held to mean a "lease in writing." *Esparie Markby*, L. C. II. 275.

## APPROPRIATION OF PAYMENTS.

See LIMITATIONS, STATUTE OF, 2.

## ARBITRATION.

See COSTS, 3.

## ARREST.

See BANKRUPTCY, 38.—CAPIAS.—DEBT, 1. 1 a.—JUDGES' ORDER, 2.—PRACTICE, 1, 9.—SHERIFF, 3, 5, 6, 7, 9.

## ARREST, PRIVILEGE FROM.

See BANKRUPTCY, 38.—PRACTICE, 1.

## ARTICLED CLERK.

See ATTORNEYS.

## ARTICLES OF THE PEACE.

See PRACTICE, ARTICLES OF.

## ARTICLES OF CLERKSHIP, SERVICE UNDER.

See ATTORNEYS.

## ASSAULT—JUSTIFICATION.

A plea in justification of an assault alleged that defendant was possessed of a dwelling-house, and committed the assault in defence of such possession: held, that the plea was not supported by proof that defendant was a lodger in the house alluded to. *Monk v. Dyke*, Ex. I. 281.

## ASSESSED TAXES.

See LAND TAX.

## ASSESSMENT.

See PARISH.

## ASSETS.

See INSOLVENT DEBTORS, 1.

## ASSIGNEES OF LEASES, LIABILITIES OF.

Where a party takes an assignment of a lease, but enters into no covenant or obligation with the assignor to pay the rent or perform the covenants reserved by and contained in the lease, his liability ceases upon his assigning over. *Rouley v. Adams*, M. R. I. 24.

EDITOR'S REVIEW of the Judgment in this case, I. 24.

## ASSIGNEES, EQUITABLE.

Where a party entered into a contract for the purchase of a lease, but no assignment was ever made to him, and he entered into possession, and part of the terms of the contract was that the tenant was bound to repair. Upon a bill by the lessor for the amount of dilapidations he had sustained at the expiration of the lease: held, that the purchaser was liable as equitable assignee to indemnify the lessor. *Close v. Wilberforce*, M. R. I. 102.

EDITOR'S OBSERVATIONS upon this case, I. 103.

## ASSIGNEES OF INSOLVENT.

Where the only person entitled to be appointed assignee of an insolvent debtor can neither read nor write, the court will appoint some other competent person in his stead. In the principal case the creditor's attorney was appointed assignee. *Exp. Routledge*, Insolvent Debtors' Court, II. 295.

## ASSIGNEES, COMMITTAL FOR MISCONDUCT.

See DEBT ACT, 5.—INSOLVENT DEBTORS, 4.

## ASSIGNEES, OFFICIAL.

See BANKRUPTCY, 12.

## ASSIGNMENT.

See ASSIGNEES, LIABILITIES, 1.—ATTORNEYS, m m.—BANKRUPTCY, 9, 14.—INSOLVENT DEBTORS, 2, 22.

## ASSIGNMENT OF ARTICLES.

See ATTORNEYS, b. c.

## ASSOCIATION.

See BENEFIT LOAN SOCIETIES.

## ASSOCIATION, ENTRY ON BOOKS OF.

See EVIDENCE, 3.

## ASSURANCE.

See COVENANT.

## ATTACHING MONEY.

See DEBT ACT, 5 a.

## ATTACHMENT.

See ATTORNEY.—SHERIFF, 1, 2.—PRACTICE, 9.—SUBPENA, 1.

## ATTESTATION.

See BANKRUPTCY, 32.—COGNOVIT.—WARRANT OF ATTORNEY, 4.—WILLS, 6—10.

## ATTORNIES.

## ARTICLED CLERKS.

1. Service.
2. Examination.
3. Miscellaneous.

## ATTORNEYS.

1. Admission.
2. Certificate.
3. Duties and Liabilities.
4. Privileges.

5. *Taxation of Costs.—Lien for Costs.—And Generally.*

6. *Miscellaneous.*

ARTICLED CLERKS.

1. (a) *Service.*—Where an articulated clerk had not attended to business during the last year of his articles, on account of ill health, the court, nevertheless, gave him leave to go before the examiners. *In Re Hodge*. B. Court, I, 27.

(b) An articulated clerk served his full clerkship under two masters, his articles being assigned from one to the other; but after the agreement for the assignment was entered into, and before the execution thereof, a fortnight intervened, during which fortnight the clerk served the second master, and the examiners deemed the service not good service. The court ordered the examiners to proceed with the examination *de bene esse*, and when the clerk applied for admission the objection might be raised if necessary. *Anon*, C. P. I, 56. *Quere*, Whether the court has power to make an order upon the examiners? *Id*.

(c) A was originally articulated to B, who was in partnership with C. B died nine months before A's period of service expired, but he continued to serve C without interruption. After the expiration of the term of clerkship (five years) A served C nine months longer, when his articles were assigned to C by B's executors, and the examiners deemed the service not good service. The court ordered the examiners to proceed with the examination of the clerk, intimating that some general rule would be laid down upon the subject. *In re Johnstone*, Bail C. I. 60.

2. (d) *Examination.*—Where an articulated clerk had been examined under the regular notice of intention to apply for admission, but his passing was postponed by the examiners on account of his incapacity in answering the requisite questions on one particular point. Upon his application to be again examined he was informed that he must give a regular term's notice; and upon application to the court for an order upon the examiners to examine him, the court held, that there must be a fresh notice of admission given, the same as if nothing whatever had taken place on the matter. Q. B. I, 26.

(e) When an articulated clerk is prevented from leaving his articles of clerkship, together with the requisite answers of the clerk and his master to the questions as to due service preparatory to examination, owing to an accidental delay in their transmission from the country, the court will, on an application properly verified by affidavits, relieve him. *Exp. Dolman*, B. C. I, 46.

(f) An articulated clerk proceeding to New Brunswick to practise as an attorney, whose articles would not expire before the 11th April, 1840, applied to the court in Michaelmas Term, 1839, for leave to be examined before the expiration of his articles, because, if he was compelled to wait till Easter Term, 1840, he would not be admitted till Trinity Term, which would be after vessels for New Brunswick had sailed, and he would not then arrive before the winter had set in, and, by being examined at once, he would be admitted in Easter Term. The court, under circumstances, ordered his examination. *Ex parte Twynam*, B. C. III, 72. See V. p. 78.

(g) Rule, H. T. 6 W. 4.—When any articulated clerk shall be dissatisfied with the refusal of the examiners to grant him a certificate testifying his fitness and capacity to act as an attorney, III, 140.

(h) Petition of an unsuccessful candidate, under such Rule, III, 141.

(i) Orders of the Master of the Rolls relating to the admission of solicitors to practice in the Court of Chancery, 27th July, 1836. III, 156.

(j) New Rule of the Q. B. for admission of attorneys. E. T. 1840. III, 38.

SEE INFANT.—ATTORNIER.—ADMISSION OF ATTORNIER.

1. (k) *Admission*—An attorney must be admitted in the Court of Bankruptcy before he can practise there. *Exp. Webb*, C. R. I, 236.

(l) An attorney of the Court of Common Pleas of Durham and Lancaster, where he had been practising seven years, applied to the court for a rule to show cause why he should not be admitted to practice in the superior courts at Westminster without submitting himself to the examination. The rule was granted, but the court suggested that the applicant had better go before the examiners in the first instance, and if he should happen to be "plucked" he could afterwards come to the court for assistance. *Exp. Marshall*, B. C. I, 410.

(m) Attorneys, who are not admitted in Chancery, cannot enforce payment of bills of costs for business done by them in that court. *Cresswell v. Norris*. Q. B. I, 27.

(n) Where a mistake appeared in the notice of intention to apply for admission by reason of a wrong christian name being inserted therein, the court allowed the notice to be amended. *Exp. Duke*, B. C. II, 122.

(o) Rule of Court of Exchequer as to. H. I. 3 Vict. III, 239.

(p) *Re-Admission.*—An application was made to the court for a rule to show cause why an attorney should not be struck off the rolls for having neglected to take out his certificate, and also for having been re-admitted without giving the usual notices of his intention to do so. The court granted the rule, which was discharged upon argument. *Peget v. Chamber*. C. P. I, 393. II, 74.

(q) Order as to admission. M. T. 2 Vict. 26.

2. *Certificate.*—(r) An attorney who does not take out his certificate in due time, although it is taken out within a year from the expiration of his last certificate, yet he is not entitled to recover costs of his client for business done during the time he was without a certificate, the new certificate not having retrospective effect. *Archer v. Garrard*, Ex. I, 314. *Bowler v. Brown*, 2 Ad. & El. 116, doubted.

(s) An unintentional default in payment of the proper amount of stamp-duty on an attorney's certificate is cured by payment of the duty and penalty. *Anon*. B. C. I, 44.

(t) An attorney may maintain an action for costs although he has not entered his certificate according to 37 G. 3. c. 90. s. 27. *Eyre v. Shalby*, Ex. IV, 92.

(u) *Allowing unauthorised Persons to Practise in their Names.*—The Law Society applied to the court for a rule to show cause why an attorney should not be struck off the Roll, and why an unauthorised person, who had practised in his name, should not be committed to the prison of the court for one year, under 22 G. 2. c. 46. s. 11. The court granted the rule. *The Law Society v. Willis and Allen*, Q. B. I, 54.

(v) An attorney applied to be re-admitted. He had taken out his 6l. certificate upon his admission, for three years; after that time he had given his client 12l. a-year during two years, to take out the second duty certificate; but he lately discovered that the client had only taken out 6l. certificates. He then offered at the stamp-office to pay the difference of the duty and penalty, which was refused without the sanction of the court. On affidavit of these facts the court granted the application on payment of the difference.

of the duty, the amount of the penalties, and a fine of 20s. *Anon.* B. C. L. 44.

3. *Duties and Liabilities.*—(v) The court has the power of enforcing the delivery of a bill of costs to the client, but the court has no jurisdiction as to the taxation. *In re Archer*, I. 107.

(v\*) A rule to set a verdict aside was refused in an action for witnesses' expenses brought against an attorney in which a verdict passed for the plaintiff, who had been subpoenaed by the attorney as a witness on the trial of a former cause, in which the defendant had acted as plaintiff's attorney, but refused to pay the witnesses' expenses. *Cannon v. Young*, Q. B. I. 25.

(w) An attorney is liable to damages for negligence, if he invests the money of his client upon insufficient security, and that to the extent of the loss sustained. *Smith v. Hanley*, N. P. I. 346.

(x) In an action against an attorney under 22nd Geo. 2. c. 45. for the penalties consequent upon acting as an attorney, while holding the offices of deputy town clerk and clerk of the peace. It was ruled at Nisi Prius by Parke, J. that proof of the defendant's merely acting as clerk of the peace, without an appointment to that office, was not sufficient to maintain the action, which ruling the court, on argument of a rule for a new trial, held to be correct. *Faulkner v. Chevill*, Q. B. II. 55.

(y) The court will not listen to an application to set aside a non-suit caused by neglect of plaintiff's attorney in not being in court when the cause was called on, but will leave the parties to bring a new action. *Ullithorne v. Cass*, Q. B. III. 26.

(z) Where an attorney is employed to bring an action, and in pursuance of his instructions sues out a writ, directed to the sheriff of Middlesex, but which was served in the city of London, and the writ is set aside by a judge's order, with costs to be paid by the plaintiff, and the plaintiff neglects to pay the costs until an attachment is issued against him; upon an action brought by the plaintiff against the attorney to recover the amount of the attachment: held that the plaintiff was entitled to recover the costs of the writ of summons, but not the costs of the attachment. *Exp. Samuel v. Pill*, N. P. III. 299.

(aa) But the attorney is not liable to the costs of an attachment against his quondam client for non-payment of the costs incident to the setting aside the writ by means of a judge's summons and order, because the client, when informed of their non-payment by the attorney, ought to have paid them instead of allowing himself to be attached. *Id.*

(bb) The court will not disturb a sale of real property by a client to his solicitor (who subsequently obtains an advance in the price) after the lapse of more than a quarter of a century, and a failure of proof of fraud. *Rudd v. Sewell*, L. C. III. 359.

(cc) Where a bill is filed, impeaching a deed on the ground of fraud, the attorney who prepared it will be allowed to be made a party to the suit, in order to obtain a full discovery, because he is in effect a party to the fraud. *Beadles v. Burch*, V. C. III. 405.

(dd) A solicitor ought not to act for both vendor and purchaser on the sale of real property, for, by so doing, he places himself in a situation rendering it difficult for him to act entirely right. When a solicitor acts for a client, and it afterwards becomes a question whether he acted for such client or not, the client may call upon the solicitor for his authority in writing. But to this rule exceptions prevail, inasmuch as the client's conduct may show authority either at the time or by subsequent acquiescence. *Cattell v. Simons*, M. R. III. 407.

(ce) When a solicitor is compelled under the 56th

Order to withdraw from the prosecution of a decree, the court will give the new solicitor liberty to inspect all papers, &c. relating to the cause which may be in the possession of his predecessor, but without prejudice to the latter's lien for costs. *Binnett v. Baxter*, V. C. IV. 5.

(ee\*) A solicitor who voluntarily removes himself from a cause, shall give up the papers to his client's new solicitor, without prejudice to his own lien, for costs, so as to enable the new solicitor to carry on the suit. *Id.* See *Heslop v. Metcalf*, 3 Mylne & Cr. 183.

(ff) An attorney cannot discharge a prisoner in execution for debt without receiving the amount thereof, and license by an attorney to discharge such a prisoner is no answer by a public officer to an action for an escape, unless he avers payment of the debt or a special authority from the creditor to his attorney to consent to the prisoner's discharge. *Savery v. Chapman* in *Davis v. Crosswell*, Q. B. IV. 89.

(gg) If the solicitor of a cause set down for hearing, neglects to deliver the usual papers to the judge, the course usually adopted at the Rolls is to strike the cause out of the paper, and, at the same time, to give leave for its restoration therein, on application being made for that purpose the same day. *Gray v. Foot*, M. R. IV. 141.

(hh) If evidence is adduced sufficient to satisfy a jury, that the defendants (two attorneys), for the purpose of arresting the plaintiff on a *copias ad satisfaciendum*, directed a clerk in their employ to devise means for that purpose, and he adopted the novel scheme of trumping up a criminal charge against the plaintiff, whereby he might be taken before a police magistrate, with a view, that on his certain discharge from thence, they might have an opportunity of arresting him on the civil process, or that the attorneys, being cognizant of such a proceeding, acquiesced therein, they are liable in damages for the offence. *Rugby v. Moss and Humphreys*, N. P. IV. 222.

(ii) An attorney who retains a proctor for a party in a cause, does not thereby necessarily become liable to him for costs, and such attorney may therefore be examined as a witness in the same cause. *Atten v. M'Pherson*, Prerog. C. IV. 285.

(jj) A solicitor will not be held to have obtained a deed of security for costs from his client by means of undue influence, where proof is merely given that the client trusted wholly to the solicitor, without showing that the latter had some particular controul over the client; but proof will, in such cases, be required that some advantage was obtained—some threats or undue influence used, or that the transaction complained of was contrary to the policy of the law. *Casborn v. Bersham*, M. R. II. 358.

4. *Privileges.*—See *Stockdale v. Hansard*, III. 251.

(kk) An attorney is entitled to carry a cause to trial after a notice from his client not to do so, where a fair reason exists of imputing collusion between the plaintiff, the defendant's attorney, and other parties, to deprive the plaintiff's attorney of his costs. *Marks v. Benjamin*, Ex. II. 152. III. 265.

(ll\*) It is not the custom of the courts to call upon an attorney to answer matters on an affidavit, charging him with an offence for which he may be indicted. *Id.*

(ll) An attorney cannot be called upon to answer matter in an affidavit which charges him with an indictable offence. *Id.*

(mm) If a plaintiff and defendant settle an action between themselves, without the plaintiff's attorney's cognizance, and without paying his costs, the latter may (on proof that the agreement for such settlement was entered into for the purpose of depriving him of such costs) proceed against the defendant to judgment

as if no settlement had been made. *Jones v. Hughes*, Ex. IV. 78.

(nn) The Insolvent Debtor's Court issued commissions to attorneys in the country to take bail. *Id.* I. D. C. II. 378.

#### 5. TAXATION AND OTHER INCIDENTS TO COSTS, &c.

(oo) The Court of Exchequer has power to enforce the delivery of an attorney's bill of costs, in order that the client may satisfy himself of the amount, and have an opportunity of seeing whether he has been properly credited for all monies received. *The point never decided on argument.*—A rule was made absolute for the delivery of a bill of costs against an attorney, *Ex parte Archer*, Ex. I. 107. See *Clarkson v. Parker*, 7 Dowl. 87.

(pp) The Court of Chancery has the power to refer the bill of costs of a London solicitor who has acted as agent for a country solicitor for taxation. *Ex parte Board*, M. R. III. 340. On appeal L. C. did not decide the point, *ante*, III. 391. See *Jones v. Roberts*, 8 Sim. 397. *Ex parte Wood*, M. R. IV. 7.

(qq) To enable a court of law to order an attorney to deliver his bill of costs, it is imperatively requisite that some portion (however small) of the business in respect of which such bill is required, should be done in the court in which an application to order such delivery is made, and the affidavits upon which the application is founded, must be entitled in the cause. The court has jurisdiction for the purpose. *Ex parte Lord Cardross re Hodgson, and Burton*, Ex. III. 410, (8.)

(rr) Rule that an attorney cannot oppose the discharge of an insolvent debtor in respect of a bill of costs not delivered before the hearing. *Re Wm. Schultz*, Ins. Deb. C. III. 72.

(ss) An assumpsit for work and labour as an attorney, the defendants pleaded in abatement and alleged that the promise was made by them jointly with others, on which point issue was joined. It was proved that some of the contracts on which the action was founded, were made by the defendants alone, but others jointly with other persons: held, that the plea was not made out; that the plaintiff was not bound to new assign, and that inasmuch as the plea was indivisible, the plaintiff was entitled to recover the whole demand. *Hill v. White*, C. P. III. 104.

(tt) An attorney cannot maintain an action against his client for the costs of a former action incurred after a positive revocation of the retainer, and notice not to proceed therewith have been given. *Briggs v. Glover*, C. P. III. 121. (See *Marks v. Benjamin* (kk), and *Jones v. Hughes* (hh), *supra*.)

(uu) Where an order was made for payment of costs within a limited time after taxation, the proceedings taken under that order were held irregular, because it was not served upon the client before the expiration of the time specified in the order, for payment. *Duffield v. Elwes*, L. C. IV. 21.

(vv) On the death of an attorney his executors delivered a bill of costs due to him as attorney for the lessor of a plaintiff in an action of ejectment, and a judge's order was obtained referring it to the master for taxation: held, that the bill was not taxable, and that the judge had therefore no power so to refer it. *Doe d. Sabine v. Sabine*, B. C. IV. 89. See *Maddaford v. Austwick*, 3 Mylne & Cr. 423.

(ww) Upon discharging the original attorney in a cause, and substituting another in his stead, the former is not bound upon tender and payment by a third person of his bill of costs, as taxed by the master

to deliver up the deeds and other writings in his custody belonging to his client, to such third person, upon his simple demand *unaccompanied by a letter of attorney*. The rule in such cases is, that a third person may make the demand upon the authority of a letter of attorney only, a copy of which must be served with the demand, and the original produced. *Doe d. Hickman v. Hickman*, C. P. IV. 280.

(xx) In 1837, the widow and executrix of A, a solicitor, filed a bill against the executrix of B, for the recovery of a bill of costs due to A for services rendered to B, from 1826 to 1830. The statute of limitations was pleaded in answer to the bill, but at the time of the filing it, the law on the subject was under the circumstances doubtful, in consequence of the decision of Lord Brougham in *Jones v. Scott*. The law being subsequently settled against the plaintiff, the defence became good. The defendant had also set up as a defence the non-application of a sum of money which A received for the benefit of B, he failed to prove this defence. The L. C. dismissed the bill, but without costs as regarded the false defence. *Field v. Churchill*, L. C. IV. 411. See *Jones v. Scott*, D. P. 4 Cl. & Fin. 382.

#### 6. MISCELLANEOUS.

(yy) Lien. A solicitor cannot retain deeds deposited in his custody, and on which he has a lien for costs, unless they belong to the person who employed him. Distinction in these cases between deeds belonging to the party who employs the solicitor, and deeds belonging to another party. A solicitor cannot have a lien upon anything to which other parties beside his clients are entitled. *Hicks v. Kent*, M. R. III. 24.

(zz) The Court of Queen's Bench has no summary jurisdiction over the attorneys to compel them to deliver up mortgage securities upon which they have a lien, although improperly or irregularly obtained. *Rising v. Dolphin*, B. C. III. 310.

(aaa) If a solicitor withdraw himself from the conduct of a suit, his client will be allowed the free use of such of the papers which he (the solicitor) held as are required in the prosecution of the suit. But it will be without prejudice to that solicitor's right of lien on those papers. In this case such use was allowed on the new solicitor's undertaking to prosecute the suit with diligence. *Cane v. Martin*, M. R. IV. 155.

(bbb) The principle is, that the solicitor claiming the lien should have every security not inconsistent with the progress of the cause, but there will neither be the same ease and celerity, nor as little expence in the conduct of it, if the new solicitor is merely to have access to the papers, as when they are placed in his hands upon his undertaking to restore them after the immediate purposes of the production have been served. L. C. IV. 156.

(ccc) Attorneys petition of, to the House of Commons, III. 325.

Resolutions in *re Howard*, *id.* 314.

#### ATTORNEY, POWER OF.

See BANKRUPTCY, 32.

#### ATTORNEY, WARRANT OF.

See WARRANT OF ATTORNEY.—See ARMED AND INSOLVENT.—LACHES, 2.

#### AUCTIONEERS.

If property which an auctioneer advertised for sale by auction is sold by private contract by the vendor's

solicitors, before the time appointed for the sale by auction arrives, the auctioneer, is, nevertheless, entitled to his usual commission upon such sale, there being a usage or custom in the trade to that effect. *Rainy v. Vernon*, N. P. IV. 249.

See PRACTICE, 4.

**AVOIDING CONTRACTS.**

See CONTRACTS.

**AVOIDING SERVICE.**

See DISTINGUISH, 3.

**AVOWAL OF ACCEPTANCE.**

See BILL OF EXCHANGE, 4.

**AWARD.**

See COSTS, 3.

**BAIL.**

See DEBT ACT, &c. 1 a, 2.—INSOLVENT DEBTORS, II.—PALACE COURT.—SHERIFF, 1.

**BAIL BOND.**

See BANKRUPTCY, 29\*.—DEBT, 1.

**BAIL CASES.**

See DEBT, 2.—INSOLVENT DEBTORS, 6 to 10.

**BAIL EXONERATING.**

See INSOLVENT DEBTORS, 9.

**BAILEE.**

See BAILMENTS.—FACTORS.

**BAILMENTS.**

1. At common law the sheriff can only seize things which he can sell; goods, therefore, deposited by A with B in the way of trade, and B holds them as a lien or work and labour bestowed on such goods, and also under a special agreement as a security for other monies, cannot be taken in execution under a writ of *ieri factas* issued against the bailee. *Legg v. Evans*, Ex. IV. 9.

2. A having obtained a horse for trial with the view of purchasing, employed B, an experienced person to take such trial. The horse ran away with B and was killed. A, was held responsible for the value of the horse. *Lord Carnegy v. Scar*, Q. B. IV. 90. 108.

See CARRIERS.—DETINUE.—FACTORS.

**BALANCE SHEET.**

See BANKRUPTCY, 33.

**BALL.**

See ENTERTAINMENT, PLACE OF.

**BALLAST.**

See INSURANCE, 3.—SHIP.

**BANKERS.**

1. Where bankers received money from a person, and after his death paid it over to the chief magistrate of London, to whom the depositor directed a sort of testamentary writing disposing of part of the money, and took his receipt only. They were held liable to make the amount good to the depositors' representatives. *De Bourget v. Rothschild*, Q. B. I. 138.

2. The exclusive privilege of the Bank of England to accept bills of exchange, having more than six months to run, operates to render it unlawful for an English Joint Stock Banking Company, consisting of more than six persons, to enter into an arrangement with a foreign bank in pursuance of which the latter drew such bills upon the manager of the Joint Stock Banking Company in his individual capacity, but payable to the company's bank, whose funds are made responsible for the due payment of the bills. *Booth v. Bank*

of England. Dom. Proc. IV. 183. Opinion of the Judges. *Id.* 203.

3. To an action by R. (Manager of the "National and Provincial Bank of England") against the maker of a promissory note payable to such "manager," the defendant pleaded that the plaintiff was not such manager. It appeared that the Company had various branches in the country, with a local manager or chief clerk to each, and at one of which branch banks the note in question was issued: held, that in this case the term "manager" referred to and meant the "general" and not the "local manager." *Robertson v. Steward*, C. P. IV. 298.

See DETINUE.—EXECUTORS, 3.—PARTNERS.

**BANK OF ENGLAND.**

The Governor and Company of the Bank of England are not liable to be called upon to transfer stock which had been previously transferred in a fraudulent manner, and by means of forgeries, where gross negligence on the part of the proprietor led them to suppose the previous transfers to have been regular. *Coles v. Bank of England*, Q. B. II. 103.

See BANKERS, 2.

**BANKRUPTCY.**

- (a). Jurisdiction of the Courts, Commissioners, &c.
- (b). Persons liable to be made Bankrupts.
- (c). Act of Bankruptcy.
- (d). Passing of the Property subsequent to the Act of Bankruptcy, and the Appointment and Duties of Assignees.
- (e). Debts provable under the Commission.
- (f). Partners and Partnership Transactions.
- (g). Superceding and annulling the Fiat.
- (h). The Certificate.
- (i). Miscellaneous.

(a) (1) The jurisdiction of the Court of Review upon petition to discharge a bankrupt from custody who had been committed by a country commissioner, *Quere*. Exp. *James*, C. R. I. 362.

(2) A commissioner of bankrupts sitting singly has no power to enforce an order made by himself for the withdrawal of a witness from the court until another witness shall have been examined. Exp. *Levin*, C. B. II. 30. *Id.* II. 75.

(3) On appeals from the Court of Review, the Court of Chancery has no jurisdiction upon facts which are not found by the Court of Review. Exp. *Ross*, L. C. II. 101.

(4) Orders of the Court of Review are of no effect until the great seal has been affixed to them. Exp. *Harper*, L. C. IV. 187.

(b) (5) A dentist who deals in teeth, and occasionally purchases large quantities of them at one time, is a trader within the meaning of the bankrupt laws. *Gibson v. Carroll*, N. P. II. 186.

(c) (6) A second affidavit against a debtor under section 8. of the act for abolishing imprisonment for debt, (1 & 2 Vic. c. 110,) will not be ordered to be taken off the file, because made for the same debt as a former affidavit, if it appears that such former affidavit is not available by reason of being made for an uncertain amount. Exp. *Ross*, C. R. II. 90.

(7) If a trader gives a bill of sale of the whole of his property for a pre-existing debt, he thereby commits an act of bankruptcy. Exp. *Iron*, C. B. II. 375. See 9.

8. An affidavit of debt was made on the 22nd Aug. and a fiat issued on the 29th September following, but being superseded for want of prosecution, a second fiat issued on the 24th Oct.: held, (on appeal from C. R.)

that the second was a good fiat, although it was not issued until after the expiration of two months from the filing of the affidavit, in as much as the act of bankruptcy was complete on the issuing of the first fiat. *Exp. Parker*, L. C. III. 165.

(9) An assignment of a trader's effects sufficient to constitute an act of bankruptcy must be an assignment of all his effects, and not of a part only. *Exp. James Moore*, Bankr. C. IV. 348. See (7), (34).

(10) Act of Bankruptcy under 1 & 2 Vic. c. 110. s. 8. Affidavit of debt and subsequent default: objections to the affidavit, that it was not made before the proper officer, nor made by the proper party, and not filed in the proper place. Fiat annulled. *Re Hall*, I. 92.

(d) (11) O, the owner of a vessel trading to the East Indies, called "the B," engaged D as her captain for the voyage; D being in embarrassed circumstances went ashore at Algoa Bay, leaving F the first mate in command, and whom he afterwards by writing desired to take charge of the vessel for O. D also wrote to the latter, stating that he had handed the cabin furniture over to him in discharge of a debt he owed him. Upon receiving this letter, O wrote to F instructing him to keep possession of the furniture, &c. for him. On the ship's arrival at London on the 6th December, O took possession of the goods. Two days previously to this, however, D committed an act of bankruptcy, on which a fiat issued on the 6th December. The assignees of D claimed the goods: but it was held, that while the goods were in F's possession, he held them as O's agent, and therefore that O, through F, had possession of the goods before the act of bankruptcy was committed, and was entitled to detain them from the assignees. *Belcher v. Oldfield*, C. P. III. 71.

(11a) Whether common house fixtures are goods and chattels within the order and disposition of a bankrupt so as to vest them in his assignees under the 72d sect. of the bankrupt act, or whether they pass to an equitable mortgagee. *Exp. King, re Walsh*, C. R. IV. 206. *Quere?* See *Id.* 290. 308. 323.

(11b) A fiat bore date on the 4th May, and the docket thereupon was struck on the same day, but was not delivered to the solicitor to the commission until the 6th of the same month: held, that from the time the great seal was applied to the fiat, the bankrupt's property was bound by it. That "suing out a commission" was the "application" for it, and that the fixing the great seal is the "issuing" of it. Therefore where a declaration of insolvency was filed on the 9th March, a fiat and docket dated and struck as above-mentioned, though not delivered till the 6th May, was held good. *Exp. Rowe*, L. C. III. 21.

12. It is optional in an official assignee to allow the use of his name in an action before he receives a sufficient indemnity. *Exp. Franks*, C. R. IV. 362.

(e) See *infra*, F.

(13) A promissory note for barrister's fees, marked by a solicitor and charged to his client is provable by a barrister against the solicitor's estate on his becoming bankrupt. *Exp. Helder and Co.*, Bankr. C. II. 376.

(14) A creditor's assignee, claiming by assignment, may prove the assigned debt against the bankrupt's estate, to the amount appearing on the bankrupt's books, without the concurrence of his assignor. *Exp. Chambers*, Bankr. C. III. 105.

(15) Where a trader became bankrupt, who upwards of six years anterior to his bankruptcy, agrees to pay his bankers, as well as his other creditors, a composition of 5s. in the pound, which the bankers agreed to accept, and on payment of part of the composition, gave an undertaking to release him from the whole debt, on payment of the full amount of the composition; but no further payment was made until after their bankruptcy, when, after a correspondence on the

part of the bankers' assignees and the bankrupt, in which the original debt was referred to and acknowledged, the bankrupt sent a check for 100*l.*, and in the form of a receipt he sent with it, the composition was referred to as then subsisting, but the assignees declined to adopt that form of receipt: held, that the whole of the composition was not paid before the bankruptcy, the original debt was revived, and could be proved under the fiat. *Exp. Waterspoon*, C. R. IV. 268. See *Exp. Bennett*, *Ross v. Ross*, Ann. 332; *Mackenzie v. Mackenzie*, 16 Ves. J. 372; *Swell v. Mussen*, 1 Vern. 210; *Boothby v. Swale*, 3 Camp. 175; *Austey v. Marden*, 1 N. R. 134; *Smith*, 426; *Steinman v. Magnus*, 11 East. 300; *Camp*, 124. 3 Western's Conveyancing, 182. n. 6.

(16) An allegation, in a petition, that proof of a debt had been received on a defective deposition is immaterial, and no creditor has a right to say a commissioner admitted a proof on defective evidence, unless he succeeds in negating the right to prove. *Ex Marston*, C. R. III. 136.

(17) Proof against a bankrupt's estate, by his trustees, for the amount of trust monies applied by the bankrupt to his own benefit, cannot be made without an order from the court above. *Exp. Clarke*, Bankr. C. I. 334.

F. (18) On a dissolution of partnership between A and B, it was agreed that B should take the whole of the property and guarantee the payment of outstanding debts: held, that on the bankruptcy of B, a debt due to A, contracted during the partnership, might be proved under the fiat against B's separate estate. *Exp. Jones*, C. R. II. 44.

(19) Two partners, A and B, dissolved partnership, and the concern was then carried on by B alone, who was to give a warrant of attorney with judgment thereon to A, for the amount which his share of the stock, &c. was valued at, payable by instalments. Before the whole of the sum due to A was paid, B became bankrupt, leaving some of the partnership debts unpaid. A claimed to prove for his balance against B's separate estate. The outstanding joint creditors were cognizant of the arrangement between the partners, and seemed to assent to it, though one of them had a joint judgment on which he had acted subsequent to the arrangement: held, that these circumstances were sufficient to take the case out of the rule in bankruptcy "that a retired partner cannot prove against the separate estate of his former partner, if any debts for which he was jointly liable remain unpaid." *Exp. Rolf*, C. B. II. 344.

(20) A member of a copartnership agreed with the other members thereof to retire from the concern, and leave all the partnership property to the continuing partners, on condition of their discharging all the partnership debts, including a large one due to the bankers. The bankers signed a memorandum according to such agreement so far as it concerned them, but afterwards took proceedings under 1 & 2 Vic. c. 110, to declare all the partners bankrupts on account of the debt due to them. The retiring partner applied for an injunction to restrain the bankers from taking any proceedings to obtain such fiat against him, which was granted as prayed. *Attwood v. Banks*, M. R. II. 153.

(21) Bankruptcy does not affect the identity of a partnership established under the joint stock banking Act, 7 G. 4. c. 46. *Exp. Marston*, C. R. III. 136.

(g) (22) A fiat will be superseded if proved to have been concerted by the bankrupt and concealed for fraudulent purposes conducing to his own benefit, and the defeat of an execution by a judgment creditor. *Exp. Glover*, C. R. III. 55. See (24).

(23) After a fiat has been superseded the Court will

under circumstances order its enrolment in order to enable the party against whom it was illegally issued to prosecute an action against the petitioning creditor for such issue. *Exp. May, Bankr. C. III. 56.*

(24) An order of the Court of Review is of no effect until the great seal is affixed thereto; and the Lord Chancellor therefore declined to alter the date of an order annulling a fiat pronounced by that Court on the 30th May, which could not be obtained from the office in order to procure his lordship's signature until the 1st of June, when it reached his lordship for that purpose. *Exp. Harper, L. C. IV. 187.*

(25) Where a fiat appears to have been issued at the instance of a bankrupt to defeat an execution by a judgment creditor, the court will annul it. *Exp. Monroe, C. R. IV. 282. See 2d sup.*

(26) A bankrupt's right to a supersedeas, after he has obtained his creditor's assent thereto, is not conditioned on payment of costs. *Exp. Green, C. R. IV. 110.*

(A) (27) The court will not on petition stay a bankrupt's certificate until the master has reported on the state of the accounts. The allowance of the certificate is a matter within the discretion of the court, and it will not interfere unless misconduct can be fairly imputed to the bankrupt. *Exp. Stocken, C. R. I. 329.*

(28) An objection to a petition because it only asked that the certificate might be stayed, without alleging that it had been issued and allowed by the proper authority, will not be allowed. *Id.*

(29) A bankrupt, after obtaining his certificate, remains liable upon a guarantee given by him before his bankruptcy, such guarantee not being proveable under the fiat. *Lane v. Burghart, N. P. IV. 206. 234.*

(i) (29\*) The commissioners of the Court of Bankruptcy will not certify their approval of a bankruptcy bail bond, where no particulars are laid before them but the bond and an affidavit of its execution, if none of the parties appear, and no evidence is given of the sufficiency of the sureties, or of the creditors having been served with notice of the debtor's intention to tender the bond. *Exp. Cathie, Bankr. C. I. 152.*

(30) The word "witness," is a sufficient attestation to a petition within the order of L. C. Eldon made in 1809. *Exp. Stocken, C. R. I. 329.*

31. Bankruptcy excludes a husband from joining his wife in the exercise of a joint power of appointment. *Hole v. Escott, L. C. I. 71.* But see *Jones Winwood, Vol. v. 360.*

(32) Powers of attorney relating solely to matters a bankruptcy require no stamp. *Exp. Davis, C. R. I. 75.*

(33) A bankrupt who kept no books, and who was unable to produce vouchers of any kind to support his balance sheet, was not allowed to pass his last examination. *Exp. Williams, Bankr. C. II. 312.*

(34) Where an act of bankruptcy is founded on an affidavit of debt under stat. 1 & 2 Vic. c. 110. s. 8. and the neglect of the debtor to pay or settle for such debt within 21 days, the fiat may be issued on the petition of any creditor, and not necessarily by the creditor filing the affidavit, to the exclusion of all his co-creditors. *Exp. Parker, L. C. III. 165.*

(35) Where it would be an inconvenience and increased expense to a great majority of creditors if a fiat was worked at the place of the bankrupt's residence, the court will allow its removal to some other place more convenient and less expensive. *Anon. L. C. II. 262.*

(36) Bills of exchange amounting to 523*l.* were drawn by A, and accepted by B for A's accommodation. They were then deposited with A's bankers to secure a floating balance. On A's becoming bank-

rupt, the bankers proved a debt of 7520*l.* against his estate (of which debt the amount of those bills formed part), and they subsequently received a dividend of 2*s.* in the pound on the whole amount of their debt. B afterwards paid the bills: held, (reversing a decision of the Court of Review,) that B was entitled to have such dividend on the value of the bills paid to him by the bankers, and also to receive all future dividends thereon. *Exp. Holmes, Re Garner, L. C. IV. 57.*

(37) A person attending the court as the husband of a petitioner, is privileged from arrest. *Exp. Britton, C. R. IV. 235.*

## BANKRUPTCY, COURT OF, PRACTISING IN.

See ATTORNIES, *k.*—APPOINTMENT, POWER OF.—HUSBAND AND WIFE, 4 *f.*—JOINT STOCK COMPANIES, 21. 25.—MORTGAGE AND MORTGAGES, 1.—PRACTICE, 4.—TROVER.

## BANKRUPTCY, SWEARING AFFIDAVITS IN, UNDER 1 & 2 VIC. c. 110.

OBSERVATIONS OF THE COMMISSIONERS UPON, L. 8. BARGE.

See WARRANTY.

## BARON AND FEME.

See HUSBAND AND WIFE.—SEPARATE USE.

## BAR TO RELIEF.

See SETTLEMENT, 3.

## BARRISTERS' FEES.

See BANKRUPTCY, 13.—PRACTICE, 1.

## BASTARDY.

A reputed father of a bastard child born some time before the passing of the poor law amendment act, is not liable after the passing thereof to pay for the maintenance of the child if no order of affiliation was made. *Slack v. Wells, Sher. Court, II. 361.*

## BELIEF.

A defendant cannot file an affidavit in opposition to a plaintiff's affidavit pledged to belief, because although the defendant may displace by affidavit the truth of the fact sworn to, yet he cannot by any affidavit displace the truth of his opponent's averment that he believed the fact. *Addis v. Campbell, R. C. III. 153.*

See BILL, AMENDING, 1.

## BELIEF, IN A FUTURE STATE.

See INSOLVENT DEBTORS, 21.

## BENEFIT LOAN SOCIETIES.

Where an association raised funds by contribution, portions of which were agreed to be advanced to the members upon certain conditions, viz. the portions to be advanced were put up by auction and lent to the highest bidder who was to pay five per cent. interest in addition to the sum bid: a verdict was given that such advance was a partnership transaction, and not a scheme to lend money at usurious interest. *Silver v. Burns, N. P. II. 252.* A motion was afterwards made to set this verdict aside, and for a new trial, but refused. *C. P. M. T. 1839.*

## BEQUEST.

1. Where a testator bequeathed property "in trust at his wife's decease for his surviving children:" it was held that the issue of children who died in the mother's lifetime were not included. *Widmorth v. Wood, M. R. I. 406.*

2. RESIDUARY.—A testator, after bequeathing a sum sufficient to produce an annuity of a given amount, directed that the principal should on the testator's death be paid over to his son and daughter, provided they attained the age of twenty-one, and he then gave them the residue of his property. If his son and daughter died under twenty-one, the testator directed it to be divided between four persons whom he named as executors, one of whom named working with



testator's effects. The children died under twenty-one: held, that the principal money producing the annuity went to the next of kin, and that the executor who had renounced was not entitled to a share of the residue. *Barber v. Barber*, L. C. on appeal, I. 41.

3. Where a testator directed trustees after, and in case of the death of his daughter without issue, to assign the residue of his personal estate, "unto the nearest of kin of his own family for ever:" it was held, (confirming a decree of the court below,) that, as circumstances shewed that these words referred to the nearest of kin of the testator at the daughter's decease, the nearest of kin both of the testator himself and of his daughter at her decease was entitled to the fund. *Clapton v. Bulwer*, L. C. IV. 75.

4. A bequest to trustees to be enjoyed by the person in possession of other property until a tenant in tail of the age of twenty-one years shall be in the possession of such property, and then to go and belong to such tenant in tail, is void for remoteness. *Ibbotson v. Ibbotson*, IV. 106. M. R. affirmed on appeal, L. C. V. 372.

5. To a woman surviving her husband and she dying unmarried. See LEGACY, 3.

See COUSINS GERMAN.—DEVISE, 1, 2, 4, 5.—LEGACY.—LIMITATION.—SEPARATE USE, 3, 4, 6.

#### BEQUEST, CONTINGENT.

See LEGACY, 3, 4.

#### BEQUEST, SPECIFIC.

See LEGACY, 2.

#### BILL, AMENDING.

1. A bill cannot be amended after replication upon affidavits which are not positive or pledged to belief. *Addis v. Campbell*, R. C., III. 153.

2. It is always a matter of discretion in the court to grant leave to amend a bill after demurrer. *Heris v. Reina*, L. C. III. 391.

3. A plaintiff may amend his bill by an order of course before answer, and without prejudice to a common injunction. *Ferrand v. Hamer*, L. C. I. 118. 137.

4. In a case where extensive inquiries were rendered necessary by the answers, and the plaintiff's solicitor could not complete them so as to move to amend his bill before the time allowed by the rules of court for so doing had expired, but permitted as little delay to take place as possible, the court granted leave to amend on payment of costs notwithstanding those rules. *Wilford v. Bell*, M. R. IV. 428.

5. If an order to amend is made upon stating amendments to shew their materiality, and if exceptions are allowed to the answer to those amendments rendering it necessary to make further amendments, the party seeking to amend must show such further amendments to have become necessary by the setting forth of new facts in such answer. *Dison v. Snowball*, Ex. Eq. II. 28.

See LACHES.

#### BILL, ANSWER TO AMENDED.

See ANSWER TO BILL.

#### BILL IN CHANCERY.

A plaintiff has a right to have his bill dismissed on payment of costs. *Curtis v. Lloyd*, L. C. I. 162.

See CREDITOR'S BILL.—INJUNCTION.—PRACTICE, (Equity, 8.)

#### BILL OF COSTS.

See ATTORNEY, 5.

#### BILL OF DISCOVERY.

See DISCOVERY.

#### BILLS OF EXCHANGE.

1. A bill of exchange draws on a discontinued

stamp is invalid, and the amount thereof cannot be recovered. *Abraham v. Skinner*, N. P. I. 119.

2. An acceptor of a bill of exchange, which was altered in its acceptance by being made payable at a certain place, but without his knowledge, is not liable for the amount. *Calvert v. Baker*, Ex. I. 108.

3. The figures in the margin of a bill of exchange are controlled by the words written in the body of it—and parol evidence will not be admitted to show to what amount the parties themselves had treated it, although the stamp was for the larger sum. *Seaton v. Piper*, C. P. II. 58.

4. An acceptance of a bill of exchange, written by a third party, but subsequently avowed by the acceptor, was ruled to be a sufficient acceptance. *Ansell v. Andrews*, N. P. II. 89.

5. In an action by A against B on two bills of exchange, a plea of tender was held supported by proof, that B's shop-boy enquired of A's attorney what was due for principal and interest on the bills, at the same time stating that he had orders to tender the amount, which the attorney said would not be accepted unless a disputed shop account was settled as required by A. This question the shop boy declined entering into, but said, "Here are 150 sovereigns: if you won't tell me what is due to the plaintiff; will you take what is due out of this sum?" and placed the money in view, which the attorney refused. *Bevan v. Rees*, Ex. II. 104.

6. An acceptance of a bill of exchange, written by a third person by direction of the intended acceptor, is of the same effect as if he had written it himself, so as to quash an indictment for forgery preferred against such third person by the holder of the bill. *Reg. v. Spencer*, Hants Summer Assize, 1839. II. 199.

7. An action of debt may be maintained against the immediate parties to a bill of exchange or promissory note, although the words, "value received," are not found upon the instrument. *Hatch v. Tregan*, *Watson v. Keightly*, Q. B. III. 408.

8. To an action on a bill of exchange, it was pleaded that before the commencement of the suit the bill was indorsed by the plaintiff to some person unknown to the defendant, and who was at that time the holder of the bill:—the plaintiff's replication, which alleged that he indorsed the bill to R. K., who presented it to defendant for payment, when it was dishonoured; after which the plaintiff again became the holder thereof and entitled to sue thereon, and concluding with a special traverse of the allegation of an unknown person's being holder of the bill, was held bad, as offering a traverse of an immaterial circumstance. *Phillips v. May*, Ex. IV. 143.

9. The proper answer to such a plea would have been to reply that the person in the said plea alluded to was not the holder of the bill *modo et formal. Id.*

#### BILL OF EXCHANGE, FOREIGN.

See BANKERS, 2.

#### HOLDER OF.

See BILLS OF EXCHANGE, 8.

#### NOTICES OF DISHONOUR.

10. A notification whereby "Mr. S informed Mr. P that B's acceptance was not paid—as indorser Mr. P was therefore called upon to pay the money, which was expected immediately," was held an insufficient notice of dishonour to the indorser of a bill of exchange. *Strange v. Price*, Q. B. II. 40.

11. But "I beg to inform you that Mr. D's acceptance for — drawn and indorsed by you, on July 1, has been presented for payment and returned, and now remains unpaid," is a good notice of dis-

honour to the drawer of a bill of exchange. *Cook v. French*, Q. B. IV. 44.

12. A notice, "This is to inform you that the bill I took of you for 15l. 2s. 6d. is not took up, and 4s. 6d. expences, and the money I must pay immediately," was held by the court not a sufficient notice. *Messinger v. Southey*, C. P. IV. 44.

A notice that "the bill for 250l., drawn by J F, and accepted by C S, and bearing your indorsement, has been presented for payment to the acceptor thereof and returned dishonoured, and now lies overdue, and unpaid with me as above, of which I hereby give you notice." The court held was a sufficient notice to the indorser of a bill of exchange. *Lewis v. Comperis*, Exch. IV. 61.

See Vol. IV. 65. for the law on this subject, and a form of notice of dishonour—by the Editor.  
See, also, BANKRUPTCY, 13, 36.—PLEADING, 1, 2, 3.

**BILL OF LADING.**

See FACTORS.

**BILL OF SALE.**

See BANKRUPTCY, 7.

**BISHOP.**

See ANNUITY, 1.

**BLANKS.**

See DEEDS, BLANK.—TRANSFER.

**BOARD AND LODGING.**

See INFANTS, 7.

**BONDS.**

See CREDITORS' PRIORITIES.—DEBT, 1.—TRADE, RESTRAINT OF.

**BOOKS.**

See EVIDENCE, 3, 4.

**BOUNDARY OF PARISHES.**

See SETTLEMENT OF PAUPERS.

**BRANCH BANK.**

See BANKERS, 3.

**BREACH OF CONTRACT.**

See VENDOR AND PURCHASER, 3, 5, 7.

**BREACH OF COVENANT.**

See ASSIGNERS, LIABILITIES, 2.

**BREACH OF TRUST.**

See BANKRUPTCY, 17.—INSOLVENT DEBTORS, 10.—TRUSTEES.

**BROKERS.**

See CONTRACTS BY AGENTS.—SHIPPING, 2.—STOCK BROKERS.

**BROKERS (OF THE CITY OF LONDON.)**

These brokers are bound to act impartially according to the state of the market, both for the buyer and the seller, and he is not acting the genuine duty of a broker who allows himself to join with the buyer to induce the seller to sell at a price he knew was unjust and unfair. *Thompson v. Osborne*, Q. B. I. 328.

**BUILDING ACT.**

See LESSOR AND LESSEE, 1.

**BURGESS LIST.**

See MUNICIPAL REFORM ACT, 1.

**BUTCHERS' MEAT, DISTRESS OF.**

See LANDLORD AND TENANT, 4.

**BUYERS, WANT OF.**

See FIERI FACIAS, 1.

**CANADA.**

See HABEAS CORPUS.

**CANAL SHARES.**

See LEGACY, 2.

**CANCELLATION.**

See WILL, 11.

**CAPIAS AD SATISFACIENDUM.**

See SHERIFF, 7, 8, 9, 12.

**CAPIAS UTLAGATUM.**

See OUTLAWRY, 2.

**CAPIAS, WRIT OF.**

1. An insolvent debtor in prison under a remand, may be detained by a writ of capias without a judge's summons and order, when in custody at the suit of, a friendly creditor, although there may be no present apprehension of his quitting the country. *Crocock v. Weller*, Q. B. III. 86.

2. See JUDGE'S ORDER, 2.

**CARGO.**

See SHIPPING, 3.

**CARRIERS.**

The statute 11 Geo. 4. and 1 W. 4. c. 68, for the protection of carriers, &c., does not protect coach proprietors who neglect to affix the notice required by that statute in legible characters in their booking offices. *Percival v. Horne*, C. P. IV. 221.

See BAILMENTS.

**CASE, ACTION ON THE, WHEN PROPER FORM OF ACTION.**

See MUNICIPAL REFORM ACT, 2.

**CAUSE, ENTRY FOR HEARING.**

See PRACTICE, 16.

**CAUSE, HEARING OF, WHEN STAYED.**

See INSOLVENT DEBTORS, 28.

**CAUSE, PAPERS IN.**

See ATTORNEYS, 3.

**CAUSE, STRIKING OUT OF PAPER.**

See ATTORNEYS (gg).

**CAUSES OF ACTION.**

See JOINT AND SEVERAL ACTIONS.

**CERTIFICATE.**

See ATTORNEYS, 2.—BANKRUPTCY, H.—COSTS, 4, 8.

**CERTIORARI.**

See INQUISITION.

**CESTUIS QUE TRUST.**

See EXECUTORS, 4.—HUSBAND AND WIFE, 4.—TRUSTEES, 3, 5.

**CESTUIS QUE VIE.**

On the application of the owner of an estate charged with an annuity for four lives, was a the affidavit deposed as to his belief that the annuitants *pro vis*, who all resided in the parish of St. Pancras, were dead, the court granted an order for their production at the parish church within one month. *Re Packerwood*, L. C. IV. 187.

**CHALLENGE.**

See JURORS AND JURY, 1, 2.

**CHANCE.**

See RACTOR.

**CHANCERY.**

See BILL, ANSWER.—BILL IN CHANCERY.—PRACTICE, &c.

**CHANCERY PROSECUTION.**

See BANKRUPTCY, 1.—DEBT, 4 & 4 & 4.

**CHANCERY MASTERS &c.**

See MASTERS IN CHANCERY.

**CHANCERY ATTORNEYS &c.**

See ATTORNEYS, 2.

## CHANCERY NEW ORDERS.

Under 1 and 2 Vict. c. 110. (II.) 78, 91, 137, 125, 139.

## CHANCERY NEW FORMS OF WRITS.

IL 155, 170.

## CHARTER PARTY.

G, a master mariner, agreed to freight the A from London to the East Indies, and C guaranteed the performance of the charter party, whereby G bound himself to repair any damage the ship might sustain during the voyage: the ship stranded on her return, and received considerable damage. On arriving at London she was taken to a shipwright's yard and repaired to some extent, but whether by the order of G or the owner did not appear. It was, however, afterwards discovered, that the ship required greater repairs than was at first anticipated, and she was then sold for the purpose of breaking up. It was decided that C was liable upon the guarantee to the difference between a sum received from an insurance office for the damage, and the estimated costs of the required repairs. *Mosley v. Coleman*, N. P. IV. 250.

See SHIPPING, 2.

## CHARTISTS.

See JUSTICES OF THE PEACE, 3.

## CHATTELS.

See DEVISE, 1.—SEPARATE USE, 4, 5, 6.

## CHILDREN, SURVIVING.

Construction of the term in a will. *Wordsworth v. Wood*, M. R. I. 406.

## CHILDREN, ACCESS TO, CLOTHES OF, &amp;c.

See HUSBAND AND WIFE, 5 a.—INFANTS.

## CHILDREN, WHEN THE WORD ISSUE CONSTRUED TO MEAN.

See LIMITATION.

## CHURCH.

See PEW.—RECTOR.

## CHURCHWARDENS.

1. *Election of*.—The following mode of electing churchwardens was held a valid custom for that purpose, viz. "The inhabitants being assembled in the vestry on the day appointed for the election, quit that room upon the vicar taking the chair, and retire into the body of the church, leaving the churchwardens whose term of office is about to expire with the chairman in the vestry. The churchwardens then proceed to the body of the inhabitants and select two of their number, whom they send into the vestry in their stead, and having so done, they themselves mingle with the rest of the parishioners. The main body still remaining in the church, then send into the vestry two more persons as their representatives, and the four who thus join the vicar call in two more. The six then deliberate amongst themselves, and appoint the two churchwardens for the ensuing year." *Reg. v. Archdeacon of Ely*, N. P. II. 219.

A *mandamus* cannot be maintained against the archdeacon to compel his admitting a person to the office of churchwarden for the parish in which such a custom prevails, where he had been elected in opposition to it. *Id.*

2. *Place of Election of*.—The proper place to elect churchwardens is some convenient place within the precincts of the church. *Reg. v. Doyle*, Clk. Q. B. IV. 314.

3. *Right to preside at Elections of*.—The rector has a common law right to preside over the election of churchwardens, because he is, for ecclesiastical purposes, the head of the parish, and because he is the owner of the freehold of the church. *Id.*

4. Although churchwardens are temporal officers,

yet they are so far connected with ecclesiastical matters, that the rector has a right to interfere. *Id.*

## CIRCULATION OF NEWSPAPERS, NOTICE BY MEANS OF.

See NOTICE.

## CLAY PITS.

See TENANT FOR LIFE.—WASTE.

## CLERGYMAN'S DUTIES.

See MARRIAGE, 6.

## CLERKS, ARTICLED.

See ATTORNIES.

## CLERK OF THE PEACE.

See ATTORNIES, z.

## CLIENT, PURCHASE FROM.

See ATTORNIES, b b.

## CLOTHES OF CHILDREN.

See HUSBAND AND WIFE, 5 a.

## CLOTHIERS.

See WOOLLEN MERCHANTS.

## COACHES.

See CARRIERS.—STAGE COACHES.

## COAL ACT.

See PLEADING, 4.

## COAL MINES.

1. A lessee of collieries is liable to pay the reserved rent thereof, whether any coals should or should not be obtained from the premises, in the event of the mine proving a failure. *Phillips v. Jones*, V. C. I. 234. Appeal dismissed with costs. *L. C. M.* 308.

2. The proprietors of coal mines are liable for damage done to vegetation in adjacent lands by the smoke and gas arising from the waste or coal dust, which on being thrown from the pit into large heaps either spontaneously ignited, or were set fire to for the purpose of being consumed. *Atkinson v. Bell*, N. P. I. 299.

On the subject of coal and other mines, see WESTERN'S CONVEYANCING.

## CO-DEFENDANTS.

See JOINT AND SEVERAL ACTIONS.

## CO-EXECUTORS.

See EXECUTORS, 10, 11.

## COGNOVIT.

1. An infant cannot execute a cognovit so as to bind himself. *Oliver v. Woodruffe*, Ex. I. 205.

2. It is necessary in all cases that the persons attesting the execution of a cognovit under the 1 and 2 Vic. c. 110. be some one expressly named by the defendant, not being the plaintiff's attorney. Therefore the provisions of the statute were held not to be conformed with, where the plaintiff's attorney attested the execution of a cognovit, and subscribed the attestation as defendant's attorney. *Mason v. Kiddell*, Ex. III. 299.—An attestation to a cognovit which was as follows (*vis*) "Witness, Geo. Edwards, defendant's attorney named by him, and attending at his request," and omitted to state that he subscribed as such attorney, was held an insufficient attestation within the above cited statute—(per *Littledale, J.* in *Pole v. Hobbs*, B. C. 11 Nov. 1839.)

See WARRANT OF ATTORNEY.

## CO-HABITATION.

See MARRIAGE, 1.

## COLLECTORS.

See LAND-TAX.—POOR RATE.

## COLLIERS.

See COAL MINES.

## COLLISION.

See SHIPPING, 1.

## COLLUSION.

See ATTORNEYS, (Ak.)

## COMMERCIAL CASES.

See AGENTS.—FACTORS.

## COMMERCIAL TRAVELLERS.

See FRAUDS, STATUTE OF, 2.

## COMMISSION.

See AUCTIONEERS.

## COMMISSION OF BANKRUPTCY, SUIING OUT.

See BANKRUPTCY, 11 b.

## COMMISSION OF LUNACY.

See LUNATICS, 4.

## COMMISSIONERS, COUNTRY.

See BANKRUPTCY, 1.

## COMMISSIONERS, POWER OF.

See Id. 2.

## COMMISSIONERS OF TAXES.

See LAND TAX.

## COMMITTAL OF ASSIGNEE.

See INSOLVENT DEBTORS, 4.

## COMMITTAL FOR CONTEMPT.

See INSOLVENT DEBTORS, 24.

## COMMITTAL FOR WANT OF ANSWER.

See EXECUTORS.

## COMMITTEES.

See LUNATICS, 2.

## COMMON.

See TRESPASS.

## COMMONS, HOUSE OF.

See LIBEL, 2.—SHERIFF, 4.

## COMMON PLEAS, COURT OF.

See SERJEANTS' PRIVILEGE.

## COMMON, TENANT IN.

See ADVOWSON.

## COMPANIES.

See INQUIRY.—JOINT STOCK COMPANIES.—TRANSFER.—VENDOR AND PURCHASER, 9.

## COMPENSATION, GOVERNMENT.

See INSOLVENT DEBTORS, 2.

## COMPENSATION MONEY.

See MANDAMUS, 1, 3.

## COMPETENCY OF WITNESS.

See EVIDENCE, 1, 2.

## COMPOSITION.

See INSOLVENT DEBTORS, 22.

## COMPOSITION CREDITORS.

See BANKRUPTCY, 15, et n.

## CONCERT.

See ENTERTAINMENT.—PLACE OF.

## CONDITION.

See DEVISE, 4.

## CONDITION OF POLICY.

See COVENANT.

## CONDITION OF SALE.

See VENDOR AND PURCHASER, 1.

## CONDONATION FOR ADULTERY.

See DOWER.

## CONDUCT OF SUIT.

See ATTORNEYS, 6.—SUIT, CONDUCT OF.

## CONFIDENCE, PERSONAL.

See EXECUTORS, 13.

## CONSANGUINITY.

See MARRIAGE, 7.

## CONSENT, ORDER BY.

See JUDGE'S ORDER, 2.

## CONSIGNEE.

See BANKRUPTCY, 10.—FACTORS.

## CONSTABLE.

Certain parties being about to execute civil process, procured the presence of a constable to keep the peace, but when the party had reached the *locus in quo*, and proceeded to do the acts which gave rise to the action, the constable assisted them by handing some furniture out of the house, &c.: held, that he was liable to damages with the other defendants, because his presence only was required, and that to keep the peace. *Blinkley v. Tickell*, Ex. 1. 139.

See POLICE CONSTABLE.—POOR RATE, 2.—REWARD, 1.

## CONSTRUCTIONS.

See BEQUEST.—COVENANT.—CREDITORS, 2.—DEVISE.—DONATIO MORTIS CAUSA.—EXECUTORS, 13.—FRAUDS, STATUTE OF.—HUSBAND AND WIFE, 4 b.—ISSUES, 1.—LEGACY, 3, 4, 5. LESSOR AND LESSEE, 6.—PARLIAMENT.—STATUTES.

## CONTEMPT.

See DEBT, 24.—INSOLVENT DEBTORS, 14, 24.

## CONTINGENT BEQUEST.

See BEQUEST.—DEVISE, 4.—LEGACY, 3, 5.

## CONTRACTS BY AGENTS.

According to a practice existing at Hull, the merchants there are not bound by contracts entered into with or by brokers on their behalf, unless the principals were satisfied that parties to whom their goods were sold on credit were respectable, and trust-worthy: held, therefore, that where such a principal, on whose behalf a broker had contracted for the sale of goods on credit, caused an enquiry to be made, from the result of which he deemed it advisable to treat with the parties for ready money only, he was, on their declining so to do, entitled to rescind the contract altogether. *Atten v. Hewell*, C. P. III. 298.

See 3 WESTERN'S CONVEYANCING.

## CONTRACTS, BREACH OF.

See VENDOR AND PURCHASER, 3, 5, 7.

## CONTRACTS, FRAUDS IN.

Where A contracted with B, of London, (who was then an insolvent to a very large amount), to sell him a quantity of lead, which B ordered to be delivered, and the lead was shipped for and conveyed to London accordingly; during which time B failed, and the bills given in payment were dishonoured. It was held, that unless B entered into the contract with a certain prospect of inability to pay for the lead, and with a fraudulent view of obtaining the property without payment, it would not amount to a case of fraud, sufficient to avoid the contract. *Toulmin v. Tarquand*, N. P. I. 139.

## CONTRACTS, ILLEGAL.

A contract to supply tar for the purpose of being manufactured into turpentine in quantities, and upon premises interdicted *per legem terre*, is void and cannot be enforced. *London Gas and Coke Company v. Turner*, C. P. II. 104.

## CONTRACTS, JOINT.

See ATTORNEYS, (11).

## CONTRACTS, FOR LEASE.

See LESSOR AND LESSEE, 2, 3, 5.

## CONTRACTS, MARRIAGE.

See MARRIAGE, 4.

## CONTRACTS, PERFORMANCE.

If a party enters into a contract which he disables himself from performing, the court will compel him to perform it, if, and when he shall become able. *Wellesley v. Wellesley*, L. C. III. 119.

See LESSOR AND LESSEE, 1, 2, 3, 4, 5.—VENDOR AND PURCHASER, 3, 4, 5, 6.

## CONTRACTS, VARIATION IN BY PAROL.

See FRAUDS, STATUTE OF, 3.—LESSOR AND LESSEE, 4.

## CONTRACTS, VOID.

1. A party who had contracted for the purchase of a cargo of wheat was held not to be at liberty to treat the contract null and void, because the Captain of the vessel which contained the wheat refused to deliver the entire quantity until his lien for the freight had been discharged. *Sturge v. Phillpotts*, N. P. II. 154.

2. A house of ill fame is not a sufficient nuisance to entitle a party to treat an agreement for taking premises adjoining thereto as null and void, although he was ignorant of the ill fame at the time of entering into the agreement, and the agent of the owner of the premises without his principal's authority, and without being cognizant that such was not the fact, in answer to a question from the party taking the premises, stated that there was nothing objectionable about them; it is not enough to constitute fraud. *Crowfoot v. Foulke*, (Bart.) Ex. II. 123. III. 40. IV. 10. 1 Judge Diss.

See ANNUITY, 1.—CONDITION OF SALE.—FRAUDS, STATUTE OF.—FUNERAL EXPENSES.—JOINT STOCK COMPANIES, 7.—LESSOR AND LESSEE, 2 to 6.—STOCK.—VENDOR & PURCHASER, 5.

See 3 WESTERN'S CONVEYANCING.

## CONVERSION.

See EXECUTORS, 8.

## CONVEYANCE, PLEADING.

See LEASE AND RELEASE.

## COPARTNERSHIP.

See BANKRUPTCY, 18, 19, 20, 21.—JOINT STOCK COMPANIES, 2.

## COPPER WORKS.

See NUISANCE, 2.

## COPYHOLDS.

1. Where the Queen is lady of a manor, a writ of mandamus to admit a party to copyhold property therein is sufficient, if directed to the steward of the manor alone. *Reg. v. Steward of Manor of Richmond*, Q. B. III. 25.

2. Loose stones of various sizes by operation of time and the elements fell from a quarry and became strewn over the lands of a copyholder: held, that they were the property of the lord of the manor, who might maintain trover against the tenant for them. *Dearden v. Evans*, Ex. I. 397, 408.

See MANDAMUS, 2.

## CORAM VOBIS.

See ERROR.

## CORPORATIONS.

See MUNICIPAL REFORM ACT.

## COSTS.

1. As to the scale of costs to be adopted by the master in taxing, when the sum recovered in an action brought in a superior court shall be less than 20l. but the sum proceeded for was above that amount, See *Waller v. Smith*, Ex. I. 408.

2. When the court had ordered a party to

give security for costs, on quitting its jurisdiction it will not rescind such order. *Badham v. Hagley*, Ex. I. 107.

3. A cause was originally set down for trial and referred to an arbitrator whose award was set aside for want of a finding, except on an immaterial issue held, that neither party could claim the costs of the trial thus rendered abortive. *Wood v. Duncan*, C. P. II. 43.

4. The court has no power under 7 Jac. I. c. 5. to award double costs to magistrates, independent of the Judge's certificate. *Penny v. Slade*, C. P. II. 42.

5. Where parties having the conduct of important and intricate causes come forward with a fair and bona fide intent for the good of all, they will not be compelled to pay the costs. *Egerton v. Egerton*, M. R. II. 150.

6. Equitable circumstances will on some occasions exempt a defeated party from payment of costs. *Townsend v. Champenown*, Ex. Eq. II. 392.

7. And therefore where in a contest in the master's office, unnecessary and insufficient objection was taken which occasioned expense and delay, each party was ordered to pay his own costs. *Id.*

8. Where a plaintiff obtained a verdict in a personal action, not being for any title to lands, and recovered less than 40s. damages, but obtained the costs before the judge had certified under 43 Eliz. c. 6. s. 1. and got the costs taxed and final judgment signed: held, that the court could not interfere, and that the verdict must, of necessity, take its course. *Davis v. Cole*, Ex. IV. 361.

## COSTS, AGENTS' BILLS OF.

See ATTORNEY, (oo).

## COSTS, BILL OF.

See ATTORNEYS.

## COSTS, COLLUSION TO DEFRAUD ATTORNEY OF.

See ATTORNEYS, (kk) (mm).

## COSTS OF THE DAY.

See SUBPENA, 1.

## COSTS, DEED OF SECURITY FOR.

See ATTORNEYS, (jj).

## COSTS, DELIVERY OF BILL OF.

See ATTORNEYS.

## COSTS, DISMISSING BILL ON PAYMENT OF.

See BILL IN CHANCERY.

## COSTS IN ACTIONS BY INFANTS.

See INFANTS, 8.

## COSTS OF LEASE.

See LESSOR AND LESSEE, 2.

## COSTS, LIEN FOR.

See ATTORNEYS.

## COSTS, PROCTORS'.

See ATTORNEYS, (ii).

## COSTS, RECOVERY OF WHERE CERTIFICATE DEFECTIVE.

See ATTORNEYS, (r) (t).

## COSTS, RECOVERY OF WHERE RETAINER REVOKED.

See ATTORNEYS, (ii).

## COSTS, REVIEW OF TAXATION OF.

See TAXATION OF COSTS.—BANKRUPTCY, 26.—EXECUTORS, 7.—LUXATION, 4.—MORTGAGE, 1.—PRACTICE, 6.

## COUNSEL'S SIGNATURE.

See DEPOSITIONS.—PRACTICE, 1.

## COUNTRY COMMISSIONERS.

See **BANKRUPTCY**, 1.

## COUNTY RATE.

See **MUNICIPAL REFORM ACT**, 2.

## COURT OF REQUESTS.

See **REQUESTS, COURTS OF**.

## COUSINS GERMAN.

Where the words of a bequest are "first cousins or cousins german," the descendants of first cousins will not be admitted to share in the estate. *Saunderson v. Bailey*, construction of the class of persons so described, L. C. I. 41.

## COVENANT.

A covenanted to appear at any insurance office that B should name, in order to the effecting a policy of assurance on his (A's) life, and also to perform all the conditions of the insurance, and do no act that would avoid the policy. A appeared accordingly, and B effected a policy of assurance on his life, one of the conditions whereof was that A should not go out of Europe. A received no notice of the particular condition of the policy which he had violated, and did not go out of Europe: held, that he was entitled to notice, and was not liable on the covenant. *Sed per cur.* If the covenant applied to any insurance to be effected in any particular office, B was not bound to give A notice. If the covenant applied any insurance office, without specifying any one, then B ought to have had notice. *Vyse v. Wakefield*, Ex. IV. 47., affirmed on appeal, Ex. Ch. Id. 331.

## COVENANT, BREACH OF.

See **ASSIGNEES' LIABILITIES**.

## COVENANT, CREDITOR'S.

See **CREDITOR'S PRIORITIES**.—HUSBAND AND WIFE, 2. b.—**JOINT STOCK COMPANIES**, 6.—**LESSOR AND LESSEE**, 1. (To repair) 7.—**RENEWALS**, 1.

## CREDITOR'S ASSIGNEES.

See **BANKRUPTCY**, 14.

## CREDITOR'S BILL.

When a creditor merely files a bill upon which his debt is to be admitted, the court will, in the first instance, order the production of the title deeds to the debtor's real estate, charged with the payment of debts. But it will not appoint a receiver *then*, unless some special reason is shown for such interference. *Moss v. Tucker*, V. C. I. 391.

1. **Priorities**.—In a case where the question for the decision of the court was, which of three classes of creditors (*viz.* Judgment, Covenant, or Bond Creditors) were entitled to priority of payment; it decided that the claims of the covenant and bond creditors should be postponed till after the judgment creditors. *Barrington v. Evans*, Ex. I. 314.

2. **Trusts for the Benefit of**.—A will, creating a trust for the benefit of creditors, does not take their debts out of the statute of limitations. *Field v. Churchill*, L. C. IV. 411.

See **ATTORNEYS, (r r)**.

## CREDITORS.

See **BANKRUPTCY**.—**DEBT**.—**INSOLVENT DEBTORS**.—**JOINT STOCK COMPANIES**, 21.

## CRIMINAL CONVERSATION.

See **DEBT**, 2.

## CRIMINAL LAW.

See **CONFESSION**.—**EVIDENCE**, 9.—**JURORS AND JURIES**.—**LIBEL**.—**LARCENY**.—**MASTER AND SERVANT**, 1.—**MURDER**.

## CROPS, SALE OF.

See **FRAUDS, STATUTE OF** 1.

## CROSS BILL, ANSWER TO.

See **PRACTICE**, 8.

## CROSS REMAINDERS.

See **DEVISE**, 3.

## CROWN, RIGHTS OF.

See **ALIENS**.

## CUSTOMS OF MERCHANTS.

See **CONTRACTS BY AGENTS**.

## CUSTOMS OF TRADE.

See **AUCTIONEERS**.—**MASTER AND SERVANT**, 3.—**WOOLLEN MERCHANTS**.

## CUSTOMS.

See **CHURCHWARDENS**, 1.—**LANDLORD AND TENANT**, 7.—**TRESPASS**.

## DATE, MISTAKE IN.

See **WRITS AND COPIES**.

## DEALER IN TEETH.

See **BANKRUPTCY**, 5.

## DEATH OF INSOLVENT.

See **INSOLVENT DEBTORS**, 5.

## DEBT, ACT FOR ABOLISHING IMPRISONMENT FOR.

1. **Arrest**.—The court refused to grant a rule to shew cause why a judge's order for defendant's arrest should not be reconsidered, and why the bail-bond given should not be discharged and the expenses of the arrest be borne by the plaintiff, in *Larchin v. Willan*, Ex. I. 47.

1 a. Where a defendant who had been arrested, made an affidavit, stating that he had not been and that he did not intend to go out of England. The court granted a rule, calling upon the plaintiff to shew cause why an order, authorizing defendant's detention until he should give bail, should not be rescinded. *Baddington v. Wordley*, Bail C. I. 60.

1 b. Where a defendant, who had been arrested upon an affidavit that he was about to leave the country, swore that he knew no such person as was alleged to have made the affidavit, and that he had no intention of quitting the country. The court granted a rule nisi for his discharge. *Exp. Jacob*, B. C. III. 56.—See **INSOLVENTS**.

2. **Bail**.—Where a person was in custody for the amount of a verdict obtained against him in an action of *crim. con.*, the court exercised its discretionary power to grant or refuse bail under this act by remanding the prisoner. *Exp. Gomme*, I. D. C. II. 90.

See **INSOLVENTS**.

3. **Discharge of Debtor**.—The court cannot discharge a prisoner out of custody while his petition under the act remains upon the file of the court. *Exp. Williams*, I. D. C. II. 13.

3 a. An insolvent who was out upon bail had petitioned the court for his discharge under the act. But while out of custody was discharged by his detaining creditor the night previous to the appointed day of hearing: held, that he could not be heard upon this petition. *Exp. Whiteman*, I. D. C. III. 27.

4. **Jurisdiction and Power of Courts and Commissioners**.—This act does not extend to the courts of Common Pleas of Durham and Lancaster. *Carl v. Elliott*, B. C. I. 58.

4 a. Under sections 14 and 18 of the act, the court has the power of ordering a sum of money standing in the name of the accountant-general of the court to the separate account of defendant to be charged with the amount of a judgment obtained against him in a court of common law. *Helm v. Day*, V. C. III. 22.

4 b. The court of chancery has no power under sec. 14. of the act to make orders creating a charge

upon stock belonging to a debtor in favor of a judgment creditor. *Miles v. Priskland*, L. C. III. 328.

5. *Property of Debtor*.—A creditor who had obtained a vesting order under the compulsory clause of the act, and was named assignee, was allowed an order to search the prisoner's room for property. *Exp. Ford*, L. D. C. 1. 4. 8.

5a. The court refused to grant a plaintiff a rule to attach a sum of money under the 12th and 14th secs. of the act, where it appeared that the sum in question was the purchase-money of a piece of land sold by the defendant to a railway company, and that it was uncertain whether the money remained with the company or had been paid by them to a trustee for the defendant's use. *Robinson v. Pearce*, Ex. I. 46.

See ATTORNIES, (18).—BANKRUPTCY, 6.—CAPIAS, 1, 2.—COGNOVIT, 2.—INSOLVENT DEBTORS.—OUTLAWRY.—WARRANT OF ATTORNEY, 1, 2, 3, 4.

#### DEBT, ACTION OF.

See BILL OF EXCHANGE, 7.

#### DEBT, ADMISSION OF.

See CREDITOR'S BILL.

#### DEBTS, ESTATE CHARGED WITH.

See *Id.*—BANKRUPTCY, 13 to 17 inclusive.

#### DEBTS, PARTNERSHIP.

See BANKRUPTCY, 18, 19, 20.

#### DEBTS, PAYMENT OF, OUT OF REAL ESTATE.

See CREDITOR'S BILL.—CREDITORS, 2.—FUNERAL EXPENCES.—LUNATIC, 3.

#### DEBTS, REVIVAL OF.

See BANKRUPTCY, 15.

#### DEBTS OF WIFE.

See HUSBAND AND WIFE, 2 to 3.

#### DEBTOR, DISCHARGE OF.

See DEBT, 3.—INSOLVENT DEBTORS, IV.

#### DECLARATION.

Where a diligent but unsuccessful enquiry had been made for the residence of a defendant, the court granted a rule to shew cause why the declaration should not be stuck up in the office. *Parker v. Cooper*, B. C. I. 44.

See PLEADING, 2.

#### DECLARATION OF TRUST.

See ANNUITY, I.

#### DECREE, FINAL.

See TRUSTEES, 5.

#### DECREE, PROSECUTION OF.

See EXECUTORS, 6.

#### DEDICATION TO PUBLIC USE.

No particular length of time during which the public has enjoyed a right of way is necessary to be shewn in order to prove a dedication on the part of the owner of a river to the public use; but the jury must be satisfied that such owner either personally or by agent, and with a full knowledge of the circumstances, had abandoned and dedicated the right to the public. Per Denman, (L. C. J.) *Anon.* I, 366.

See PRESCRIPTION.

#### DEED, BLANK.

A deed executed in blank is void at the common law. *Hibblewhite v. M'Morine*, Ex. IV. 360.

See TRANSFER.

#### DEED, IMPEACHMENT OF.

See ATTORNIES, cc.

#### DEEDS, LIEN ON.

See ATTORNIES, cc, cc', vv, and 6.

#### DEED, PROFERT OF.

See LEASE AND RELEASE.

#### DEED, RETAINING.

See ATTORNIES, yy.

#### DEED OF SEPARATION.

See HUSBAND AND WIFE, 2 *et seq.*—DOCUMENTS

#### DEFALCATION, COMMITTAL OF OVERSEERS FOR.

See INSOLVENT DEBTORS, 10.

#### DEFAULTERS.

See LAND TAX.

#### DEFENCE, FALSE.

See ATTORNIES, zz.

#### DELAY.

See SUIT, CONDUCT OF.—LACHES.

#### DELIVERY OF ATTORNEY'S BILL.

See ATTORNIES, 5.

#### DEMAND OF DOCUMENTS.

See ATTORNIES, w w.

#### DEMISE, WHEN AGREEMENT OPERATES AS.

See LESSOR AND LESSEE, 2.

#### DEMURRER, AMENDING AFTER.

See BILL, AMENDING, 2.

#### DEMURRER FOR WANT OF EQUITY.

See JOINT STOCK COMPANIES, 3, 7, 10.—NUNCIANCE, 2.—HUSBAND AND WIFE, 2 c.—JOINT STOCK COMPANIES, 5.—LEASE AND RELEASE.—PLEADING, 2, 4.

#### DENTIST.

See BANKRUPTCY, 5.

#### DEPARTURE.

See PLEADING, 5.

#### DEPOSITIONS.

The depositions of two witnesses to cross interrogatories were suppressed, because such interrogatories wanted counsel's signature. *Pritchard v. Foulke*, R. C. II. 8.

#### DEPOSITION BEFORE MAGISTRATES.

See CONFESSION.

#### DEPOSITION, DEFECTIVE.

See BANKRUPTCY, 16.

#### DEPOSIT.

See DETINUE.—MORTGAGE AND MORTGAGERS, 1, 1.

#### DEPOSIT MONEY.

See VENDOR AND PURCHASER, 4, 5.

#### DEPOSIT MONEY ON SHARES.

See JOINT STOCK COMPANIES, 9.

#### DEPOSITOR OF MONIES.

See BANKERS, 1.

#### DETAINER.

See CAPIAS, WRIT OF.—INSOLVENT DEBTORS, 6.

#### DETINUE.

Property deposited with a banker for safe custody, and not by way of pledge or security, cannot be detained by him from the representatives of the depositor for a debt due from the latter. *Waters v. Segar*, C. P. IV. 220.

#### DEVISE.

1. If a leasehold estate be devised in such terms as would, in case the property was freehold, create an estate tail, the whole interest in it will pass as a chattel, be the same what it may. *Doe d. Howarth v. Helms*, N. P. I. 364.

2. A testator devised the "freehold lands," which he held in the parishes of W, B, and M, and which he described as being held for a considerable time by his father's ancestors in the same line, unto his son.

#### ERRATA.

Title Br

ne 4, instead of "A was held responsible," read "A was not held responsible."

collateral heir of the name of D; held, that this devise was sufficient to pass "leaseholds" in those parishes, which had been held as described by the testator. *Doe d. Dunning v. El. of Cranston*, IV. 267.

3. H devised lands to his daughters J L and R A or life, remainder to his sister for life, remainder to M H and N H for their respective lives, and if either of the two should die without leaving issue male, the whole to the survivor for life. If M H should die after testator's daughters and sister before N H, leaving issue male, a moiety of the estate was to go to the first and other sons of M H in tail male, and in default of such issue, remainder to N H for life, remainder to the use of the first and other sons of N H in tail male, and in default of such issue to testator's right heirs. If N H after the death of testator's daughters and sisters should die before M H, leaving issue male, a moiety of the estate was to go to the first and other sons of N H in tail male, and in default of such issue to the testator's right heirs. In case M H and N H should both die without issue male or such issue male should die without issue male, the estate to go to the use of such person as at the death of the survivor should be the testator's right heir. Testator's daughter R A, his sister and M H, all died in the lifetime of J L without issue: held, that upon her death without issue N H took an estate tail in the whole of the property. *Franks v. Price*, 3 C. IV. 278.

4. A testator after making a trust direction of the produce of the residue of his real and personal estates in favor of R P, if a certain event should not happen, on the happening whereof he "revoked that bequest," and made a conditional direction "of the residue of his estate" to R P's issue, and in default thereof, after bequeathing some specific legacies, directed the remainder of "the said property" unto W H, his executors and administrators, to whom in any event he gave and bequeathed the same. Neither condition took effect, and R P died without issue: held, that W H was entitled to realty as well as personalty, notwithstanding the non-technical use of the words printed in italics. *Hinds v. Pugh*, L. C. IV. 397.

5. A devise to three daughters by name M, E, and A, will not include an illegitimate daughter bearing one of such names, unless she can satisfy a jury that the testator intended her to be one of the devisees. *Doe d. Thomas v. Brynnon*, N. P. I. 365.

See HUSBAND AND WIFE, 4 d.

#### DILAPIDATIONS.

See LESSOR AND LESSEE, 7.

#### DIRECTORS' LIABILITIES.

See JOINT STOCK COMPANIES, 7, 8, 9, 10, 19, 22.

#### DISCOVERY.

See SETTLEMENT, 2.

#### DISCOVERY, BILL OF.

1. A foreign sovereign power being a voluntary plaintiff in an English court of law, is amenable to the jurisdiction of an English court of equity as to all matters connected with the suit at law, and consequently may be compelled to answer a bill of discovery. *Rothschild v. The Queen of Portugal*, Ex. Eq. I. 87. II. 361.

2. A bill of discovery cannot be supported against parties not on the record, although they may be interested in the subject matter of the action on which such a bill is founded. *The Queen of Portugal v. Sir F. C. Glynn, bart. and others*, Dom. Proc. IV. 166.

3. A party cannot be made a defendant to a bill of discovery in, and of a defence to an action-at-law,

who was not a plaintiff on the record in the action. *Irving v. Thompson*, V. C. II. 390.

See ATTORNIES, 2.

#### DISCLAIMER.

See AGREEMENT.—EXECUTORS, 13.—BEQUEST, 2. HUSBAND AND WIFE, 4 g.

#### DISHONOUR, NOTICE OF.

See BILL OF EXCHANGE, 10, 11, 12.—PROMISSORY NOTE, 4.

#### DISMISSAL OF BILL.

See BILL IN CHANCERY.

#### DISMISSAL OF PETITION.

See INSOLVENT DEBTORS, 18.

#### DISORDERLY HOUSE.

See ENTERTAINMENT, PLACE OF.—NUISANCE.

#### DISSOLUTION.

See PARTNERSHIP, 1.

#### DISTRESS.

See LANDLORD AND TENANT, 1 to 6 inclusive.

#### DISTRESS, ILLEGAL.

See POOR RATE, 2.

#### DISTRINGAS.

1. A rule was obtained by a defendant to set aside a distringas which the plaintiff opposed upon the insufficiency of the affidavits in support of the rule, which were entitled "B and H A R sued as H R." The defendant had not appeared, and there was consequently a variance between the writ of summons and the affidavits. The court held the objection and discharged the rule. *Borthwick v. Ravenscroft*, Ex. II. 27. See *Skrimpton v. Carter*, 3 Dowl. 648.

2. Where it appeared that enquiries had been made for a defendant at his residence in order to serve him with a writ of summons, on the 10th December, when he was stated to be at a certain inn, and also on the 27th of the same month and five following days, when the servant's reply was that he was "from home." The court refused a distringas, observing that "there is a distinction between not at home," and the defendants being "from home." *Williams v. Beresford*, Ex. III. 207.

3. Where repeated attempts had been made to serve a writ of summons on a defendant who kept out of the way to avoid service, and gave directions that the person who attempted the service should be given into custody the next time he called, the court granted a rule for a distringas. *Mason v. Graham*, C. P. IV. 108.

#### DIVIDENDS, (RETURNING.)

See BANKRUPTCY, 36.

#### DIVORCE.

See HUSBAND AND WIFE, 2 b.

#### DOCUMENTS, PRODUCTION OF.

Where documents are in the hands of A on behalf of A, B, and C, it is not the practice of the court to make an order for their production by A in the absence of B and C. *Murray v. Wallers*, L. C. on app. II. 247. 262.

#### DOCUMENTS, USE OF.

See ATTORNIES, (n u).

#### DOCUMENTS.

See EVIDENCE, 3.—JOINT STOCK COMPANIES, 7, 8, 9, 10. PARTNERSHIP, 2.—VENDOR AND PURCHASER, 10.

#### DOCK WARRANTS, BAILEES OF.

See FACTORS.

#### DOMESTIC SERVANT.

See MASTER AND SERVANT, 2.



## DOMICILE.

See *LEX LOCI DOMICILII—LEX LOCI REI SITÆ.*

## DONATIO MORTIS CAUSA.

A gift of a cash box, accompanied by the words—"At my death go to my son and ask him for the key, which will be found in the iron chest: if he will not give it up, take the box to Vaughan. It contains money, take care of it. It will make hundreds difference to you—it is for yourself and your sister, and entirely at your own disposal after I am gone, but I shall want it from you every three months while I live," is not a *donatio mortis causa*. *Reddell v. Dobree*, V. C. II. 215.

## DOUBLE COSTS.

See *COSTS*, 4.

## DOWER.

*Wife's Adultery*.—Condonation for past adultery cannot indemnify the wife against the consequences of future adultery, so as to restore her right to dower in case of such future adultery. *Halliday v. Best*, Q. B. I. 90.

See *HUSBAND AND WIFE*.

## DOWRY, FRENCH LAW OF.

See *MARRIAGE*, 4.

## DRAWER, NOTICE OF DISHONOUR TO.

See *BILL OF EXCHANGE*, 11.

## DRUGS.

See *APOTHECARIES*.

## DURHAM AND LANCASTER, COURTS OF.

See *ATTORNEYS*, 1.—*DEBT ACT*, 4.

## DUTY.

See *LEGACY DUTY*.—*STAMP*.

## DWELLING-HOUSE.

See *ASSAULT*.

## DYING WITHOUT ISSUE.

See *DEVISE*.—*LIMITATION*.

## EASEMENTS.

The enjoyment of an easement under sec. 2. of the statute 2 & 3 W. 4. c. 71. must be continuous, and is therefore destroyed by unity of possession during any part of the time limited by that act. *Only v. Gardner*, Ex. I. 90. See IV. 148. 199. 2 Sug. Vend. and Pur. 372.

See *PRESCRIPTION*.

## EAST INDIA COMPANY.

See *MARRIAGE*, 2.—*PENSIONS*.

## EDITOR'S ESSAYS, REVIEWS AND OBSERVATIONS.

See the different Titles.

## EFFECTS, ASSIGNMENT OF.

See *BANKRUPTCY*, 9.

## EJECTMENT.

The court refused to grant a rule for judgment against the casual ejector, where an affidavit stated the service of the declaration to have been made in May, without stating May last. *Doe v. Roe*, Ex. IV. 159.

See *VENDOR AND PURCHASER*.

## ELECTIONS.

See *CHURCHWARDENS*, 1, 2, 3.

## ELOPEMENT, PREVENTING.

See *HUSBAND AND WIFE*, 1.

## ENROLMENT.

See *ANNUITY*, 2.

## ENTERTAINMENT, PLACE OF.

The penalty imposed by 26 Geo. 2. on persons who keep a place of entertainment without being duly li-

censed, only attaches when the place is kept open with the owner's permission, and in an action for such penalty it is not necessary to prove that the house was kept solely for the purposes which were unlawful without such license, it being sufficient if proof is adduced that that was one of the purposes for which it was kept, and it is immaterial that the owner of the house derives no profit from the entertainment. But these are questions of fact and ought always to be left to the jury. *Markis v. Benjamin*, Ex. II. 132. III. 265.

## EQUITABLE ASSETS.

See *DEBT*, 4a, 4b, 5a.

## EQUITABLE ASSIGNEE.

See *ASSIGNEES*.

## EQUITABLE INTERFERENCE OF A COURT OF LAW.

See *LESSOR AND LESSEE*, 7.

## EQUITABLE MORTGAGEE.

See *BANKRUPTCY*, 11a.—*MORTGAGE AND MORTGAGES*, 2.

## ERROR.

A writ of error *coram vobis* is not per se a supersedeas of execution, but operates so as to render it necessary for the other party to obtain the leave of the court or a judge before taking out execution. *Simple v. Turner*, Ex. IV. 92.

See *JURISDICTION*.—*TAXATION*.

## ESCAPE.

1. After an insolvent had been heard, he, accompanied by an officer went to a place 300 yards out of the direct line from the court to the prison, and there remained about an hour and a half and had some refreshments. The court held, that he had been out of custody and dismissed the petition. *Exp. Lockard*, I. D. C. I. 108.

2. A prisoner in the Queen's Bench prison for debt was seen beyond the prescribed limits of the prison rules, viz. at Greenwich fair on the 16th April, 1838, which fact coming to the creditor's knowledge, he sued the gaoler for an escape. It being proved that the prisoner returned within the rules next evening, and the jury being satisfied that he theretofore remained in custody until the action was commenced, they by the judge's direction returned a verdict for defendant. *Davies v. Chapman*, N. P. IV. 267.

See *ATTORNEYS*, ff.—*PRACTICE*, 1.—*SERIALITY*, 2.

## EUROPE, GOING OUT OF.

See *COVENANT*.—*POLICY*.

## EVIDENCE.

1. The evidence of a person, who signed a promissory note as surety, is admissible in an action against the principal to prove the signature by him or such, and by the witness and another person as sureties. *Page v. Thomas*, Ex. IV. 330.

2. A husband, to whose wife a testator had bequeathed all the property, furniture, and credits appertaining to him at his decease, cannot be examined as a witness in an action by the executors to recover some of the property, although he had executed a release to them, unless the wife joined in such release, because her interest in the property could not be reduced into possession by the husband before its recovery by the executors. *Budd v. Edwards*, N. P. IV. 270.

3. On the trial of an action by a person, who had been secretary to an association, for the amount of his salary. The books of the association were produced, and the following entry appeared thereon:—"Resolved that J H be secretary, at a salary of £1. per week:" held, that this entry was properly received in evidence, although unstamped. *Morgan v. Byrd*, C. P. IV. 330.—*But*,

4. The books of a joint stock company are not evidence of agreements with their officers unless stamped as such. *Hammon v. Timmins*, N. P. I. 124.

5. An I O U for money lent without an address will in the absence of proof to the contrary be construed to represent the person in whose possession it is as the lender, and he will be entitled to recover upon it although unstamped. *Curtis v. Richards*, C. P. IV. 414.

6. In an action of debt on an I O U, which was given in pursuance of an illegal and corrupt agreement, touching the withdrawal of a petition against the return of an M. P. on the ground of bribery, unstamped papers were admitted in evidence to prove the illegality of the agreement. *Coppock v. Bowen*, Ex. I. 46.

7. Where a party seeks to enforce an agreement, a stamp is necessary; but where papers are produced to prove the illegality of the alleged agreement, which on that ground ought not to be enforced, then such papers are admissible without any stamp. *Id.*

8. A letter from a landlord to a tenant intended only as a proposal for a lease is inadmissible in evidence as an agreement unless properly stamped, although the tenant entered and held the land under its terms. *White v. Deverell*, Ex. I. 46.

9. The removal of a witness from humane motives to prevent his giving evidence on the trial of a very near relation punished with imprisonment. *Reg. v. Colcraft*, 2 B. I. 89.

See AFFIDAVIT. — ALIVE. — ATTORNEYS, *dd.* — BANKRUPTCY, 2, 16. — BILL OF EXCHANGE, 6. — CONFESSION. — INFANTS, 7. — JOINT STOCK COMPANIES, 6, 18. — MARRIAGE, 7. — STAMP, 2, 3. — SUBPENA, 1 to 4. — WILLS, 13, 17, 19, 25.

#### EXAMINATION OF ARTICLED CLERKS. See ATTORNEYS.

#### EXEMPTION FROM COSTS.

See COSTS, 6.

#### EXCEPTIONS.

The master disallowed exceptions to an answer because they differed from the interrogatories in the bill by the substitution of the word "recollection" for "remembrance;" held, that such variation was not fatal. *Brown v. Keatinge*, M. R. IV. 142.

See ALIENS.—BILL, AMENDING, 5.

#### EXCESSIVE DISTRESS.

See LANDLORD AND TENANT, 3.

#### EXCESSIVE LEVY.

See LEVY.

#### EXCHEQUER, COURT OF.

See SUMMONS, WRIT OF.

#### EXCHEQUER CHAMBER.

See JURISDICTION.

#### EXECUTION.

See BAILMENTS, 1.—JOINT STOCK COMPANIES, 8, 23, 24.—ERROR.—LEVY.—SHERIFF, 4.

#### EXECUTION, DEFEATING.

See BANKRUPTCY, 22, 25.

#### EXECUTION OF DEEDS, &c.

See COGNOVIT, 2.—DEED.—TRANSFER.—WARRANT OF ATTORNEY.

#### EXECUTORS.

1. An account may be taken against one of two executors, although his co-executor who was originally a party to the suit has been committed for want of an answer after appearance, and subsequently discharged under Sir E. Sugden's act, 11 Geo. 4. and 1 W. 4. c. 36. *Hughson v. Cookson*, Ex. Eq. II. 153.

2. Executors cannot discharge themselves from liabilities by their own books and affidavits, but must

produce other evidence. Payments of above 40s. will not be allowed in executors' accounts without vouchers. *Hargrett v. Bell*, M. R. I. 407.

3. Where the directing executors of a will (so far as the estate was concerned) permitted certain sums to remain in the hands of bankers, who failed, and the money was lost in consequence: it was held, that such executors were personally liable for the deficiency. *Drake v. Martin*, M. R. II. 122.

4. Two executors O W and J W instead of investing 300*l.* in manner directed by their testator, suffered the money to remain on the personal security of S, who failed, and whom *cestui que trust* had never accepted as their debtor: held, that the representative of the surviving executor took upon himself the responsibility of the legacy by not adopting measures to secure the money, and was therefore personally liable. *Kemp v. Brown*, M. R. II. 135.

5. G bequeathed all his property to L and D in trust for his wife for life, and after her decease for his children, and appointed his wife and L and D executors. After G's death, N, his attorney, received 1500*l.* due to G, on mortgage, 1000*l.* whereof he paid to Mrs. G, other part thereof he paid to the trustees, and the remainder through N's insolvency became irrecoverable. The trustees had by deeds acknowledged the receipt of 890*l.* of the money paid to Mrs. G.: held, that they were liable for the amount, because they ought not to have allowed the widow to enjoy it, otherwise than by receipt of interest. *Garland v. Littlewood*, M. R. II. 342.

6. Parties on going into the master's office, can only have regard to the decrees. The above trustees could not therefore be charged on further directions with other sums, for which the plaintiff's (G's children) did not at the hearing obtain from the court a declaration or enquiry. *Id.*

7. The trustees having succeeded in some parts of their resistance to the plaintiff's claims were held liable only for the costs occasioned by their resistance of claims which had been allowed. *Id.*

8. A bequeathed leasehold houses to B, in trust for his wife for life, remainder to his daughter S, and in default of issue of S, to his next of kin. A directed his executor to convert the houses into money, but this he did not, and the term expired in the lifetime of S: held, that the executor was liable to the next of kin for the value of the terms at the expiration of one year from the death of A. *Mehrters v. Andrews*, M. R. II. 391.

9. Equity will not support a purchase by executors of the estates of their testators against the creditors of the deceased, although a fair price may have been given, the policy of the court not allowing such transactions by trustees. *Luik v. Stallard*, M. R. II. 403. See 3 WESTERN'S CONVEYANCING, 174. *n. i.*

10. Where two of three executors permitted a sale of their testator's effects to be managed by the other of them, the court held them personally answerable for the acts of the third executor. *Stevenson v. Smith*, M. R. III. 378.

11. A testator appointed two executors, and died leaving money in the funds, and other property. The executors proved the will, but one of them alone received the dividends, which he misapplied; the other ignorantly and yet reasonably believed that the property was duly applied: held, that he was not answerable for the default of his co-executor. *Williams v. Nixon*, M. R. IV. 43.

12. Where an executrix and devisee of an insolvent's estate, carried on the testator's business for the benefit of his family, when she was entitled to nothing until all the debts were paid, the court granted an injunction on behalf of the creditors to re-

strain her from further interference. *Jones v. Broster*, M. R. II. 24.

13. A testator authorized three executors to carry on his business, and to stand possessed of the monies arising thereby, as well as from the sale of his property, in trust for his children, all of whom he named, except his son John, who he stated was purposely omitted on account of his misconduct, and the testator dismissed him with 3*l*. trusting he would amend his conduct, in which case he gave his three executors and the survivors, and survivor of them, and the executors and the administrators of such survivor, full authority to give John an equal share with the others. One executor alone proved the will. John demeaned himself according to the testator's wish: held, that the executor who proved was competent to exercise his discretion on a claim made by John's representatives for an equal share, although the other executors had not executed a deed of disclaimer, because the confidence was not personal, inasmuch as it was given to the executors, and the survivor of them, and the executors, &c. of such survivor. *Eaton v. Smith*, M. R. III. 85.

14. One of several persons named as executors and residuary legatees refusing to act, not entitled to the legacy as residuary legatee, because it was given to him by name on condition that he was to discharge the duty of executor, and the share to which he would have been otherwise entitled, devolved on the testator's next of kin. *Barber v. Barber*, I. 41.

#### EXECUTORS OF ATTORNEY.

See ATTORNIES, *v. v. s.*

#### EXECUTORS.

See BEQUESTS, 2.—TRUSTEES.—WILLS, 17.

#### EXECUTORY SETTLEMENT.

See SETTLEMENT, 4.

#### EXISTENCE, PROOF OF.

See ALIVE.

#### FACTORS.

In an action for the value of a quantity of tobacco, pledged with defendants by plaintiff's factors by means of the dock warrants, and which the former claimed to retain to their own use under the Factors' Act, 6 Geo. 4. c. 92. which enacts (s. 2.) that documents representing property may be pledged to secure loans to factors intrusted therewith, the same as if they were the actual owners of the property, the symbols of which they were so entrusted with the possession of, the court held it insufficient merely to shew the possession of the documents by the factors, and required proof to be given that when the plaintiffs consigned the tobacco to those factors by bills of lading, they intended and considered that they should be enabled to possess themselves of the dock warrants, so as to appear to the world as actual owners. *Phillips v. Huth*, Ex. IV. 26.

#### FAIR.

See TRESPASS.

#### FALSE CHARGES.

See JOINT STOCK COMPANIES, 7.

#### FALSE DEFENCE.

See ATTORNIES, 6 *s. s.*

#### FALSE IMPRISONMENT.

See LAND TAX.—SHERIFF, 9.

#### FEEES, BARRISTERS.

See BANKRUPTCY, 13.

#### FELONY.

See MASTER AND SERVANT, 1.

#### FEME COVERT.

See AGREEMENT.—INFANT, 1.—HUSBAND AND WIFE.—LIMITATIONS, STATUTE OF, 1.—MARRIAGE.—PRACTICE, 10.—SEPARATE USE FIAT.

See BANKRUPTCY.

#### FIERI FACIAS.

If a sheriff's return to a *fieri facias* states a return of defendant's goods, to an unknown value, remaining in the officer's hands for want of buyers, the court will grant a rule to shew cause why the return should not be amended. *Whittle v. Ld. Chetwynd*, B. C. L. 248.

#### FIERI FACIAS, WHAT MAY NOT BE TAKEN UNDER.

See BAILMENTS, 1.—SEPARATE USE, 6.

#### FILING SCHEDULE.

See INSOLVENT DEBTORS, 23, 24.

#### FINDING, WANT OF.

See COSTS, 3.

#### FIRE.

See INSURANCE, 2.

#### FIRE ARMS.

See JUSTICE OF THE PEACE, 3.

#### FIRST INFORMATION.

See REWARD, 2.

#### FIXTURES.

See BANKRUPTCY, 11 *a*.

#### FORECLOSURE.

See MORTGAGE, 3.

#### FOREIGN BANKERS.

See BANKERS, 2.

#### FOREIGN LAW.

See LEX LOCI DOMICILII.—LEX LOCI REI SITÆ.—FRENCH LAW.

#### FOREIGN SOVEREIGNS.

See BILL OF DISCOVERY, 1.

#### FORFEITURE.

See LESSOR AND LESSEE, 7.—MARRIAGE, 2.

#### FORFEITURE OF SHARES.

See JOINT STOCK COMPANIES, 18.

#### FORGERIES.

See BANK OF ENGLAND.—BILLS OF EXCHANGE, 46.

#### FORMATION OF COMPANIES.

See JOINT STOCK COMPANIES, 10.

#### FORM OF ACTION.

See MUNICIPAL REFORM ACT, 2.

#### FORMS.

See WRITS, FORMS OF.

#### FRAUDS.

See ATTORNIES, *b b, c c*.—CONTRACTS, FRAUDS IN.—INSURANCE, 2.—JOINT STOCK COMPANIES, 6, 7, 9, 10.—SETTLEMENT, VOLUNTARY.—STOCK BROKERS.

#### FRAUDS, STATUTE OF.

1. A contract to sell the produce or crop of a certain specified close of potatoes at so much per sack, to be dug by the purchaser at the usual time, and to be then paid for by him, is not such an agreement for the purchase of an interest in land as will require a contract in writing. *Saintsbury v. Mathews*, Ex. L. 107.

2. D, a commercial traveller of the plaintiffs (wholesale grocers) called on the defendant (a retail grocer in the country), and received an order for a quantity of sugar, which he entered in his book and signed, but which the defendant himself did not sign: held, that D's signature was insufficient to take the

case out of the enactment requiring a signature by the party to be charged, in as much as D was the agent of the plaintiffs only. *Graham v. Munson*, C. P. II. 103.

3. In construing the statute of frauds no distinction is to be observed between contracts for lands and contracts for goods, when those of the latter description are required to be in writing. Both classes are therefore susceptible of variation by writing only. *Marshall v. Syn*, Ex. III. 218. Overruling, *Guff v. Penn*, 1 M. & S. 21.

See CONTRACTS, FRAUDS IN.

#### FRAUDULENT TRANSFER.

See BANK OF ENGLAND.

#### FREEHOLD.

See DEVISE, 1, 2.

#### FREIGHT, LIEN FOR.

See CONTRACTS, VOID, 1.—SHIPPING, 2.

#### FRENCH LAW OF DOWRY.

See MARRIAGE, 4.

#### FUNERAL EXPENCES.

Funeral expences are not included in the debts to which the real estate of an intestate is liable by the 3 & 4 W. 4. c. 104, because the obvious intent of the statute was to render intestates' real estates liable for debts created by them, and a debt cannot be contracted for by a dead man. *Carter v. Beard*, V. C. II. 70.

#### FURNITURE.

See HUSBAND AND WIFE, 3 a.—SEPARATE USE, 6.

#### FURTHER DIRECTIONS.

See EXECUTORS, 6.

#### FUTURE ACQUIRED PROPERTY.

See INSOLVENTS, 1—3.

#### FUTURE CONVEYANCE.

See SETTLEMENT, 4.

#### FUTURE STATE, BELIEF IN.

See OATHS.

#### GAMBLING.

See ANSWER TO BILL, 2.

#### GAME.

See LESSOR AND LESSEE, 8.

#### GAS.

See COAL MINES, 2.

#### GAOLER.

See ESCAPE, 2.

#### GERMAN, COUSINS.

See COUSINS GERMAN.

#### GIFT, CAUSE OF.

See LEGACY, 1.

#### GIFT.

See DONATIO MORTIS CAUSA.—HUSBAND AND WIFE.

#### GIFT VOID FOR REMOTENESS.

See BEQUEST, 4.—LIMITATION.

#### GOODS AND CHATTELS, WHAT ARE.

See BANKRUPTCY, 11 a.

#### GOODS, CONTRACTS FOR.

See FRAUDS, STATUTE OF, 3.

#### GOODS EXPOSED FOR SALE.

See SHOPKEEPER, 2.

#### GOVERNMENT OFFICERS' COMPENSATION.

See INSOLVENTS, 2.

#### GUARANTEE.

See BANKRUPTCY, 29.—CHARTER PARTY.

#### GUARDIAN AD LITEM.

See PRACTICE, 17.

#### HABEAS CORPUS.

1. A single Judge of the Queen's Bench may, in vacation, order this writ returnable immediately before himself at chambers, to bring up the body of a prisoner in custody, and under sentence of transportation, by a Colonial Judicature. *Case of the Canadian Prisoners*, I. 184, 201, 392. II. 28.

The return to the writ set out that, by an act of the Legislature in Upper Canada (passed after 5 G. 4. c. 84), the Lieutenant-Governor was enabled to grant a pardon under the great seal, upon such terms as might appear proper, to such persons then under charge of high treason committed in that province as should petition the Lieutenant-Governor before their arraignment, praying for pardon, and it provided that in case any persons should be pardoned under that act, upon condition of being transported, or banishing himself from that province either for life or for any term of years, such person, if he should return to the province before the period of his transportation or banishment, should be guilty of felony, and liable to suffer death; that the prisoner was duly indicted at a special court of Oyer and Terminer, held by authority of another act of the same legislature for the crime of high treason; that before his arraignment, in accordance with the statute, the prisoner petitioned the Lieutenant-Governor, confessing his guilt of the treason charged against him, and praying that her Majesty's pardon ought to be extended to him upon such conditions as the Lieutenant-Governor should see fit; that the Lieutenant-Governor did consent that her Majesty's mercy should be extended to him, upon condition that he should be transported, and remain transported to her Majesty's colony of Van Diemen's Land, for the term of fourteen years next ensuing the date of his arrival at Van Diemen's Land, to which terms and conditions the prisoner assented; that there being no means of conveying the prisoner directly from Upper Canada to Van Diemen's Land, it became necessary to convey him first to Quebec in Lower Canada, and then to England, for the purpose of transporting him to Van Diemen's Land; and that accordingly he was transmitted, by authority of the Lieut.-Governor of Upper Canada, to Quebec, and thence, by authority of the Executive Government there, which issued letters patent in the name of her Majesty to command that the prisoner should be delivered to Digby Martin, the master of the bark *Captain Ross*, to be by him conveyed to England, to such place as her Majesty should think fit, to the end that he might thence be transported to Van Diemen's Land; that Digby Martin accordingly brought him to Liverpool, the same being the place which seemed fit to her Majesty, and which was the most proper place for the purpose, and there delivered him to the gaoler of Liverpool, who retained him in his custody whilst means were preparing to transport him to Van Diemen's Land: held, that the return was good—that he was liable to be tried in England for the crime—that he cannot plead the pardon he has renounced; and that any subject of the crown in England under such circumstances might take and detain such prisoner until dealt with according to law. Any subject who held him in custody, with a knowledge of these circumstances, would be guilty of aiding him to escape, if he permitted him to go at large without lawful authority. *Id.* II. 28.

See INSOLVENT DEBTORS, 13.

# HEARING, SETTING A CAUSE DOWN FOR, IN DIFFERENT COURTS BY DIFFERENT DEFENDANTS.

See PRACTICE (Eq.) 16.—INSOLVENT DEBTORS.

## HIGH TREASON.

See HABEAS CORPUS.

## HIGHWAY ACT.

See JUSTICE OF THE PEACE, 2.

## HOLDER OF BILL.

See BILLS OF EXCHANGE.

## HOLIDAYS.

See MASTER AND SERVANT, 3.

## HOUSE OF ILL-FAME.

See CONTRACTS, VOID.

## HULL MERCHANTS, CUSTOM OF.

See CONTRACTS BY AGENTS.

## HUSBAND AND WIFE.

### HUSBAND—

1. *Rights of the Husband over the person of his Wife.*
2. \_\_\_\_\_ over the property of his Wife.
3. *His Liabilities for the Wife's debts and actions.*
4. \_\_\_\_\_ to debts contracted by Wife before marriage.
5. *His exoneration from liability for Wife's necessities.*

### WIFE—

6. *Her Rights to property.*
7. \_\_\_\_\_ where Husband lunatic.
8. \_\_\_\_\_ to access to Children under custody of Infants Act, 2 & 3 Vict. c. 54.
9. *Separate Estate.*
10. *Rights of both Parties during separation.*

### 1. *Rights of the Husband over the person of his Wife.*

By the common law, a husband, to prevent his wife from eloping, may confine her to his dwelling house; and restrain her liberty for an indefinite period; provided he uses no unnecessary cruelty, or hardship, towards her, and imposes no unnecessary restraint upon her, and that although the wife's previous conduct affords no reason for the supposition that in her husband's absence, or whilst free from his controul, she would by her conduct injure his honour or property. *Re Mrs. Cochrane*, Bail Court, IV. 119.

### 2. *Husband's right over the property of his Wife.*

(a) Under a devise the wife of an insolvent was entitled to a life interest in the rents and profits of real estate. The husband's assignees filed a bill praying payment to them of the rents and profits of the wife's estate during coverture, and that the receiver should account to him accordingly. The wife insisted that she was entitled to a provision out of the rents. Decree for the assignees as prayed, but the Court has no power to order payment out of the rents for the maintenance of the wife. *Sturgis v. Champney*, V. C. II. 232. Decree reversed as to the wife, the assignees in coming to the Court for the purpose of enforcing equitable rights against the property, must themselves do equity by allowing a reasonable sum for the support of the wife, and a reference will be made to the master to settle the proportion that ought to be appropriated to her maintenance. *Id.* L. C. on appeal, III. 36.

(b) Upon the husband's death the wife is entitled to the rents and profits of the estate from the day of his decease, and to be let into possession, *Id.* III. 247.

(c) Where the wife of a bankrupt is entitled to a legacy, she has an equity and is entitled to a settlement. The Court is not tied down to any fixed rule

as to the proportion the wife should have; in this case the wife was devised half the legacy. *Ex parte Peters*, C. R. III. 57.

(d) J P bequeathed personal estate to W M C upon trust for sale; and out of the proceeds to pay the interest, dividends, and annual produce thereof unto a permit the same to be received and taken by A R (the wife of H R,) and her assigns during her life, in her and their own absolute use and benefit. After the death of the testator, A R alone agreed and directed W M C, in writing, out of the interest of part of the testator's estate to pay and allow unto A E, till a week until she should attain the age of sixteen, and A R alone covenanted to indemnify W M C against such payment. A R lived separate from her husband, and she filed a bill against W M C, for due administration of the testator's estate according to the trust of her will. Her husband H R disclaimed all interest in the trust funds: held, that as the husband had put in his answer, and did not dispute the agreement made by his wife, and as the fund was in the hands of the defendant, W M C, and the trust for A E was therefore executed, the agreement made by A R, although voluntary, ought to be enforced against her. The trust did not constitute a gift to the separate use of A R; but the disclaimer by the husband left the trust fund at her disposal. *Rycroft v. Charny*, M. R. IV. 344.

(e) A man marrying a woman having children by a former husband, and by settlement all her property was assigned to trustees for her separate use. The husband becoming embarrassed, the sheriff took in execution the clothes belonging to the wife and her children by her former husband. She at the time was living separate from her husband, and the apparel was purchased from her separate property: held, that a married woman may have the use of a chattel settled upon her, but cannot convert that chattel into another. The trustees have no property in the chattels purchased with the settled property, because they belong to the husband. The trustees of the settlement are entitled to the goods purchased before the marriage, but not to the goods purchased since the marriage; the husband has no property in the clothes belonging to the children of the former marriage, even if he purchased the clothes himself, subsequent to the second marriage, for as they are not his children, but the children of his wife by a former husband, such articles can only be considered in the nature of gifts. *Corn v. Bryer*, Ex. N. P. IV. 60., affirmed by the Court on the ground that there was no evidence to prove agency in the trustees by the wife. V. 125.

### 3. *Husband's liabilities for Wife's debts and actions.*

(a) "Furniture" does not fall within the term "necessaries" so as to render a husband, who turns his wife out of doors without making any settlement on her, liable to pay for it. *Harvey v. Norton*, Q. B. N. P. III. 278. 294.

(b) A husband is *prima facie* liable, but he is liable only for necessities furnished to her *bona fide*, for the purpose of maintaining her in a reasonable and decent manner according to her station in life. *Id.*

(c) A husband is liable to the father of his wife for her maintenance, after he had turned her out of doors and compelled her to go to her father. *Graham v. Buann*, C. P. N. P. IV. 92.

(d) Where, in consequence of the intemperance of the wife, she is returned by the husband to her father, but an agreement is made between the husband and wife's father that, upon the husband receiving her again, if she returned to her intemperate habits, her father should take her back again, such a defence is an answer to the action. *Id.*

#### 4. Husband's liability for debts of Wife contracted before marriage.

(a) A husband was liable to debts contracted by the wife before marriage. *Edwards v. Perry et Uz.* Q. B. I. 173.

(b.) A husband is not liable for the debts of a wife, who, before her marriage and during the time she was a *feme sole*, had taken the benefit of the insolvent act. The plea of her discharge under the insolvent act is an answer to the action. The case not one contemplated by the statute. *Storr v. Lea et Uz.* Q. B. I. 235.

#### 5. Husband's Exoneratation from liability for Wife's necessities.

The law exonerates a man from all liability on account of a wife who commits adultery. *Newton v. Barclay, Ex. I.* 123.

#### 6. Wife's right to property where Husband lunatic.

The court will grant a summary order under the 91st sect. of 3 & 4 W. 4. c. 74, on the part of a woman whose husband was and had been in a lunatic asylum three years, that she might execute a release of her dower, without such husband's concurrence. *Re Ann Holborn, C. P. I.* 264.

#### 8. Wife's right to Children under the custody of Infants Act.

On an application by a married woman (plaintiff in a suit in the ecclesiastical Court for a restitution of conjugal rights) to the Court of Chancery under the custody of infants act (2 and 3 Vict. cap. 54.) for an order for access to her children, who were in the husband's custody, the Court declined making an order until the result of the proceedings in the ecclesiastical court should become known. *Re Mrs. Taylor, V. C. IV.* 262, 292.

#### 9. Wife's Separate Estate.

A testator gave certain specified stock to trustees upon certain trusts with an ultimate trust as to a moiety, in default of appointment by his daughter, to her executors, administrators or assigns. After the date of the will, the daughter married, and her husband died in the lifetime of the testator without issue. After the death of the testator his daughter married again, previous to which her specified property, and any future property she might acquire, was settled with an ultimate limitation in default of issue to her next of kin. The second husband survived; his wife had no issue, and she had made no appointment: held, that after the death of the husband and wife, the next of kin of the wife and not the representative of the husband were entitled to the moiety. The words "executors and administrators" had been construed to mean next of kin. *Graffley v. Humpage, M. R. I.* 25.

#### 10. Rights of both parties during separation.

(a) If a wife elope from her husband, he is not liable for her subsequent debts; so on the contrary, if he turn her away either actually or by his own bad conduct, as by living in adultery, he is liable. Where the parties separate by consent, the husband is still liable, unless it appears that the wife has a competent maintenance, either by the provision of the husband considering his station in life, or by a settlement. If the husband is liable at all, it is of no avail that he proclaims he will not so consider himself. *Dixon v. Hurrell, I.* 122. *Ex. N. P. Colman, J.*

(b) A, by deed of separation, in consideration of Col. P. (a trustee) undertaking to indemnify him against his wife's future debts, covenanted that he would on a certain day secure, either on real estate or by investment in the funds, or by the best means in his power secure payment to his wife an annuity of

1000*l.* a-year for her separate use; also, that he would pay his wife's solicitor 1000*l.* within a certain time. A became entitled subsequently to charge real estates with a jointure of 1500*l.* a-year for his present or any future wife, but refused to perform his covenants with Col. P. within the times specified. A bill was filed for a specific performance, alleging that the trustees in whom this property was vested were raising money upon it and remitting it to A, that he had no other property whereon to charge the annuity, and that he refused to secure it on this: held, that the wife had an equity to have the covenant specifically performed. A's trustees demurred for want of equity, but the demurrer was overruled. *Wellesley v. Wellesley, V. C. II.* 341. affirmed on appeal, *L. C. III.* 119.

(c) If a party enters into a contract which he disables himself from performing, the court will compel him to perform it if he shall become able. *Id.*

(d) It is not absolutely necessary that a deed of separation between husband and wife should contain a covenant by a trustee to indemnify the husband against the wife's future debts, or show some circumstance, which would induce the ecclesiastical court to grant a divorce *a mensa et thoro*. Therefore a deed containing neither of these particulars, is valid against volunteers, but not against creditors, such a deed requires no consideration. *Clough v. Lambert, V. C. II.* 358.

(e) As there are confessedly separations in matrimony which are legal, and as nothing appeared to show that it was in any degree in opposition to the law, the presumption must be in favour of its legality, and in such circumstances a promise to sign a deed of separation will constitute a good and sufficient consideration to support the promise to pay. *Jones v. Wait, C. P.* Affirmed in Error, *Ex. Ch. I.* 280.

(f) If a deed of separation has been actually executed, and if the husband, being party to that deed, had promised to pay a sum of money to a trustee for the wife, such a promise will be binding upon the husband; as will also a promise if made by a person who is an actual trustee for the wife. *Id.*

(g) The actual signing of such a deed will constitute upon the husband a sufficient consideration upon the part of the husband to support such promise on the part of the trustee. *Id.*

See APPOINTMENT, POWER OF.—EVIDENCE, 2.—INFANTS, 1.—MARRIAGE.—PRACTICE, 10.—SETTLEMENT, 3. *LEX LOCI.*

#### IDENTITY OF DEVISEE.

See DEVISE, 5.

#### IDENTITY OF PARTNERSHIP.

See BANKRUPTCY, 21.—JOINT STOCK COMPANIES, 25.

#### ILLEGITIMACY.

See DEVISE, 5.

#### ILL-FAME, HOUSE OF.

See CONTRACTS, VOID, 2.

#### IMPEACHMENT OF DEEDS.

See ATTORNIES, (cc.)

#### IMPLICATION.

See JOINT TENANTS.

#### IMPLIED COVENANT.

See RENEWAL, 1.

#### IMPLIED COVENANT, FALSE.

See LAND TAX.

#### INCESTUOUS MARRIAGE.

See MARRIAGE, 7.

## INDICTMENT.

See BILL OF EXCHANGE.—HARRIS CORPUS.

## INDIVIDUAL PARTNERS.

See JOINT STOCK COMPANIES, 19.

## INFANTS.

1. Custody of.
2. Necessaries supplied to, actions for.
3. Suits on behalf of.

1. Custody of. (See HUSBAND AND WIFE, 8.)

2. (a). *Necessaries*.—In an action by a tradesman against an infant for goods to which infancy was pleaded, and the plaintiff replied that the goods were necessities: held, that although, as a general rule, it is the duty of tradesmen, before giving credit to an infant, to enquire of his friends whether or not he required the articles ordered for him, yet the court denied the existence of the rule in a case where the defendant was accompanied by her mother, and in her carriage, to the door of the plaintiff's shop, and the goods were either taken home in the carriage, or sent to where the mother resided, so that she must have seen them, and the jury found the goods were necessities suited to the infant's apparent condition in life, and the court refused a new trial. *Dalton v. Gibbs*, C. P. I. 265.

(b). In an action by a jeweller against the son of a M. P., an undergraduate of Cambridge, and residing there, for a watch and other articles of jewellery, to which he pleaded infancy, &c.; and the plaintiff replied, that the goods were necessities suitable to the degree and condition of life of the defendant: held, that necessities are such things as are useful and suitable to the station in life of the party requiring them, and the term is not to be confined to things absolutely necessary for life, but is to be extended so as to include such things as are fit and proper to maintain the infant in the degree and state of life in which he may happen to move. But all things which are merely ornamental, and calculated for no actual use, are in no instance necessities for any person. It is a question for the jury in such cases, whether the particular things being calculated for use were bought by the infant to support him in that degree of life in which he moves. *Peters v. Fleming*, Ex. II. 220. The Court refused a new trial. Ex. III. 266.

(c). An infant may bind himself for his education. *Id.*

(d). In an action against the same person for expensive wines, cigars, eau de Cologne, and liqueurs, supplied at his lodgings in the University: held not to be considered necessities for him, and he had a verdict. The Judge also certified, that it was a fit case to be tried by a special jury. *Schwabacher v. Fleming*, Ex. N. P. III. 122.

(e). Damask goods and expensive upholstery are not necessities for a young lady of fifteen occupying apartments, but who did not appear to have the means of paying for them. *Dench v. Webb*, N. P. II. 250.

(f). In an action against a parent for a debt incurred by his son (an infant), who had been accustomed to support himself, for board and lodging, the plaintiff relied on a letter from the father in these terms:—"I am sorry to hear J is so ill. You have written home for money, but I cannot advance any at this time, being harvest; but J will be of age soon, when he will be able to pay you what he owes you, being entitled to some 'money.'" held, that this letter contained no evidence to bind the father to pay the claim. *Mortimer v. Wright*, Ex. IV. 45. There is a moral obligation on a father to support his child, but no legal one more binding on him than on any other relation. *Id.* *Lowe v. Wilkin*, over-ruled.

(g). A Mackintosh coat of "the first cut and most fashionable appearance," is such a necessary for an articulated clerk as to support an action against him by the tailor for the cost. *Bragslaw v. Eaton*, Sheriff: C. I. 364.

3. *Suits on behalf of*.—It is incumbent upon a person who files a bill on the behalf of infants, to show that he did it for their benefit, and not on account of interested motives towards himself, and if he files such a bill improperly he will be held liable for the costs, but the court will protect persons who properly and not craftily file such bill. *Sale v. Sale*, M. R. II. 230.

See COGNOVIT, 1.—LEGACY, 4.

## INFORMATION.

See REWARD.

## INJUNCTION.

The Master of the Rolls refused an injunction on a motion *ex parte*, where a bill had been filed, but defendants had neither appeared or been subpoenaed. *Bulwer v. Thomas*, M. R. I. 102.

## INJUNCTION.

See BANKRUPTCY, 20.—BILL, AMENDING, 3.—EXECUTORS, 12.—JOINT STOCK COMPANY, 9, 11, 13, 16.—LACHES, 1.—LEX LOCI RESIDE, 2.—LIGHTS, 1.—MORTGAGE, 3.—NUISANCE, 2.—PATENT, 2, 3, 4, 5.—PRACTICE.—PRACTICE, 11, 12.—SOIL, RIGHTS IN THE.—TRADESMEN'S SHAW BOARDS.—VENDORS AND PURCHASERS.

See an Essay on the jurisdiction of the Court of Chancery to restrain proceedings in other courts, III. 115.

## INNKEEPERS.

1. In an action against an innkeeper by a traveller, for the value of goods that had been stolen. The plaintiff went with his horse and cart to the defendant's inn. The cart was put into a barn and locked up, the plaintiff slept at the inn, and on going next morning to the barn, found it open: the defendant's brother and nephew were at work in the barn: the cart had been taken out and his goods stolen: the goods were afterwards found in the houses of the defendant's brother and nephew, who were prosecuted and convicted of the robbery. The defendant pleaded 1st, That the plaintiff was not in his house as a traveller; 2dly, That the barn had been given him for his separate use, and that he was responsible for safe custody. It was left to the jury to say whether the goods were left in the custody of the innkeeper or of the traveller himself, who was a guest at the inn, and the plaintiff had a verdict. *Richett v. Edgington*, N. P. III. 120.

2. In an action by a traveller against an innkeeper for jewels stolen from the inn where the plaintiff was a guest, the plaintiff had a verdict. *Gey v. Martin*, Ass. III. 383.

## INQUIRIES, PRELIMINARY.

The fifth of the new Orders in Chancery applies only to cases free from doubt and difficulty, and preliminary inquiries will only be allowed when the court is satisfied that they applied to clear cases, and that if the cause was actually at the hearing those inquiries would be necessary. *Mainhartzaga v. Dera*, V. C. III. 23.

No orders can be made under the terms of such fifth order against a defendant who has not appeared, or is out of the jurisdiction. *Id.*

See these Orders, II. 78.

See EXECUTORS, 6.—See also, V. 71.

## INQUISITION.

Where it appeared that the defendants (shareholders of a railway company) being in want of certain land for the purposes of their undertaking, summoned a jury to assess the value—that the court, at which such assessment was made, was presided over by an attorney's clerk—and that the foreman of the jury was a shareholder of the company: the court granted a *certiorari* to remove the proceedings in order that they might be quashed. *Reg. v. Leeds and Manchester Railway Company*, Q. B. II. 44.

## INSCRIPTION.

See TOMASTONE.

## INSOLVENT DEBTORS AND EFFECT OF INSOLVENCY.

1. *Property of the Debtor.*
2. *Bail.*
3. *Confinement and Imprisonment of Debtor.*
4. *Discharge of Debtor.*
5. *Petition.*
6. *Preferences.*
7. *Schedule.*
8. *Vesting Order.*
9. *Future acquired Property.*

1. *Property of the debtor.*

(a) A compensation to officers of the Government for loss of office is not assignable so as to be effectual against the assignees of an insolvent debtor. *Exp. Browne*, I. D. C. II. 377.

(b) The court will not grant a peremptory order for the committal of an assignee for retaining money in his hands after being ordered to pay it into court. *Anon.* I. D. C. III. 129.

2. *Bail.*

(a) Where an insolvent was directed to be liberated till his day of hearing on filing bail, but on the day on which his bail had been allowed, and before he left the prison, a fresh detainer was lodged against him, which rendered the direction ineffectual: the court said the applicant must again give notice of bail, and again come up before them. *Exp. Richardson*, I. D. C. I. 7. *Exp. Lawson*, id.

(b) Where an insolvent is out upon bail and does not appear at the day of hearing, the recognizances will be put in force against the bail and the Court will order a warrant for the apprehension of the insolvent by the assignee; but the court has no jurisdiction to alter or reduce the amount secured by the recognizances. *Exp. Hastings*, I. D. C. IV. 29. 96.

(c) The court (I. D.) will not grant a rule to shew cause why money paid into court in lieu of bail should not be paid out again. *Anon.* B. C. I. 60.

(d) An insolvent may render himself in discharge of his bail. *Ouston v. Coster*, Q. B., I. 393. II. 87.

(e) The court (I. D.) will not on the petition of an overseer committed to Newgate for defalcations, admit him to bail, under the insolvent act, but the court has authority to discharge him upon petition. *Exp. Giblett*, I. D. C. IV. 189. See 1 & 2 Victoria, c. 110. s. 78.

(f) Where an insolvent is out on bail and does not attend when the hearing of his case is called on, the court will adjourn it and send him to prison instead of enlarging his protection on bail. *Exp. Morrison*, I. D. C. II. 394.

(g) When insolvents are out on bail, and are remanded at their hearings, the time they are out on bail will be considered to have been excluded from the time mentioned in its judgment. *Exp. Johnson*, I. D. C. III. 46

3. *Imprisonment.*

(a) Where a debtor makes away with his property to the injury of his creditors, the court (I. D.) will order him to be confined within the walls. *Exp. Solomon*, I. D. C. I. 152. But the court will allow a prisoner to reside within the rules during a remand on the ground of serious illness. *Id.* 346.

(d) The court refused an application to stay proceedings against a prisoner, where, he being in custody at the suit of another person was then brought up under a *habeas corpus*, and was about to be charged in execution. *Reynolds v. Simmonds*, Exch. I. 30.

(c) The court (I. D.) has no power to remove a prisoner from one prison to another for contempt of its orders. *Exp. Board*, I. D. C. I. 108. 163. 206.

(d) The court (I. D.) can only remove an insolvent from a London prison to a country prison, and not *vice versa*. *Anon.* I. 334.

4. *Discharge.*

(a) The court (I. D.) will, in a proper case, grant a rule nisi, to dismiss a prisoner's petition in order to his discharge. *Exp. Williams*, I. D. C. II. 13.

(b) The court (I. D.) has power to annul its adjudication where a remand has been ordered, and the insolvent obtains his discharge from custody at the suit of his detaining creditor. *Exp. Fellgate*, II. 876.

5. *Petition.*

(a) Where an insolvent had three years previously filed his petition, but had remained in prison for want of funds to proceed upon it, the court ordered *Si.* to be paid to the attorney in the case out of the unclaimed fund, for that purpose. *Exp. Shacklesford*, I. D. C. I. 316.

(b) Upon a denial by an insolvent of a belief in a future state of rewards and punishments, the court will dismiss an order for hearing his petition. *Exp. Connard*, II. 393.

6. *Preferences.*

The insolvents owed their bankers 600*l.* which was secured by the father-in-law of one of them. Their book debts and stock were sold under an assignment, out of the produce of which sale the bankers were paid, and the father-in-law received 157*l.* of a debt due to him, and a composition was subsequently offered the other creditors, which they partially accepted: held, that the payment to the bankers was no preference; *aliter* of the payment to the father-in-law. *Exp. Johnson and another*, I. D. C. III. 45. See 1 & 2 Vict. c. 110. s. 78.

7. *The Schedule.*

(a) The court will allow a prisoner time to file his schedule. *Exp. Gompertz*, I. D. C. I. 206.

(b) The court has no jurisdiction to commit a debtor to the county gaol for contempt in not filing his schedule, although a creditor may have obtained a vesting order. *Exp. Chambers*, I. D. C. III. 169, 343, 363.

8. *Vesting order.*

(a) The court (I. D.) will not dismiss a vesting order on payment of the detaining creditor's debt. *Exp. Jones*, I. D. C. I. 316.

(b) If a creditor who obtains the vesting order has his debt discharged and satisfied, that will not be a reason why the vesting order should, as a matter of course, fall to the ground. *Exp. Chambers*, I. D. C. III. 363. But

(c) A vesting order has no effect against the estate of a debtor, who does not take the benefit of the act after his liberation on bail, and the discharge of the debt. *Exp. Lee*, I. D. C. II. 377.

(d) The hearing of a cause will be stayed on pro-



duction of the vesting order, until the assignee of the debtor shall appear in the cause. *Chambers v. Bircham*, Ex. III. 410.

(e) A vesting order cannot be dismissed without the consent of the creditor obtaining it, and the only way to get rid of it in such cases is to declare it null and void. *Exp. Gardner*, I. D. C. IV. 251.

#### 9. Future acquired property.

(a) P, in 1819, took the benefit of the Insolvent Debtors' Act, then existing, and assigned his effects to the provisional assignee; he had no estate and consequently no assignees were appointed; he subsequently engaged in trade and acquired 3,000*l.*; he died in 1838, and made a will, by which he gave all his property to his wife, who administered. One of the creditors under the insolvency filed a bill against the widow and administratrix, praying an account, that the assets might be administered by the court, and supplied first in the discharge of the deceased's debts, contracted since his insolvency, and then in discharge of the debts from which he was relieved by the insolvent act. The widow demurred, that the debts were barred by the statute of limitations, that the court had no jurisdiction for want of equity: held, that the acts for relief of insolvent debtors were to relieve them from personal imprisonment, and not to discharge their future estates, they were allowed to acquire future property, but subject to their former debts. The intention of the legislature was to make the judgment available against the insolvent in the insolvent debtor's court, but upon his debts, the application of assets being part of the general law of the land, the jurisdiction of chancery cannot be ousted, and the remedy was properly there. The demurrer was overruled. *Ward v. Painter*, M. R. II. 216. affirmed on appeal, L. C. V. 41.

As to the statute of limitations, the case *Barton v. Tattershall*, 1 Russ. & My. 237. was a sufficient answer. *Id.*

A bill may be maintained by any one creditor against the personal representative without the sanction of the insolvent debtor's court. *Id.*

A verdict for debt and damages, when recovered by an insolvent after his discharge under the act, is such future acquired property as passes to his assignees. *Exp. Bartlett*, I. D. C. III. 72. *Exp. Stockdale*. *Id.* 186.

(b) The court has no power to interfere with a judgment entered up on an insolvent's warrant of attorney. *Exp. Forsyth*, I. D. C. IV. 125.

See ATTORNIES (N.B.).—CAPIAS, 1.—CONTRACTS, FRAUDS IN.—ESCAPE.—EXECUTORS, 12.—HUSBAND AND WIFE, 2 a, b.—OUTLAWRY, 1.

#### INSURANCE.

1. In order to effect an insurance upon profits, the goods insured must be such as the insurer has an actual present interest, and a vested right in. *Stockdale v. Dunlop*. Ex. III. 411.

2. A mis-statement made in a claim for a loss by fire, which is not a substantial mistake, nor made with a fraudulent view, will not be the means of avoiding the policy. *Weller v. Lewis*, N. P. IV. 167.

3. It is generally a *prima facie* case of negligence in the captain of a ship to throw out ballast while at sea. *Dixon v. Sadler*, N. P. I. 317.

See COVENANT.—PRINCIPAL AND AGENT.

#### INTEREST.

See VENDOR AND PURCHASER, 5.

#### INTERLOCUTORY JUDGMENT.

See SCIRE FACIAS.

#### INTERPLEADER.

See VENDOR AND PURCHASER, 4.

#### INTERROGATORIES.

See DEPOSITIONS.—EXCEPTIONS.

#### INTROMISSION.

In a case where the question was, "What degree of interference will constitute a vicious intromission in Scotland?" the House of Lords on appeal decided that the Court of Session cannot alter a decision of the Lord Ordinary, referring the case to be tried by a jury. *Montgomery v. Sir James Boswell*, D. P. I. 404.

#### INVENTION, NOVELTY OF.

See PATENT, 6.

#### INVESTMENTS.

See EXECUTORS, 4.

#### INVESTMENTS, IMPROPER.

See TRUSTEES, 2, 3.

#### I O U.

See EVIDENCE, 5, 6.—STAMPS, 3.

#### IRELAND, SWEARING AFFIDAVITS IN.

See AFFIDAVITS.

#### ISSUE.

1. The word "issue" as a word of limitation. See LIMITATION.—BEQUEST, 1, 3.

2. Where an issue was granted on an interlocutory application, and tried, but the parties went on with the cause, and entered into evidence. The verdict was held inconclusive on the court, facts having been proved throwing a different aspect on the case from what it bore when before the jury. *Comper v. Ansell*, L. C. III. 231.

3. Issues will be taken *pro confesso* against a party who neglects to take the cause for trial at the time for which it is appointed. *Att.-General v. Clive*, L. C. IV. 152.

See PRACTICE, 12.

#### JOINT AND SEVERAL ACTIONS.

Satisfaction of an injury to one of several defendants is satisfaction as to all. Therefore, when a plaintiff accepted an annuity in satisfaction of all subsisting causes of action against some of the parties to the action, but subsequently sued another of the defendants thereto, the court stayed proceedings in the second action. *Paternoster v. King*, C. P. IV. 429.

#### JOINT CONTRACTS.

See ATTORNIES, s. s.

#### JOINT POWER.

See APPOINTMENT, POWER OF.

#### JOINT STOCK BANKING COMPANIES.

See BANKERS, 2.—JOINT STOCK COMPANIES, 1, 2, 3, 4, 29, 30, 31.

#### JOINT STOCK COMPANIES.

1. Rights and ties of shareholders, directors, trustees, and public officers against each other, and suits by, between, and against each other.
2. Contracts by and with—fraud—misrepresentation.
3. Control over land required by them for their purposes.
4. Payment of purchase-money where title defective.
5. Liabilities for damages to goods, and injuries to roads and walls.
6. Liabilities of shareholders to call upon for shares.
7. Liabilities, personal, of shareholders.
8. Identity of partnership—what does not affect it.

1. *Rights and lien of shareholders, directors, trustees, and public officers against each other, and suits by, between, and against each other.*

(1) The directors of a joint stock banking company instituted a suit in equity in the name of their public officer, under 7 Geo. IV. c. 46. s. 9, against several shareholders of the company, and other persons not shareholders, to recover monies improperly withdrawn by such shareholders from the Bank, without the knowledge or consent of the other shareholders, out of the funds of the company, and applied for the purposes of carrying on a newspaper, submitting that the defendants, who were shareholders, ought to be held responsible jointly with the other proprietors of the newspaper who were not shareholders, and praying a declaration that the shares of the defendants were subject to a lien in the hands of the company for what should be found due. Demurrer for want of equity, it being nothing more than an ordinary legal debt on a balance of account for advances made by the bank, and ought to be sued for under 1 & 2 Vic. c. 96, and if not, the plaintiff had no right to represent the company, to whom the debt was due: held, that *prima facie* there was equity enough to support the bill against the shareholders, and that there was nothing in the second objection. Demurrer overruled with costs. *Manners v. Rowley*, V.C. III. 394.

(2) A bill was filed by several shareholders of a joint stock bank, which had suspended its payments against the directors, all of whom except one were bankrupts, on behalf of themselves and all the other shareholders except the defendants, praying the usual account of the partnership concerns, and for a receiver, that the assets might be applied as far as they would extend in payment of all the co-partnership liabilities. Demurrers for want of equity, and for want of parties, because "all the partners or shareholders in the partnership or company were necessary parties to the bill, and all such partners or shareholders were not made parties," and because the assignees of the bankrupt defendants were not made parties, and because the bill was exhibited for several and distinct and independent matters and causes, which had no relation to each other: held, that the court could not grant the limited relief asked without declaring a dissolution of the copartnership, and directing the accounts to be taken, because the bill did not pray the court to administer the funds of each individual partner. Demurrers allowed. V. C. IV. 380—ON APPEAL: held, there was more equity for the bill than against it. The court will decree an account in a suit between partners without declaring a dissolution. L. C. V. 200. A bill by some partners, on behalf of themselves and all the other shareholders except the defendants, who should come in and contribute to the expenses of the suit against other shareholders, trustees, and directors, is maintainable. *Id.*

Order of V. C. reversed. Demurrers overruled. *Id.* See 3 and 4 Vic. c. 111.

(3) S purchased 500 shares in a joint stock banking company, and filed a bill against the public officer, and the directors of the company to set aside the purchase, and have his purchase-money refunded, alleging against the defendants, the director's fraud and misrepresentation as to the prosperous, flourishing, and profitable condition of the company's affairs, at the time he had made the purchase, by which he was induced, relying upon the representations to be *bona fide*, to make the purchase, and that after signing the company's deed, he discovered that these representations were fraudulent and untrue, and that the affairs of the company were in a very embarrassed state. Demurrer by the public officer for want of equity,

and that he could not be sued in a dispute between the partners. Demurrer allowed. *Seddon v. Connell*, V. C. IV. 412.

(4) A, possessing shares in a joint stock bank, deposited them with the bank to secure advances, and became bankrupt. The bank sold the shares, and the assignees filed a bill for an amount of the produce of the sale, and a motion was made for inspection of the bank books and papers, to enable the assignees to establish fraud against the bank, who did not refuse the production of such books and papers as were produced at the public meetings of the shareholders, but refused the inspection of any others, on the ground of an express stipulation in the deed of partnership constituting the company, that no shareholder should be at liberty to call for or inspect any books, papers, &c. but such as were produced at the request of a general meeting of the shareholders: held, that the transaction was only a mortgage, which would not give a mortgagee a greater right than a shareholder, but that such a covenant would not protect a fraudulent transaction; and if a bill is filed alleging the whole affair to be a bubble, and stating particular grievances and instances of fraud the court will interfere. Decree made for production of books and papers produced at the public meetings only. *Stubbs v. Lister*, V. C. II. 371.

2. *Contracts by and with fraud and misrepresentation.*

(5) Where directors of a joint stock company made gross misrepresentations to induce persons to purchase shares, holding out that the money subscribed was to be applied in carrying on the works, but concealing other payments that were to be made from the subscribed capital, and it turned out that the expenses exceeded the receipts, and the property was mismanaged: an injunction will be granted to restrain directors from proceeding with the concern, and a manager and receiver appointed to carry on the business, and prevent the property from perishing. *Bullman v. Thomas*, M. R. I. 137.

(6) A, B, S, and W projected a public institution, the incorporating charter whereof declared that a capital of 20,000*l.*, consisting of 400 50*l.* shares, should be raised; provided for the appointment of managers, who were to be holders of five shares each, and then declared that T, A, B, S, W, and G should be the first managers. When the charter was granted, T and G were not shareholders, but had agreed to become so. Afterwards A, B, S, and W appropriated all the shares among themselves, agreeing to resell them for their own benefit, and they charged themselves with the whole 20,000*l.* accordingly, and took credit for 16,000*l.* in the Society's account as for sums expended by them in its formation, &c. and paid the remaining 4000*l.* to the Society's bankers. Exclusive of several shares entered in the names of the wives of A and B, about 160 others were sold previous to February 1836, when a general meeting of the Society was held; on representation that the fund had been so appropriated, it was confirmed by such meeting. It was subsequently found that the 16,000*l.* was not laid out as represented—that a moiety thereof only was so laid out, on which a bill was filed against A, B, S, and W's widow, charging them with fraud; alleging an appropriation of purchase monies on the sale of shares to their own use; that, on W's death, A, B, and S transferred his shares to their own use in discharge of an alleged debt due to them; and praying an account of the appropriation of the shares, purchase-money, and expenditure; that the Society might not be bound by the resolution of February 1835, and that the proceeds of W's shares might be appropriated to make

good what should be found due from him to the Society. The defendants demurred for want of equity and for want of parties, alleging that the wives of A and B, and the original shareholders, ought to be made parties. Demurrers over-ruled, but defenders to answer the bill. *The Society for the Illustration and Encouragement of Practical Science v. Abbott*, IV. 425. M. R.

(7) The shareholders who purchased shares from, are not necessary parties. *Id.*

(8) This decision was appealed from, but before the appeal came on to be heard before the Lord Chancellor, the disputes between the parties were settled by a compromise. MSS.

(9) The plaintiff was the owner of mines of very great magnitude, and entered into a contract with the defendants, *Small, Shears, and Taylor*, managing directors of *The British Iron Joint Stock Company*, in their own names; the effect of which was to give those persons the property in the mines, for which the plaintiff was to be paid by certain instalments; that the defendants were not to be personally liable; that the instalments were to be paid at certain stipulated periods, the last in 1827; and the plaintiff was to look to the estate for payment. That in fraud of that contract, they instituted a suit containing a variety of false charges, which at one time were supposed to be well founded, but which, by the ultimate decision of the House of Lords have been declared to be ill-founded, and that by those means, and by undertakings in the cause when it was pending in the Court of Exchequer, they have protracted the day of payment, and the result had been that during the whole of this period, the defendants were continuing to work the mines and exhaust the property to which the plaintiff was to look for the purpose of working out his security; and the result of that had been that 300,000*l.* remained due, the property itself having, by the working of the company in the meantime, become an inadequate security for that sum. While the suit was pending in the Exchequer the plaintiff filed a bill for a specific performance; but upon the Chief Baron pronouncing the agreements void, the plaintiff on the next day obtained an order to dismiss his bill with costs. Afterwards the decree of the Chief Baron was reversed by the House of Lords, by which the agreements were established, and the plaintiff had made no attempt to get rid of the dismissal of his bill; he therefore sought a declaration of the court that the defendants or some of them were personally liable for the remainder of the purchase-money. The defendants demurred for want of equity and want of parties, the directors of the company at the time the bill was filed not having been made parties; held, that, that on the ground of conduct no relief could be had against *Small, Shears, and Taylor*, and *a fortiori* none against the other directors or their agent, or the company; yet as some relief could be given against them in the way of a specific performance, their demurrers were overruled, the demurrer for want of equity only entertained. *Attwood v. Small*, V. C. L. 37*f.* ON APPEAL, demurrer for want of equity overruled. Demurrer for want of parties allowed. The actual proprietors of the property of the company are necessary parties, because the property of the company is liable to the plaintiff, and the plaintiff had leave to amend. L. C. *Id.* III. 375.

(10) It is not necessary that all the shareholders are necessary parties, but if they are not so as shareholders, there must be some persons whom those in contact with the company are at liberty to sue. *Id.*

### 3. Control over land required for their purposes.

(11) The proprietor of a railway company required

some land, not for the railway to pass through, but for the purpose of digging for materials for the embankments of another part of the railway a mile distant; in the notice to the proprietor the object for which they wanted the land was not stated; the proprietor did not wish to part with the land, but the company sent a precept to a jury. The proprietor then filed a bill and obtained an injunction restraining the company from proceeding with the precept and from taking possession, but which was afterwards dissolved. ON APPEAL, it was suggested that some scientific person might be fixed upon on each side, who would examine the works and report upon the necessity for taking the land. *Webb v. The Manchester and Leeds Railway Company*, L. C. I. 390.

(12) A report was subsequently made by an engineer, who stated that part of the land only was required, and the injunction was ordered to restrain the company from proceeding with the precept for any land beyond that part. MSS.

(13) The powers conferred on railway companies are so large and so injurious to individuals that they will receive no extension from the court. L. C. *Id.*

(14) The proprietors of railway companies will be restrained by injunction from exercising any control over land staked out by their agents, unless included in the company's notices. *Blayney v. The Barn & Glouc. R. C.* M. R. II. 134.

### 4. Payment of purchase-money where title defective.

(15) The directors of a joint stock company may pay the purchase-money for land required for its purposes into the Court of Chancery where the title is not shown to the satisfaction of the company, although directed by their act of Parliament to be paid into the Exchequer. *Hyde v. G. W. Railway Company*, V. C. II. 7.

### 5. Liabilities for damages to goods.

(16) The proprietors of a steam-boat company were held liable in damages done for goods shipped on board one of their boats for conveyance, and which became damaged and unsaleable. *Muddle v. Strze*, N. P. Q. B. III. 298.

### 6. Director's powers, and liabilities.

(17) A director of an incorporated company is not personally liable (unless made so by their act of parliament) to a judgment obtained against him as a nominal defendant; and therefore a rule, calling upon such a director to show cause why he should not pay the damages and costs recovered, in an action, wherein he was such a defendant, or why in default execution should not be issued against his goods, was discharged. *Harrison v. Timmins*, Q. B. I. 55, 73.

### 7. Injuries to roads and walls.

(18) A mandamus will be granted directing joint stock companies to make good and sufficient new roads in the place of roads destroyed or rendered useless by their operations. *Reg. v. Birmingham Railway Co.*, Q. B. N. P. I. 314.

(19) They have no right to extend parapet walls: if they might, there would be no limit to their power, and they might continue them as far as they pleased. *Id.*

(20) On motion for an injunction against a railway company, to restrain them from carrying works across a turnpike road, and from doing other damage thereto, by altering the level of the road: it was refused with costs, although, in the consent given by the trustees of the road, to the passing of the company's act, it was provided that the railway should cross over the road at a sufficient elevation, and that the road should not be lowered to effect such elevation, or be prejudicial thereby, because such assent did not interfere with the trustees' right of opposing the bill, to obtain the road-

fication they insisted on; as a protection to their road; and as the bill had passed without any proviso limiting the company's power of levelling roads, the court had no power to prevent damage thereto by the company's works. *Aldred v. Directors of the North Midland Railway Company*, V. C. I. 342.

8. *Liabilities of shareholders to calls upon their scrip shares.*

(21) A railway company brought an action for calls. The defendant held scrip for forty shares, and had claimed to be registered for them, and his name was accordingly entered in the books of the company. Calls were made and advertised, but he paid none of them. He was not an original scrip subscriber, and other proprietors had been registered in respect of his shares. The directors were empowered, in case of default made in payment of calls, to declare the shares of such defaulters forfeited, and, in a notice they had given the defendant, they stated that "his shares would be declared forfeited," but no subsequent declaration was made. The defendant pleaded that he was not indebted; that when the calls were made he was not a proprietor; and that after he had become a proprietor, the directors had declared his shares forfeited: held, that the notice was a declaration that something would be done at a future time; no subsequent declaration was made, and therefore the shares were not forfeited, and that the plea was not made out, and the defendant must be taken as a proprietor, and a verdict went against him. *The Birmingham, Bristol, and Tham Junction Railway Co. v. Locke*, 1. 105. (See NOTICE.)

9. *Personal liabilities of shareholders.*

(22) An action was brought against a shareholder in a scrip company for goods supplied; the company had issued prospectuses announcing a capital of 250,000*l.* in 10,000 shares at 25*l.* each, and the certainty of success, upon the faith of which the defendant took some shares; the project turned out a failure, as the directors only disposed of a small portion of the shares: held, that as the contract of partnership entered into by the defendant, with the directors, had been altogether set aside by the latter, the defendant could not be made liable for goods supplied them on the order of their secretary, because he was a shareholder under the prospectus of the company. He made himself liable on a capital of 250,000*l.*, and as the directors began on 12,000*l.* the defendant's assent to such circumscribed capital, must be shown before he can be made liable. The directors are the persons primarily liable, *Pitchford v. Davis*, Ex. 1. 407.

(23) A shareholder of the same company was held not liable, as a proprietor thereof, to be sued by a tradesman, for articles supplied by him for the company's use, which were ordered before such shareholder became a member of the company. The action was brought for the price of some machinery. The prospectus was issued in May, 1836, which stated the machinery to be in a state of forwardness. The defendant had not his shares till the 31st of that month. *Whitehead v. Barron*, N. P. III. 105.

(24) To an action for arrears of salary against a director of a joint stock company, the defendant pleaded that he was not a director when the action was brought, inasmuch as he had become disqualified by selling his shares. It appeared that the defendant was appointed a director by the act of Parliament, and would continue so for some time: plea held bad. *Harrison v. Warnford*, Ex. III. 71.

(25) A creditor of a joint stock company is entitled to make an individual shareholder thereof a bankrupt, such being a common law right and not taken away

by any act of Parliament. *Exp. Wood*, C. R. II. 328.

(26) A consented to become a member of a joint stock company (*The Metropolitan Parcels Delivery Company*), if 5000 shares were sold. The directors commenced business when 400 only were disposed of: held, that A was not bound by their acts. *Hopkinson v. Snow*, N. P. 14. 253.

(27) A shareholder cannot be made liable for the contracts entered into by the company, unless it is shewn that the principles upon which the company was originally established had been fully carried out in every respect, or that the defendant as a shareholder was aware of any deviation that had been made in them. *Id.*

(28) The clerk of a joint stock company brought an action against a director for arrears of salary. The defendant pleaded he was not a director at the time the action was brought, he having transferred his shares and thereby become disqualified: held, that the plea was bad, as the defendant was appointed a director by the company's act, and so would continue until 1840. *Harrison v. Warnford (West Gork Mining Company)*, Ex. III. 71.

(29) Where it became necessary to proceed against individual partners of a joint stock banking company, an application was granted to enter a suggestion on the roll under the joint stock companies' act, 7 G. 4. c. 46, that certain persons were such partners, in order that execution might be had against any individual partner, on a judgment obtained against the company. *Powlett v. Imp. Bank of England*, B. C. III. 71. See ss. 12, 13, 7 G. 4. c. 46. IV. 329.

(30) A judgment had been obtained against the registered public officer of the Leamington Joint Stock Bank, a rule was obtained calling upon individual proprietors of shares to shew cause why a suggestion should not be entered upon the roll to charge them as separate individuals, and why execution should not issue accordingly. The question was, whether such interposition ought to be effected in the manner proposed by the rule, or in the form of *scire facias*. It was, in fact, a question in what manner new parties were to be placed upon the record, which according to the antecedent usage, must be by *scire facias*, the proceeding by suggestion being only appropriate to the introduction of collateral facts, as the change of name or death of parties: held, that no parties ought to be chargeable with any liability without full notice and opportunity of defending himself, and this could most effectually be done upon a *scire facias*. In *Bartlett v. Pentland*, 1 Barn. & Ad. 704, it was determined that if an Act of Parliament authorizes the making an officer of a company a nominal defendant, and enables the plaintiff to take out execution against the individual partners as being the real defendants, it is necessary that he should in some way have the authority of the court before he can have such execution. A *scire facias* is the usual course in such cases. A suggestion is applicable only to collateral facts affecting other parties than those upon the record, and the rule was discharged per *Lord Denman*. *Bosquet v. Rainsforth*, Q. B. IV. 329.

(31) Where a joint stock banking company (*The Imperial Bank of England*) had failed, and a fiat had issued against one of the registered officers, proof was allowed on his estate for a debt due by the company for the purpose of enabling the claimant to vote in the choice of assignees, and to exercise a control over his estate. Upon petition to have the proof expunged it was dismissed. *Exp. Marston*, C. R. III. 126.

10. *Identity of Partnership.*

(32) Death.—Bankruptcy or disposition of shares does not affect the identity of a partnership established under the Joint Stock Banking Act, 7 Geo. 4. c. 46. *Exp. Marston, C. R. III. 36.*

See BANKERS, 2, 3.—EVIDENCE, 4.—INQUISITION.—MANDAMUS, 3.—MINING ADVENTURE.—NOTICE.—TRANSFER.—VENDOR AND PURCHASER, 9.

## JOINT TENANTS.

See TENANTS, JOINT.

JUDGE'S CERTIFICATE UNDER 43 ELIZ.  
See COSTS, 8.

JUDGE'S CERTIFICATE OF DOUBLE COSTS.

See COSTS, 4.

## JUDGE'S DUTIES.

See LABEL, 3.

## JUDGE'S ORDER.

1. A Judge's order must be served forthwith, i. e. before the opposite party can take further proceedings in the cause. Therefore an order allowing two days to join in demurrer obtained at five o'clock on one day, and not served until between two and three o'clock on the following day, before which time the other party had signed judgment: held, that the order was served too late. A rule was refused for setting aside the judgment. *Kenny v. Hutchinson, Ex. IV. 46.*

2. As to what is a reasonable time to allow a party obtaining an order to elect to draw it up, and serve it or not. When the parties live within any reasonable distance of each other there is ample time from five in the afternoon until nine at night to serve an order of this description, but at all events it ought to be served before the opening of the office next morning, or rather in strictness before the time when the opposite attorney would have to leave his office for the purpose of being present at the opening of it at 11. *Per Parks, B. Id.*

3. A judge had (by consent of both parties) made an order that on payment of costs by defendant, and on payment of the debt at a given time all proceedings should be stayed, but that on default of such, plaintiff was to have final judgment: held, that the plaintiff could not, before the appointed time had arrived, apply to a judge for a *capias* to arrest the defendant on his being about to leave the kingdom. *Bell v. Stanley, Ex. III. 412. IV. 188.* The court suggested that in cases where the plaintiff has reason to suspect an intention in the defendant to leave the kingdom, he should by the order, by a special clause in the margin, reserve leave to apply for a *capias* if necessary. *Id.*

The word "proceedings" means any proceedings tending to final judgment. A *capias* is only such a proceeding. *Id. per Parks, B.*

The order staying proceedings is an agreement on the part of the plaintiff granting six months for the defendant to pay the debt. He can take no proceedings against him while that time is running. *Id.*

See ATTORNIES, (v v).—DEBT, ACT FOR ABOLISHING IMPRISONMENT FOR, 1.—PRACTICE, 1.—STAYING PROCEEDINGS.

## JUDGE'S SUMMONS.

A judge's summons operates as a stay of proceedings; therefore, where a plaintiff had signed judgment for want of a plea, the defendant having taken out a summons for time to plead, which the plaintiff had abandoned, the court ordered the judgment to be set aside. *Hodgson v. Casler, B. C. III. 342.*

## JUDGMENT AVAILABLE AGAINST EQUITABLE ASSETS.

See DEBT, ACT FOR ABOLISHING IMPRISONMENT FOR, 4. a. See *Id.* 4. b.

## JUDGMENT CREDITORS.

See CREDITORS' PRIORITIES, 1.

## JUDGMENT.

See DEBT, ACT, &c. 4. a.—INSOLVENT DEBTORS.—JOINT STOCK COMPANIES.—JUDGE'S ORDER.  
1. 2.—JUDGE'S SUMMONS.—PRACTICE, 2.—SEPARATE USE.—STAYING PROCEEDINGS.—WARRANT OF ATTORNEY, 5.

## JUDGMENT, SUBPENA TO HEAR.

See SUBPENA, 5.—REGISTER.

## JURAT.

See PEACE, ARTICLES OF.

## JURORS AND JURIES.

1. *Challenge*.—The crown has the privilege of challenging a juror without showing satisfactory cause. *Reg. v. Dayne, I. 398.*

2. A special juror may be challenged the same as a common juror, for cause arising or becoming known to the parties subsequently to the striking of the special jury. *Broyne v. Unwin, Eq. N. P. IV. 237.*

GRAND JURY having interest in cause. See INQUISITION.

## JURISDICTION.

The court of Exchequer Chamber has jurisdiction as a court of appeal from the Queen's Bench. A rule for quashing a writ of error from Queen's Bench to this court, on the ground that the 11 Geo. 4. and 1 W. 4. c. 70. did not intend to allow three writs of error where two only previously existed, was therefore discharged. *Rushton v. Nisbett, Ex. Ch. I. 188.*

See ATTORNIES, § 9. 22.—BANKRUPTCY, 1. 3.—DEBT, ACT FOR ABOLISHING IMPRISONMENT FOR, 4.—DISCOVERY, BILL OF, 1.—INSOLVENT DEBTORS, 5. 7. 24. 30.—LEX LOCI REI SITÆ, 2.—REPLEVIN.—REQUESTS, COURTS OF.—STAYING PROCEEDINGS.

## JURISDICTION, SUMMARY.

See ATTORNIES, 22.

## JUSTIFICATION.

See ASSAULT.—TRESPASS.—WAY.

## JUSTICE OF PEACE.

1. *Qualification*.—In a *qui tam* action against a clergyman for acting as a justice of peace, without being duly qualified, the court held that a sequestration, under which a sequestrator was in possession of the grounds, &c. belonging to defendant's vicarage, was an incumbrance within the 13 Eliz. c. 36., although the vicarage was allotted to the defendant by the bishop, with 120*l.* per annum, in order that he might do the duties, on the ground that the allowance of that stipend was discretionary in the bishop, and it did not appear that the vicarage-house was worth 100*l.* a-year. *Pack v. Turpley, Q. B. I. 264.*

2. *Actions against*.—Before an action is brought against a justice of the peace, for enforcing a conviction under sects. 74 and 75 of the Highway Act (5 and 6 W. 4. c. 60.), he is entitled to a month's notice under the 24 G. 2. c. 44., although sect. 9 of the Highway Act provides that no action shall be commenced for anything done in pursuance of that statute, until twenty-one days' notice shall be given. *Ex v. Boston, Q. B. IV. 205.*

3. *Power of*.—A justice has no power to enter the house of a chariot to search for and take for arms

from the person in possession, though known to be a suspicious character and not qualified to have such arms in his possession. *Bryson v. Unwin*, Esq. N. P. IV. 327.

See COSTS, 4.—POOR RATE, 2.

## JUSTICE OF PEACE, CONFESSIONS TO BY PRISONERS.

See MAGISTRATES.

### KIN, NEAREST OF.

See BEQUEST, 3.—HUSBAND AND WIFE, 2.—SETTLEMENT, 2.

### LACHES.

1. A bill was filed in 1835, complaining of an infringement of a patent obtained for a newly invented gas-burner. The alleged piracy continued upwards of four years without an injunction being moved for or any steps being taken to determine the legal right, or any motion being made to bring the cause to a hearing. Bill dismissed, M. R. affirmed by L. C. *Bacon v. Jones*, II. 266.

2. A bill was filed in 1836, and answered by two out of three defendants in January, 1837; no further proceedings were taken by plaintiff until March, 1839: held, (reversing a decision of the vice-chancellor) that in the absence of any attempt to explain the delay, the plaintiff was not entitled to an order to amend his bill. *Altres v. Hordern*, L. C. II. 327.

It is the duty of solicitors to be diligent in the prosecution of their causes, and the object of the orders of the court is merely to keep them to their duties and prevent delay. *Id.*

The 13th New Order is peremptory and cannot be dispensed with by the Master. *Id.*

See ATTORNIES, w.—PATENT, 2.—PRACTICE, 14.—SPECIFIC PERFORMANCE.—VENDOR AND PURCHASER, 6.

### LANCASTER, COURT OF.

See DEBT, ACT FOR ABOLISHING IMPRISONMENT FOR, 4.

LANDS, CONTRACTS FOR SALE OF.  
See FRAUDS, STATUTE OF, 3.

LAND, WHAT AN INTEREST IN.  
See FRAUDS, STATUTE OF, 1.

LANDS REQUIRED BY COMPANIES.  
See JOINT STOCK COMPANIES.

### LANDLORD AND TENANT,

*As to Distress.*

1. A landlord has no right to distress goods removed to avoid a distress, unless removed after the rent became due, the stat. 11 G. 2. does not apply. *Wells v. Day*, B. C. I. 28.

2. Unless rent is actually due and payable when goods are removed to avoid a distress, the landlord has no right to follow and take them. *Nun v. Johnson*, N. P. III. 87.

3. Some damage is implied in all exscessive distresses. *Haoper v. Armes*, Ex. I. 106.

4. Butcher's meat in a butcher's shop cannot be distrained for rent, because the distrainer is bound to keep the distress merely as a pledge for a certain number of days, and then to deliver it up in the same plight as when taken if the rent and costs are paid, and which he could not do in the case of fresh meat from the perishable nature of the article. *Parrott v. Oakes*, N. P. IV. 286.

5. Where parties entering a house in an unlawful manner ostensibly for the purpose of making a distress for rent, and taking a greater quantity of goods than necessary for that purpose, fail to connect themselves

with the landlord, all their proceedings will be deemed illegal. *Muir v. Sewell*, N. P. III. 412.

6. Where a broker and his men, in order to effect a distress for rent, on being refused admittance by the door, entered by means of a ladder placed against a window at the back of the house, it was ruled that such entry was a trespass in itself, for which those parties were answerable, even if they had a landlord's warrant. *Id.*

7. *Outgoing tenant*.—Under a custom to stub the land where it would be fit for cultivation, an outgoing tenant has no right, after his receipt of a notice to quit, to cut the whins, and dispose of them for his own benefit. *Storm v. Miller*, N. P. II. 204.

See CONTRACTS VOID, 2.—EVIDENCE, 8.—LESSOR AND LESSEE.—LEASE.—LEASEHOLD.—REPLEVIN.

### LAND-TAX.

The commissioners of lands and assessed taxes have power when their collectors are defaulters under 3 Geo. 4. c. 60. to arrest and imprison such a defaulter who has absconded, and is living in another district. See *Sharpe v. Reed*, N. P. IV. 252.

### LARCENY.

If a prisoner indicted for larceny, on being called on for his defence, produces witnesses to prove an *alibi*, the counsel for the crown has a right to address the jury in reply, although the prisoner was undefended by counsel. *Reg. v. Lover*, I. 3.

See MASTER AND SERVANT, 1.

### LAW EXAMINERS.

See ATTORNIES (*Articled Clerks*).

## LAW, COURT OF, EQUITABLE RELIEF IN.

See LESSOR AND LESSEE, 7.

### LEASE.

See APPORTIONMENT.—ASSIGNERS OF LEASES.

### LEASE, CONTRACT FOR.

See LESSOR AND LESSEE, 2. 35.

### LEASE, COSTS OF.

See LESSOR AND LESSEE, 2.

LEASE, DEPOSIT OF AS SECURITY.  
See MORTGAGE AND MORTGAGEE, 2.

### LEASE, PROPOSAL FOR.

See EVIDENCE, 8.

LEASE, EQUITABLE ASSIGNEE OF.  
See ASSIGNEES OF LEASES.—(*Liabilities of*) 2.

### LEASEHOLD.

See DEVISE, 1, 2.—EXECUTORS, 8.

### LEASEHOLD FOR LIVES.

See RENEWALS, 1.

### LEASE AND RELEASE.

To an action of trespass *quare clausum fregit*, defendant pleaded a title by conveyance by lease and release, to which the plaintiff demurred, because the deed of release had been pleaded without *proffert*: held, that although *proffert* is unnecessary of a conveyance deriving effect from the statute of uses, yet as a release operates at common law, the defendant ought to have pleaded *proffert* of it. To an action of trespass, the defendant pleaded a conveyance by lease and release; the plaintiff demurred by reason that the release had been pleaded without *proffert*. Leave was given to amend by making *proffert* of release. *Jenkin v. Pence*, Ex. IV. 382.

(a) A bargain and sale for a year (now abolished) or a covenant to stand seised to uses, will operate by the statute of uses without *proffert*, but a release on the contrary operates at the common law, and a party

claiming under such an instrument must make perfect of it. *Id.*

### LEGACIES.

1. *Legacy given to a person under a falsely assumed name.*
2. *General and specific Legacies.—Construction.*
3. *To a daughter who shall survive any husband, and she dies without having been married.—Construction.*
4. *Legacies vested.*

1. *Legacy given to a person under a falsely assumed name.*

2000*l.* was given by a testator to trustees upon trust to pay the interest to Lady C, the widow of Sir N. C. so long as she should remain single and unmarried. He also gave her 500*l.* without any condition annexed. There was a close intimacy between the testator and Lady C. At the date of the will, and at the testator's death Lady C. was a married woman, having been secretly married to Mr. R, who was still alive, but who had deserted her and gone abroad, and she did not take her second husband's name: the testator was unacquainted with this second marriage, but no evidence was produced to shew that his attachment would have ceased had he known of such marriage. She went by her first husband's name; and the testator considered her as his widow: held, that she was entitled to both legacies. *Rishton v. Cobb*, L. C. III. 134.

When a legacy is given to a person under a particular character, which the legatee falsely assumed, and which alone can be the supposed inducement to the testator's bounty, the court will not permit such a legatee to avail herself of such falsely assumed character, and she cannot demand the legacy. *Per Lord Alvanley. Id.*

2. *General and specific Legacies.—Construction.*

A testator bequeathed to trustees, their executors, administrators, and assigns  $\frac{5}{8}$  shares in *The Leeds and Liverpool Canal*, upon trust to permit his son J R and his assigns to receive the quarterly produce for his and their own use, and after his decease upon certain other trusts, and he gave other shares in the same canal upon trust for the benefit of other children. At the time of making his will the testator was possessed of fifteen and a half shares of 100*l.* each; but between that time and his death he sold the whole of them, and was not at the time of his death possessed of any shares in the canal. The children filed a bill against the executors of the testator and other parties for a declaration of the Court that the several bequests of the shares were general and not specific legacies, and that they were entitled to have so much money as at the end of one year next after the death of the testator would have been sufficient for the purchase of fifteen and a half shares in the canal at the then current market price, raised and paid out of the testator's personal estate: held, that the bequests of the shares were general and not specific legacies, and the children had a decree as prayed. *Robinson v. Addison*, M. R. IV. 311.

3. *Legacy if a daughter shall survive any husband, and she dies without having been married.—Construction.*

A bequeathed 4,000*l.* to trustees in trust for his daughter for life for her separate use, without power of anticipation, and after her decease upon trust as she should appoint, and in default of appointment upon trust for all her children, but in case there should be no child who should attain twenty-one or be married, then if his daughter should survive any husband whom she might marry, in trust for her and her heirs, executors, administrators and assigns abso-

lutely; but if any such husband should survive the testator's daughter, then in trust as she should appoint by will as if she were sole and unmarried, and in default of such appointment, upon trust for her next of kin. The testator's daughter died intestate, and without having been married, and her administratrix claimed the 4,000*l.*, and the trustees refused to act but under the direction of the Court: held, that the legacy did not pass to her personal representatives, but fell into the residue of A's personal estate, and belonged to his residuary legatees. *Lennox v. Lennox*, V. C. IV. 41.

4. *Legacies vested.*

(a) Five hundred pounds was bequeathed to an infant when he attained the age of twenty-five: held, that the interest of the legacy could not in the interim be applied towards the infant's support. *Robert v. Williams*, L. C. I. 54.

(b) Testator devised to trustees upon trust, to sell and lay out so much as should be sufficient to raise three annuities of 100*l.* each, and to apply one of such annuities towards the maintenance and education of his grandchildren, the children of his late daughter M H, until the youngest of such children who should live to attain twenty-three should attain that age; and from and immediately after such youngest child should have attained that age, upon trust that the principal money laid out in purchase of the annuity "should be paid and divided unto and equally amongst his last mentioned grandchildren, share and share alike as tenants in common;" and as to the two other annuities, to be paid to his daughters E C and S W respectively, for life; and as to the principal money laid out in purchase of these annuities, he directed "to pay, apply and divide each of them, from and immediately after the respective deaths of E C and S W, unto and equally amongst all and every his grandchildren then living (children of M H), and all the children of E C and S W, as well those then living as those who might thereafter be born, share and share alike as tenants in common." And as to the residue, to pay and divide the same unto and equally amongst the children of M H then living, and the children of E C and S W then living or who should be born during his lifetime, share and share alike as tenants in common; and he directed that the legacies or shares should vest in the grandchildren, in sons at twenty-three, and in daughters at that age or marriage, and that if they should die under twenty-three without issue, then the legacies or shares of them so dying, should go and accrue to the survivors and survivor of them, and the lawful issue of such as might be dead, share and share alike. At the testator's death there were eleven grandchildren; of these, four died under twenty-three, six and seven attained that age; M H had five children, three attained twenty-three, and one of them, J T H, died after attaining that age but before the time when the principal money became divisible: held, first, that J H, one of M H's children, took an original one-fifth share, one-third of another share, but no part of his brother D's original share; secondly, that as to the principal monies of the two other annuities, the bequest was void for remoteness, and fell into the residue; thirdly, that eight were entitled—the representatives of J T H were entitled to one-eighth, and the remaining grandchildren to the rest equally. *Cromek v. Lamb*, Ex. Eq. II. 167.

### LEGACY. CONTINGENT.

See EXECUTORS, 13.—DEVISEE, 4.—HUSBAND AND WIFE, 9.—WILLS.

### ERRATA.

Under the reference "Confession," read "Negotiated."

## LEGACY DUTY.

The Commissioners of Stamps have the power of taking a fixed sum in gross for legacy duties due under a will, and may therefore discharge the testator's estate from all future claims of duty. *Egerton v. Egerton*, M. R. II. 150.

## LEGAL ESTATE.

An estate was devised to A, B and C in trust, to permit and suffer A to take the "net rents" thereof during her life, and then in trust to suffer B to take the "net rents" during her life, and after her decease, to suffer C to take the rents during his life: held, in an action by A, B and C, for use and occupation, that the legal estate was vested in them as trustees, and therefore, that they were proper parties to bring the action. *Barker v. Greenwood*, Ex. I. 73.

It is a maxim that whenever any duties are imposed upon trustees, the legal estate is vested in them. *Id.*

The word *net* must be taken to be something contradistinguishable from *gross* rents. The trustees are therefore to take the *gross* rents and pay the *net* rents to the first *cestui que trust*. *Id.*

## LEGAL RIGHTS.

See *LIONS*, 1.

## LEGATEES, CLASS OF.

See *COUSINS GERMAN*.

## LESSOR AND LESSEE.

1. Lessee for thirty years, under covenants to "rebuild sufficiently the party walls" and to repair. The house was a wooden house and fell down; the lessor insisted that the lessee was bound to build another house, and, as the *Building Act* prohibited wooden houses, that it should be of brick, the cost of which would be 450*l.* which the defendant refused. In an action by the lessor for damages, he obtained 200*l.* *Trustees of the Strathmore Estate v. Hart*, Sh. C. Middlesex, II. 169.

2. In 1825, by "memorandum of agreement," C agreed to take, and B agreed to let, certain premises on lease for the term of twenty-one years. The lease to contain the same covenants as in the lease to B, and to be prepared at C's expense. C entered and continued in possession until 1838, when he gave notice to quit. B then called upon C to take a lease according to the terms of the agreement, which C refusing to do, the lease was prepared and tendered to C, who refused to accept it, contending that the "Agreement itself operated as a lease." B then brought an action against C for the costs of the lease, and obtained a verdict. Upon motion to enter a nonsuit, on the grounds that the agreement was a lease in itself; that the statute of limitations was a bar to the action: held, 1st, that the agreement was an agreement to grant and execute a future lease at C's expense, for the expense of preparing which C was liable; and, 2d, that as to the statute of limitations, the time was to be calculated from the moment at which a cause of action arose, which could only have been when the lease was offered, and the defendant refused it, and not from the date of the agreement which could not give any right of action until a breach had been committed, and the motion was refused. *Burnel v. Curties*, Ex. IV. 346. See 3 *Western's Conveyancing*, pp. 75, 113, in notis.

3. N agreed to let, and C to take, premises in K, for twenty-one years; N to put the premises in a proper state of repair; C entered in September 1830; and in November, while the repairs were going on, received a draft lease for perusal, of which he took notice, and no lease was executed; but C sent repeatedly to N requesting him to get the repairs done until 1833, when he expressed himself satisfied, and

then, on being pressed to execute a lease, refused to do so, or bind himself otherwise than as tenant from year to year, alleging that the repairs were not done in due time, and the lease contained covenants which N had not made him acquainted with, being covenants contained in the original lease by which N held the premises under the crown: held, (affirming a decree of the Vice-Chancellor,) that the contract must be performed, and a specific performance was decreed accordingly. *Nash v. Cockrane*, L. C. II. 197.

4. In an injunction suit by a lessee of mines against his lessor, to have his rent reduced below the amount reserved by the lease on the ground of a *parol agreement* with the lessor to that effect, in consideration of the works being increased by the lessee, it appeared that a verbal communication had been made by the lessee to the lessor, that if the reduction was acceded to, the working of the mines would be increased; that the works had been increased accordingly, and that accounts had been settled on the faith of such agreement; the lessor afterwards brought an action at law against the lessee for the whole of the rent reserved by the lease, and the lessee filed his bill for an injunction to restrain the lessor from proceeding with the action: held, there was sufficient to support the plaintiff's case, and the injunction was made perpetual. *Raes v. Phillips*, M. R. II. 360.

5. An intended lessor by his own act became incapable of performing his contract, having destroyed the subject matter thereof pending a suit by the intended lessee for a specific performance, and a reference to the master to ascertain the amount of damages. The Court ordered an action to be brought, the defendant making the requisite admissions to bring the question of damages fairly before a jury. *Nelson v. Bridges*, M. R. III. 69.

6. By lease, dated in January 1832, P demised a farm to G, *habendum* from October 1831 for seven years, "and so on from year to year:" held, that P was entitled, on giving G notice to quit at the preceding Lady-day, to recover possession as from October 1839, the words used not implying a tenancy for two years certain at the expiration of the term of seven years. *Doe d. Pryme v. Gifford*, Ass. III. 346.

7. The equitable interference of a court of law under 4 G. 2. c. 28. which enables courts of law to give relief in cases of forfeiture under particular circumstances, was denied, where the lessee of some houses held under the usual covenants to repair, and to make good all dilapidations within three months after notice, neglected to comply with such a notice, and the lessor had judgment in ejectment for a forfeiture, although the lessee swore that he had since fully repaired the premises, and therefore he claimed the equitable interference of the court. *Doe d. Mayhew v. Asby*, Q. B. II. 40.

8. A lessee of the game upon a manor, is not, as such, a lessee of the land, and consequently entitled to maintain an action of trespass against another person for taking the game. *Pearce v. Eastwood*, N. P. II. 204.

See ASSIGNEE OF LEASES.—COAL MINES, 1.—CONTRACTS, VOID, 2.—LANDLORD AND TENANT.—RENEWAL, 1.—REPLEVIN.

## LETTER.

See EVIDENCE, 8.

## LETTER OF ATTORNEY TO RECEIVE DOCUMENTS.

See ATTORNIES, *W. & C.*

## LEVY, EXCESSIVE.

Where an excessive levy was made on an execution  
E



under a warrant of attorney, and the sale was improperly conducted, they were liable to the defendant in damages for the irregularity. *Guest v. Reynolds*, N. P. II. 42.

See *FIXI FACIAS*.

#### LEX LOCI DOMICILII.

1. A and his wife, British born subjects, after living a short time at St. Kitts, went to St. Croix, where A advanced money on mortgage, and subsequently with his wife returned to England and died domiciled there. A and his wife made a joint will according to the Danish form, and appointed executors (Danish subjects domiciled in St. Croix, who claimed control over the money invested there on mortgage by taking out probate at St. Croix). A's wife survived, and she made another will intended to supersede the joint will, she being the legatee of her husband of the mortgage-money, which was proved in England: held, that probate must follow the domicile, and that the property must be dealt with according to the English law, and that the executors in St. Croix were trustees of the mortgage-money for the legatees of A's wife. *Pries v. Dewhurst*, L.C. I. 54. affirmed on appeal from the Vice-Chancellor.

Rule of law. Where a person dies intestate, his personal estate is to be administered according to the law of the country, in which he was domiciled at the time of his death: whether he was a British subject or not, and the question whether he died intestate or not must be determined by the law of the same country. *Id.* II. 113.

2. Where a question arose as to the title of certain parties to the personal estate of a testator, in the course of which it appeared that his place of domicile was disputed. The Master of the Rolls, before making any adjudication, directed an inquiry before the master to ascertain the place of domicile; if in England, who were the next of kin, if in France, who by the law of France would be entitled. *Champan v. Riley*, M. R. I. 88.

See *LEX LOCI REI SITÆ*.

#### LEX LOCI REI SITÆ.

(a) Upon ejectment sent to be tried by Lord Eldon in King's Bench for a special verdict to settle the law on the question. W B died, in 1819, seized of lands in England without issue; all his brothers died in his lifetime unmarried, and without issue, except one A B, who went from England to Scotland, and became and was domiciled there, and there remained and dwelt so domiciled till the time of his death. While domiciled in Scotland he cohabited during the whole period of time with M P, being also domiciled there, and during such cohabitation had issue by her, J B, (the plaintiff) who was the only son of A B and M P, and was born in Scotland on the 15th May, 1799. On the 6th May, 1805, after the birth of J B, A B and M P were married in Scotland according to the laws of Scotland, and on the 5th February, 1810, A B died in Scotland, seized to him and his heirs of lands there, leaving J B him surviving, who after the death of his father was duly served thereto according to the law of Scotland, which he held and enjoyed in his own right, he having from the time of his birth dwelt and remained in Scotland and been domiciled there. Question put by the Lords to the Judges: "Is J B entitled to the real estate in England of W B as heir of A B?" held, that J B was not so entitled, which was the judgment of the court below. Affirmed, Dom. Proc. *Birtwhistle v. Vardill*, IV. 204. 214. Leading Case.

(b) If a marriage of the mother of a child with the father of such child takes place in Scotland, such

child born in Scotland before the marriage is equally legitimate by the law of Scotland with children born after the marriage, for the purpose of taking land, and every other purpose. *Id. sed qu. per Lord Lauderdale. Id.* 216.

(b) B, of St. Vincent's, married an English woman there, having previously settled lands and slaves on that island, the ultimate remainder whereof was limited to the issue of the marriage in equal shares. B afterwards whilst residing at Demarara (then ceded to England) purchased lands there, where his wife died leaving two children, H M B and L J, who married V, a Frenchman. In 1811, B returned to England with his children, and in 1822, there was married a second time, having previously settled the Demarara property to secure a jointure to his wife, and limiting it to the issue of the second marriage, reserving thereto to himself a power of appointment over 30,000*l.* which in default of such appointment was limited to the issue of both marriages in equal shares. In 1832, when he had five children by the second marriage, he made a will devising half his Demarara lands to them, and the other half to all his children equally: he made several codicils to this will, by one of which he gave compensation slave money among his children, and directed that if the children by his first wife should trouble his wife by litigation, the devise to them should be void. He died in England in 1838, leaving the two children by the first marriage, and eight children by the second, him surviving. H M B, and L J V filed a bill in Demarara for a moiety of the land purchased there, of the slaves, and to a moiety also of the slaves and compensation money in accordance with the Demarara law of property which they claimed *exclusively*. The children of the second marriage then filed a bill in England against all parties claiming beneficial interests in the property, praying that the trusts of the settlements made on the second marriage might be established, and that the will and codicil might be carried into execution, and for an injunction to restrain the children of the first marriage from proceeding with the suit at Demarara. The defendants (all of whom resided in England except L J V) appeared and answered: held, that as all the parties claiming a beneficial interest in the property had appeared, and were within the jurisdiction of the Court of Chancery in England, it would be more convenient to have the ultimate question decided in this country. Leave given to the plaintiffs in the Demarara suit to go on with it there, and obtain a verdict if they could. Injunction granted to restrain execution. *Bunbury v. Bunbury*, M. R. affirmed on appeal, L. C. II. 387.

#### LIBEL.

1. Upon a rule for a criminal information for libel held, that in an indictment for libel, as well as a criminal information, the question of the truth or falsehood of the libel must be altogether laid aside; but where, in the preliminary stage of the proceedings, before they are ripe for the consideration of a jury, a defendant might have offered evidence to the Queen's Bench to shew that the allegation of the prosecutor as to its falsehood was without foundation, and if when the defendant shewed cause against the rule, he at the same time established the facts in the libel, or failing to do that, had shown that at the time of the publication he had reason to believe them to be true, if the statement complained of appeared to the court to have been made with a *bona fide* belief that it was true, then the Court will not make the rule absolute. *Reg. v. Latham*, I. 120. Q. B.

The jury are the sole judges of the question of issue. *Id.*

2. The question of libel is a mixed question of law

and fact, and the jury are at liberty to find a general verdict. *Knight v. Coupland*, II. 200.

There is a distinction between public men's public conduct, and private men's private conduct. There is no public interest concerned in dragging into public notoriety a private man; and if any one choose to drag him forth, and wound him in private life, nothing would justify him but a direct proof of the truth of his assertion. But with regard to public men and public measures, it is necessary for the public interest that they should be examined with great freedom, and the mode of doing so is by the public press. Whoever makes comments upon public men in a spirit of honesty is only doing that which is allowable. In respect to men in parliament, or even parliament itself, all persons may with the greatest freedom, even with courtesy of language, examine into the wisdom or folly, the justice or injustice of their proceedings. *Id.* per Coleridge, J.

3. In an action against the printers and publishers of the reports of proceedings in the House of Commons for libel reflecting on the character of the plaintiff, the defendants pleaded that they published the documents containing the libel by command of such house: held, that the defence pleaded was no defence at law. *Stockdale v. Hansard*, Q. B. II. 8 at seq. 333.

4. On the trial of an action for a libel, it is not the compulsory or necessary duty of a judge to tell the jury whether the publication is a libel or not: but it may be left to the jury alone to decide the question, whether it is or is not a libel. *Baylis v. Lawrence*, Q. B. IV. 142.

See also *Knight v. Coupland*, II. 200.

#### LICENCE.

See MARRIAGE, 3.

#### LIEN.

See ATTORNEYS, 6.—BAILMENTS, 1.—CONTRACTS, VOID, 1.—JOINT STOCK COMPANIES, 1.—PLEADING, 5.

#### LIFE ASSURANCE.

See COVENANT.

#### LIFE, TENANT FOR.

See TENANT FOR LIFE.

#### LIGHTS.

1. The court will not grant an injunction to restrain a defendant from erecting a building which when completed would exclude the light from a neighbouring house, but will leave the defendant at his peril to finish the erection, so that the plaintiff may bring an action at law, and if he obtains a verdict, then the court will deal with it. *Smith v. Elger*, II. 340. L. C. overruling an order of the V. C., who granted an injunction on the ground that the defendant had no ground to cause the obstruction (building a wall.)

The principle on which the court interferes by injunction, is purely for the maintenance of the legal right of the parties, either when that right clearly appears to be invaded, or when there is good reason for anticipating that it will be invaded. If there is any doubt of the legal right, then the court left the parties to establish it at law, putting them, if it thought fit, on such terms as the exigencies of the case may require. *Id.*

2. To entitle a party to recover damages for stoppage of lights, he must prove the obstruction to be so material as to cause inconvenience. Mere proof that there is somewhat less light than at a former period is insufficient. *The Mercers' Company v. Hudson*, Q. B. III. 204.

#### LIMITATION.

1. G W, by his will, devised real and personal property to trustees upon trust for L for life, and after her decease "for all and every his brothers and sisters who should be living at the time of the decease of L, and to their issue male and female equally, share and share alike. All the testator's brothers and sisters died in the lifetime of L, the brother and one sister without issue, and the other sister left issue who filed their bill: held, that the word "issue" is a word of limitation. It was in this case the same as heirs of the body. The words of limitation must be applied to the brothers and sisters who were intended to be the first takers, and that the plaintiffs took no interest under the devise. *Tate v. Clarke*, M. R. I. 137.

2. J M gave the produce of the residue of his real and personal estates to his daughter S M for life, for her separate use, and after her decease he first directed his trustees to transfer and pay one moiety of that residue "to the issue" of his daughter, if she should happen to marry and have any such issue, equally at their respective ages of twenty-one years, and if only one child, then the whole to be in trust for such one child, the dividends to be applied for the maintenance of such issue, and the surplus to be invested for the benefit of such issue; and in default of such issue, he gave that moiety to his nephews and nieces living at his daughter's decease, and as to the other moiety, "at the decease of his said daughter without issue," he gave it to trustees in trust for his godson for life, and after his decease for charitable purposes. The testator's daughter survived him, and suffered a recovery of all the freehold estates of T M, and married C C; she afterwards died without having ever had a child, surviving her husband, but having previously made a will, whereby she devised one moiety of her real and personal estate to the plaintiffs W C C and S C C, two-thirds of the remaining moiety to the children of W B who should be living at her death, and the remaining third to the children of W A. The plaintiffs charged that the gifts by T M, for the benefit of his nephews and nieces and of the charities, were limited to take effect after an indefinite failure of issue of his daughter, and were therefore void, and lapsed for her benefit as heiress at law, and sole next of kin of T M: held, that as related to the first moiety, the direction of T M, the testator, amounted to a distinct gift to the issue of his daughter, and that the use of the words "if only one child," and "such one child," illustrated that the testator meant by the word "issue," children of his daughter; and in default of such children, the gift over to the testator's nephews and nieces took effect. 2nd. That as related to the second moiety, there was no such distinct gift; that the word "issue" being there unexplained, the gift over in default thereof was too remote, and consequently void as to all the property. *Carter v. Bentall*, M. R. IV. 286.

See DEVISE.—ISSUE.—SETTLEMENT.

#### LIMITATIONS, STATUTE OF.

1. In an action for *mesne profits* for a period of twenty-five years and ten months, the plaintiff, M K, was devisee of the land by will dated in 1781, when she should attain twenty-one; and the testator, at the time of making his will, and at his death, was in possession. M K married E K in 1790; during the marriage the husband of M K never demanded the rents, and the defendants had received them. The husband died in 1835, leaving M K surviving, and she then claimed the rents. The defendants pleaded the statute of limitations. M K had a verdict. *King v. Edwick*, Ass. I. 317, and subsequently judgment in ejectment, *Id.* I. 336.

2. As the law empowers a creditor to appropriate a payment made by a debtor to such account as it best suits his interest to select, he may apply such a payment in discharge of a debt barred by the statute of limitations. *Mills v. Fowkes*, C. P. II. 27.

See ANNUITY, 2.—ATTORNEYS, & C.—CREDITORS.—LESSOR AND LESSEE, 2.

#### LIVES, LEASE FOR.

See RENEWALS, 1.

#### LOAN.

See STOCK.

#### LOAN SOCIETIES.

See BENEFIT LOAN SOCIETIES.

#### LODGER.

See ASSAULT.

#### LONDON BROKERS.

See BROKERS.

#### LONDON, SHERIFFS OF.

See REPLEVIN.

#### LORD OF MANOR.

See COPYHOLDS.

#### LUNATICS.

1. An order will be made for an advance from the funds of a lunatic for the purpose of defending his heir from a criminal prosecution. *Exp. Medhurst*, L. C. I. 341.

2. Committees of the estates of lunatics will not in future be allowed for monies expended in improvements of such estates, unless the permission of the court has been previously obtained for that purpose. *Re Buckee*, L. C. II. 23.

3. Money expended for the maintenance of a lunatic cannot be recovered as a debt (under 3 & 4 W. IV. c. 104.) payable out of his real estate, inasmuch as the statute only intended to render the real estates of intestates, &c. liable for the debts they contracted, and a debt could not be contracted by a lunatic, as he is incapable of contracting. *Carter v. Beard*, V. C. II. 70.

4. It is insufficient merely to show incompetency of mind, there must be other circumstances to render a commission of lunacy expedient and necessary. *Wilkinson v. Harwood*, L. C. III. 85.

5. Where a lunatic was confined in an asylum, the keeper whereof refused the plaintiff access to him for the purpose of serving process upon him. The court granted a rule nisi for the keeper to show cause why a *habeas corpus* should not issue. *Marston v. John*, Ex. IV. 206.

See HUSBAND AND WIFE, 4.—TRUSTEES, 5.

#### MAGISTRATES.

1. A prisoner taken before a magistrate for house-breaking, about to make a confession, was told by the magistrate, that "any thing he might say for or against himself would be taken down, and in the event of his being committed, would be used at the trial as evidence against him," when he made a confession, and it was objected at the trial that the caution amounted to an inducement to confess: held, that this evidence was admissible. *Reg. v. Arnold*, Ass. I. 3.

Magistrates are often in too great a hurry to warn prisoners against making statements. Provided that no stratagem be made use of to induce a prisoner to make one, he ought to be encouraged to say what he thinks proper. *Id.* per LORD DENMAN.

3. It is the duty of magistrates to inform a prisoner, that all he may have said previously is to go for nothing, but that any thing he is about to say then will be taken down and used as evidence against him. Ma-

gistrates had better drop the use of the word "for," as it tends to raise a question of law. *Id.* per LORD DENMAN.

See COSTS, 4.—JUSTICES OF THE PEACE.

#### MAINTENANCE.

See HUSBAND AND WIFE, 3, c.

#### MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution, the questions for the consideration of the jury are—whether the defendant acted *without reasonable and probable cause*, and whether he *maliciously* instituted the proceedings against the plaintiff. *Williams v. Panten*, N. P. II. 167, and

2. In such actions the proof of those facts is cast upon the plaintiff, who seeks reparation for the alleged injury. *Evans v. Panten*, N. P. II. 168.

#### MANDAMUS.

1. A mandamus issued to the trustees of a public work, commanding them to pay B a sum due to him for compensation-money for some land appropriated for the purposes of the trust. Return—That defendants had not, as such trustees, any money or adequate funds wherewith to pay the sum ordered. The return was quashed as frivolous. *Reg. v. Trustees of Swansea Harbour*, R. C. II. 27.

2. A mandamus will not be granted against an incorporated joint stock company, upon the application of a party claiming compensation from it, unless there has been a positive refusal on the part of the company to make such compensation. *Reg. v. Bristol and Wiltshire Canal Company*, B. C. IV. 413.

See CHURCHWARDENS, 1.—COPYHOLDS, 1.

#### MANOR, LESSEE OF GAME ON.

See LESSOR AND LESSEE, 8.—COPYHOLDS.

#### MARRIAGE.

1. *Valid by the English law.*

2. *Valid by the Scotch law.*

3. *By licences in another diocese.*

4. *By an English woman in France with a Frenchman under the French law of dowry.*

5. *Validity of, by British subjects with French women at the Hotel of the Embassy by the Chaplain.*

6. *Refusal by a Clergyman to celebrate.*

7. *Incestuous.*

1. *Valid by the English law.*—The marriage act of 1822 made all previous marriages by parties under age, without consent, valid, provided the parties had cohabited together as man and wife. *Doe d. Queye v. Nicholson*, N. P. I. 299.

2. *Valid by the Scotch law.*—H R, formerly the widow of S B, who was in the service of the East India Company, and was a subscriber to the Bombay Civil Fund, which entitled his widow to a pension so long as she remained his widow, became acquainted with R R in England, with whom she lived, acting in all respects as his wife, and afterwards went to Scotland, where she lived with R R in a similar manner, and was received in society as Mrs. R. She continued to receive her pension upon a declaration that she was still the widow of S B. Subsequently the Bombay Civil Fund removed the restriction upon widows of members who should marry after that resolution; and then H R married R R in Scotland, according to the law of Scotland, the certificate of which marriage stated, "they having been previously irregularly wed." From these words of addition to the certificate, the Bombay Civil Fund discontinued the pension. Mr. and Mrs. R filed their bill to establish their claim, and the Master reported that no valid marriage had taken place prior to the resolution made by the Fund. Exceptions were taken to the

report: held, that the Master was right in his finding. A contract of marriage can only be made by the mutual consent of the parties; but in this case the habit and repute the parties had gained was for appearances only, which is not of itself according to the law of Scotland sufficient to constitute a marriage, and Mrs. R. was held entitled to her pension. *Robertson v. Crawford*, M. R. IV. 428.

See *LEX LOCI REI SITÆ*.

3. *By licence in another diocese*.—H W W, aged 21, and Miss D, aged 19, agreed to a clandestine marriage. W procured a licence for the marriage at S, in the diocese of L and C, where Miss D resided, but he procured it from a surrogate of the dean of St. A, in whose diocese it was celebrated by a clergyman in orders of the Church of England: held, that as it had been decided by the judicial committee with respect to banns, that in order to render a marriage null and void under the marriage act 4 G. 4. c. 76. s. 23, both parties must have acted knowingly and wilfully with an intention to defeat the law; the words of the section with respect to licence, may be construed to mean either having authority to grant the particular licence, or any licence at all. The marriage was legal. *Williams v. Williams*, I. 56. C. C.

4. *By an English woman in France, with a Frenchman, under the French law of Dowry*.—Miss M F was entitled under the settlement made in the marriage of her parents to money charged on lands in Ireland. She married in Paris G, and by the marriage contract it was declared that the marriage took place under the law of dowry established by the French code. G and his wife filed a bill in England to ascertain who was entitled to the fund under this contract. The master reported that according to the French law G was not entitled, except under the obligation of converting it into immoveable property in France, over which neither he or his wife would have any power of alienation, and that the trustees would not part with the money unless for the acquisition of such property: held according to the master's report. *De Gaga v. The Duke of Leinster*, M. R. II. 327.

See *A LIENS*.

5. *Validity of marriages by British subjects with Frenchwomen at the Hotel of the Embassy by the Chaplain*.—G L, aged 22, a domiciled subject of England, married A P, aged 25, a domiciled subject of France, in the first instance by civil contract before the mayor of the Arrondissement, which was duly registered, and on the same day they were married at the Hotel of the British Ambassador at Paris by the Chaplain of the Embassy, both being described according to their respective places of domicile. On a suit for a nullity of the marriage on the grounds that the consent of the father of G L was not obtained, and that it was necessary to prove his birth according to the law of France, and that neither of the parties was a member of the household of the embassy: held, that under the statute 4 G. 4. c. 91. the marriage was valid. *Lloyd v. Petitjean*, III. 4. C. S.

A marriage between two British subjects in the house of the British Ambassador by the chaplain to the embassy is valid under the 4 Geo. 4. c. 91. *Id.*

Marriages at *St. Petersburg* in the chapel of the Russia Company, and in private houses, are valid, whether both or one of the parties be English subjects, under 4 Geo. 4. c. 67. *Id.*

See also 3 & 4 W. 4. c. 45. declaring valid marriages solemnized at *Hamburg* since the abolition of the British factory there. *Id.*

English decisions have established this rule, that

a foreign marriage valid according to the law of the place where celebrated is good anywhere else, *Per Lord Stowell. Id.*

Marriages in ambassadors' chapels, if made by the allowance of the foreign state, would be good marriages in those countries; but that if not a good marriage in the place where it was celebrated, it would not be a good marriage anywhere. *Per Lord Ellenborough. Id.*

See the law of France previous to the celebration of a marriage. *Id.*

6. *Refusal by a clergyman to celebrate*.—Plaintiff obtained a verdict against a clergyman of the Church of England for refusing to marry him with a woman, on their producing a sufficient licence, without giving sufficient reasons for his refusal. *Davis v. Bluck*, Clk. Ass. III. 413. See Vol. 6, where the court declined any opinion on the subject.

7. *Incestuous*.—A man married the daughter of his own sister; proceedings were taken to annul the marriage as being incestuous, and a question arose as to what was the best evidence that the marriage had taken place: held, that in all the courts the fact of the marriage may be proved without any register at all. If there is any connection between the parties by blood, even if they are illegitimate, the marriage is void. It is not absolutely necessary that a marriage should be registered, therefore a register is not the best evidence. Nor can a mistake in the register affect the validity of the marriage. A register is a mere record or memorandum. Oral evidence was here given to establish the fact, that the party proceeded against had married, and still cohabited with his own niece, and the marriage was declared null and void. No penance was directed. *Woods v. Woods*, Cons. C. IV. 300.

A baptismal certificate is no evidence of birth. *Id.*

## MARRIAGE SETTLEMENT.

See SETTLEMENT.—HUSBAND AND WIFE.

## MARRIED WOMEN.

See AGREEMENT, 1.—HUSBAND AND WIFE.—LIMITATIONS, STATUTE OF.—MARRIAGE, SEPARATE USE.

## MASTERS IN CHANCERY.

The Masters in Chancery have no power to dispense with or relax the general orders of the court, consequently they cannot give leave to amend contrary to those orders. *Lloyd v. Wait*, L. C. II. 120.

## MASTER AND SERVANT.

1. A servant was indicted for stealing some wheat from his master. The prisoner took the wheat to give to his master's horses, because they were out of condition: held, that if the prisoner took the wheat without his master's permission even to give it to his master's horses, that constituted a felony, and the prisoner was found guilty. *Per* Ld. Denman, *Reg. v. Mould*, III. 382. The civil law makes the *lucri causa*, or the intention of the thief to derive a profit from his crime, an essential part of the offence of theft: it has been held to be larceny in a servant clandestinely to take his master's corn to give his master's horses, and in which some of the judges stated it to be the ground of their opinion, that the additional quantity of corn would diminish the work of the men who had to look after the horses; so that the *lucri causa*, viz. to give themselves ease was an ingredient in the case. *Western's Conveyancing*, Ed. 3. 208. n. 13. See also *Id.* 227. 228. 422.

2. In the absence of any special agreement, a domestic servant, on quitting his situation *instantly* at his master's command, is entitled to a month's wages

in lieu of a month's warning. *Hutton v. Wilson*, 8h. C. II. 248.

3. On proof of a custom that sugar-bakers' workmen for upwards of twenty years had enjoyed certain holidays in the course of the year, they will be held entitled to such holidays, notwithstanding they are yearly servants. *Berensstein v. Hodgson*, Pal. C. II. 249. 311.

#### MEDICAL PRACTITIONERS.

A clergyman and perpetual curate of a parish, who also carried on the profession of a surgeon and apothecary for gain, is liable in damages for negligence and want of skill. *Gledhill v. Steggall*, N. F. I. 365.

See APOTHECARIES.

#### MERCHANTS' CUSTOMS.

See CONTRACTS BY AGENTS.

#### MERITORIOUS AGREEMENT.

See AGREEMENT.

#### MERITS, ORDER ON.

See PRACTICE, 16, 17.

#### MESNE PROFITS.

See LIMITATIONS, STATUTE OF, 1.

#### MINERAL WATERS.

See SOIL, RIGHTS IN.

#### MINES.

See COAL MINES.—JOINT STOCK COMPANIES, 2. No. 9.—LESSOR AND LESSEE, 4.—TENANT FOR LIFE.—WASTE.

#### MINING ADVENTURE.

A purchaser of shares in a mining adventure (*The Wheal Morgan Mine, Devon*) is liable for his engagements consequent thereupon, notwithstanding that he accepted such shares through fraudulent misrepresentations. Therefore where A accepted a bill of exchange for shares, and refused payment, and to an action against him he pleaded that he had accepted the bill by fraud, covin, and misrepresentations, and without receiving any consideration, a verdict passed against him. *Lane v. Burdys*, N. F. II. 251.

#### MISAPPLICATION.

See EXECUTORS, 10, 11.

#### MISREPRESENTATION.

See CONTRACT, VOID, 2.—MINING ADVENTURE.—JOINT STOCK COMPANIES, 2. No. 9.

#### MISTAKE.

See INSURANCE, 3.—SETTLEMENT, 1.

#### MONEY, SEIZURE OF.

See OUTGATE, 2.

#### MORTGAGE AND MORTGAGEES.

1. *Equitable*.—A deposit of share certificates for a *bond fide* advance of money is valid as an *equitable mortgage* against assignees in case of bankruptcy. *Leading case*. *Esp. Richardson*, C. R. I. 266. All the authorities on this subject will be found in 3 *Western's Conveyancing*, 67, *et seq.*

2. A deposit of a lease by way of *equitable mortgage*, does not render the depository liable for the rent-deed covenants. *Over-ming Flight v. Bentley*, *Meares v. Chant*, V. C. I. 294.

See BANKRUPTCY.

3. *Foreclosure*.—The court will grant an injunction to restrain proceedings on a bill of foreclosure in the Exchequer, where the circumstances warrant such an interference, but unless some early step is taken to

prevent the proceedings there, the party obtaining the injunction will be liable to costs. *Boulter v. Boulter*, M. R. I. 172.

#### MUNICIPAL CORPORATIONS ACT.

1. Where nine overseers are appointed in one parish, it is a several duty attaching on all of them individually, to sign the burgess list thereof, and if anyone of such overseers neglects signing the list of that portion of the parish allotted to him, he will be liable to the penalty imposed by the act, although all the other overseers signed the lists for their respective portions of the parish. *Reg. v. Burrill*, Q. B. I. 409. IV. 265.

The *Corporation Act* differs from the *Reform Act*; it drops the word "wilfully" and gives the penalty for any omission or inaccuracy, per *Lord Denman*. *Id.*

2. The 92d section of the municipal corporation reform act empowers town councils to order a rate, in the nature of a county-rate, and gives them the same powers as those exercised by justices under 56 G. 3. c. 51. In 1839, the town council of S ordered such a rate, and required F, the overseer of the township of C B, to levy a certain sum on a portion of E, which was situate in the borough. Then, F was unable to do, and his goods were seized and detained by virtue of a warrant from W, the then mayor of S, until the amount was paid: held, that the proper mode of levying the rate had not been adopted, although F resided in the borough; and that trespass was the proper form of action. *Fearnley v. Worthington*, C. P. IV. 314.

#### MURDER.

Where a person intending to commit murder, fails to do so by the means he proposed, but yet effects his evil object by another agency, he is guilty of the crime. *Reg. v. Michael*, Gen. Crim. C. IV. 11.

#### NAME, VARIANCE IN.

See DISTINGUISH.

#### NECESSARIES.

See HUSBAND AND WIFE.—INFANT.

#### NEGLIGENCE.

See ATTORNEYS.—BANK OF ENGLAND.—INSURANCE, 3.—MEDICAL PRACTITIONERS.—PASSAGE COAST.—PILOTS.—SHERIFF, 7, 8.—SHIPPING, 1.

#### NET RENTS.

See LEGAL ESTATE.

#### NEWSPAPERS, NOTICE BY ADVERTISEMENT.

See NOTICE.

#### NEW TRIAL.

A new trial will not be granted on a mere affidavit of a defendant unsupported by testimony which he could avail himself of at a new trial. *Arrowsmith v. Johnson*, Ex. I. 75.

See PRACTICE.

#### NEXT OF KIN.

See BEQUEST, 2, 3.—HUSBAND AND WIFE, 9.—SETTLEMENT, 2.

#### NOTICE.

An Act of Parliament authorizing the formation of a railway required "notice of calls to be inserted in some newspaper published and circulated in each of the counties of Middlesex, Essex, Suffolk and Norfolk:" held, that insertion of such notice in London newspapers of which evidence was given that they were circulated in all those counties, was sufficient. *Eastern Counties Railway Comp. v. Walsh*, M. P. II. 312.

NOTICE OF ACTION.

See JUSTICE OF THE PEACE, 2.—POLICE CONSTABLE.—POOR RATE, 2.

NOTICE OF ADMISSION.

See ATTORNEYS, 1.

NOTICE OF CONDITIONS OF POLICY.

See COVENANT.

NUISANCE.

1. The smoke arising from a blacksmith's forge does not constitute such a nuisance as will support an action, where it appears that the party seeking damages came into the locality of his own accord, and that the smoke created an annoyance, but without interfering with the fair exercise of his trade or rendering his house uncomfortable. *Muggleton v. Edwards*, N. P. I. 348.

If the smoke and dirt from the defendant's chimney rendered the occupation of the plaintiff's house in a suitable and substantial degree uncomfortable, or interfered in the like degree with the carrying on of his trade, then the defendant could not justify himself in the action. *Per Tindal, C. J. Id.*

2. A lease had been granted in 1736, by A to B, of lands with a covenant to build one new copper smelting house for smelting, making and refining copper, and to contain 202 furnaces, and another covenant to deliver up the premises at the end of the term in a sufficient state, and condition for smelting, making and refining of copper or other metals. The lessor covenanted to allow the lessees to dig on his land for clay to make bricks for the furnaces, and to supply them with coals for the works. Various copper works were accordingly erected, and the lands came to the Earl of J. who also granted leases of other works of a like nature in the same locality. A competition existed between the lessees of the latter and former works. B had also erected other works of which A was aware, upon some exchanged land, formerly the property of the Earl of J's ancestors. The Earl complained that the smoke and vapour arising from A's furnaces had infected and corrupted his farms and lands which had been prevented from increasing, and brought his action at law for a nuisance. A filed his bill for a declaration, that he might be entitled to use and practise the smelting of copper ores, without any interruption by the Earl of J, and to be quieted in the use and enjoyment of the works, and for an injunction perpetually to restrain the Earl of J from molesting or disturbing him in the enjoyment of the works, either by prosecuting the action at law, or by commencing any other action. The Earl of J demurred for want of equity. The injunction was granted to stay the action at law. *Williams v. Earl of Jersey*, V. C. IV. 246. Affirmed on Appeal, L. C. V. 181.

See CONTRACTS, VOID, 2.—LIGHTS.

NURSERYMAN'S STOCK IN TRADE.

A lease of a nursery ground was granted in 1776 for 60 years: upon its expiration the holder of the lease proceeded to advertise a sale describing the nursery stock, "consisting of large and ornamental trees and shrubs, forest trees, &c." The lessor filed a bill for an injunction restraining the lessee from selling, cutting down or removing any full grown or standard timber, fruit or other trees or any hedges except such trees or shrubs as might or could be removed in the ordinary course of his trade or business of a nurseryman. Injunction granted until answer or order to the contrary. The question in the cause applied to trees of the growth of above 40 years. *Littler v. Thompson*, M. R. I. 245.

OATHS.

See INSOLVENT DEBTORS, 5 b.

OBSTRUCTIONS.

See LIGHTS.

OFFICER.

See PALACE COURT.—SHERIFF.

OFFICER, PUBLIC REGISTERED.

See JOINT STOCK COMPANIES.

OFFICIAL ASSIGNEE.

See BANKRUPTCY, 12.

ORDERS, GENERAL.

1. ORDERS OF THE COURT OF CHANCERY, ISSUED UNDER THE STAT. 1 & 2 VICT. c. 110, 9TH MAY, 1839, II. 78.

New Writs in Chancery.

- (a) Writ of *fieri facias* on a decree or order for payment of money. I. 91.
- (b) Writ of *fieri facias* on a decree or order for payment of money and interest. I. 92.
- (c) Writ of *fieri facias* on a decree or order for payment of money and costs. I. 107.
- (d) Writ of *fieri facias* on a decree or order for payment of money, interest, and costs. I. 107.
- (e) Writ of *fieri facias* on a decree or order for payment of costs. I. 25.
- (f) Writ of *elegit* on a decree or order for payment of costs. I. 126.
- (g) Writ of *elegit* on a decree or order for payment of costs, I. 139.
- (h) Writ of *elegit* on a decree or order for payment of money, or money and interest, I. 155.
- (i) Writ of *venditioni exponas*, 170.

2. ORDERS OF THE COURT OF EXCHEQUER, JUNE 12, 1839.

New Writs in the Exchequer.

- (a) Writ of *fieri facias* on a decree or order for payment of money, II. 206.
- (b) Writ of *fieri facias*, on a decree or order for payment of money and interest, II. 206.
- (c) Writ of *fieri facias*, on a decree or order for payment of money and costs, II. 222.
- (d) Writ of *fieri facias*, on a decree or order for payment of money, interest, and costs.
- (e) Writ of *fieri facias*, on a decree or order for payment of costs, II. 236.
- (f) Writ of *elegit* on a decree or order for payment of money, or money and interest, II. 253.
- (g) Writ of *elegit*, on a decree or order for payment of costs, II. 254.
- (h) Writ of *elegit*, on a decree or order for payment of money and costs, II. 255.
- (i) Writ of *elegit*, on a decree or order for payment of money, interest, and costs, II. 269.
- (l) Writ of *venditioni exponas*.

3. *Attornies*.—Order of the Judges for attornies admitted in any one of the superior courts of Common Law at Westminster to be entitled to practise in any other of such courts, and regulating the fees payable by 1 Vict. c. 56. I. 26.

4. *Bankruptcy*.—Lord Eldon's Order, 12th Aug. 1809, for the signature and attestation of petitions. I. 329.

5. Order for the following forms of writs framed by the Judges under 1 & 2 Vict. 110. s. 20. I. 248.

New Writs of Common Law.

- (a) Writ of *elegit* upon a judgment in the Court of Queen's Bench, in an action of *assumpsit*. I. 248.
- (b) Writ of *elegit* on a rule made in the Court of Queen's Bench for payment of money, I. 249.

(c) Writ of *elegit* on a rule made in the Court of Queen's Bench for payment of money and costs. I. 260.

(d) Writ of *elegit* on a judgment of an inferior court in an action of assumpsit removed into the Court of Queen's Bench, I. 270.

(e) Writ of *elegit* on an order for payment of money made in an inferior court, and removed into the Court of Queen's Bench, I. 283.

(f) Writ of *elegit* on a rule for payment of money and costs, made in an inferior court and removed into the Court of Queen's Bench, I. 283.

(g) Writ of *feri facias* on a judgment in the Court of Queen's Bench, in an action of assumpsit, I. 284.

(h) Writ of *feri facias* on an order of the Court of Queen's Bench for the payment of money, I. 284.

(i) Writ of *feri facias* on an order of the Court of Queen's Bench for the payment of money and costs, I. 285.

(k) Writ of *feri facias* on a judgment of an inferior court in an action of assumpsit, removed into the Court of Queen's Bench, I. 285.

#### ORDERS FOR COSTS.

See ATTORNEYS.

#### ORDERS OF COURSE.

See PRACTICE, 15.

#### ORDERS OF JUDGES.

See JUDGE'S ORDER.—STAYING PROCEEDINGS.

#### OUTGOING TENANT.

See LANDLORD AND TENANT, 7.

#### OUTLAWRY.

1. The insolvent debtors' court can in effect reverse an outlawry by discharging a party outlawed as an insolvent under the act for abolishing imprisonment for debt, without obtaining the consent of the Crown. The Court being of opinion that the words used in the act "any process whatsoever" were large enough to and did include process of outlawry. *Adcock v. Fiske*, C. P. II. 26.

2. A sheriff cannot seize money under a special writ of *capias ultagatum*. *Reg. v. Bick*, Sher. Court, III. 363.

See SHERIFF, 1.

#### OVERSEER.

See MUNICIPAL CORPORATIONS ACT, 1.

#### OVERSEER, COMMITTAL FOR DEFALCATION.

See INSOLVENT DEBTORS, 2 s.

#### PALACE COURT OFFICERS.

Where, through the neglect of an officer appointed by the Marshal of the Palace Court, bail were taken upon an arrest who proved insolvent, the officer was held responsible to the plaintiff. *Pal. Court*, I. 153.

#### PARENT AND CHILD.

An indictment for a misdemeanour may be maintained against the parent of a child for not giving, in the manner provided by 6 & 7 W. IV. c. 86. s. 20, the information required by that statute, of the birth of the child to the registrar of the district. *Reg. v. Price*, Q. B. IV. 58.

See HUSBAND AND WIFE, a.—INFANTS.

#### PARISH.

Assessment for the relief of the poor. Construction of the statute 6 & 7 W. 4. c. 96. as applied to the rating of the West India Dock Company. *The W. I. Dock Company v. Parish of Poplar*, I. 110.

See POOR.—SETTLEMENT OF PAUPERS.

#### PARLIAMENT.

The Legislature will not be presumed to have intended the repeal of an act of Parliament, where express words do not appear to have been used for the purpose. *Reg. v. Lumadaine*, Q. B. II. 11.

#### PARLIAMENT, ACTS OF.

See STATUTES.—LIBEL, 2, 3.

#### PARLIAMENT, WITHDRAWING PETITIONS AGAINST RETURNS TO.

See EVIDENCE, 6.

#### PAROL AGREEMENT.

See PATENT, 1.

#### PAROL EVIDENCE.

See BILL OF EXCHANGE, 3.

#### PAROL EVIDENCE TO VARY, &c.

See LESSOR AND LESSEE, 4.

#### PARTNERS, LIABILITY OF.

Where one of several partners in a banking firm received money of a person, and pretended to place it in the bank for her, and her checks upon them were duly honoured, but her pass-book, which was of the same description as those used as the regular pass-books of the bank, was headed as an account with that individual partner only; it was ruled that all the partners were nevertheless liable on that account. *Taylor v. Lloyd*, N. P. II. 313.

See BANKRUPTCY, f.—JOINT STOCK COMPANIES.—PARTNERSHIP.—SUBPENA, 3.

#### PARTNERSHIP.

1. *Dissolution*.—Articles of copartnership provided for a general account half-yearly, and if it appeared that the gains of the concern in any successive half year were insufficient to pay the expenses, then either party might, after one month's notice, dissolve the partnership. A deficiency of 83*l.* appeared in the Midsummer account of 1839, and a deficiency of 2,650*l.* in the subsequent account. One of the partners gave the other notice on the 4th of January 1840, to determine the partnership: held, that he had a right to do so, and that the partnership ceased to exist on the 4th of February. *Ratcliff v. Dickens*, V. C. III. 293.

2. Where one of several partners filed a bill, praying the production of documents which were in the hands of another partner, but which were deposited with him as the common agent appointed to hold them for the mutual benefit of all. The court refused an order for such production, on the ground that all the partners were not before it. *Murray v. Walter*, L. C. (on Appeal) II. 244. 262.

The act of one partner may bind another, but the answer of one defendant will not be read against another, although they are partners. *Id.*

See BANKRUPTCY, f.—BENEFIT LOAN SOCIETIES.—JOINT STOCK COMPANIES.—PARTNERS.—STAGE COACHES.

#### PASSENGERS.

See SHOPKEEPERS.

#### PATENT.

1. *Equitable Rights to*.—In a bill complaining of an infraction of a patent, and praying for a specific performance of a parol agreement for its purchase, it is unnecessary to set forth a full statement of the specification. *Westhead v. Kern*, M. R. I. 87.

2. After an injunction had been obtained against a party for infringement of a patent; he laid by for ten months, before applying to the Court to have it dissolved. His application after that lapse of time was refused by the Vice-Chancellor, and that decision confirmed on appeal. *Bickford v. Shann*, L. C. I. 341.

3. The court is not bound to grant injunctions merely because a patent has been granted and exclusively enjoyed for some time; but at the hearing the plaintiff must prove his title clearly, and must not rely upon evidence of a *prima facie* title. The court may interpose its injunction without putting the party to establish the validity of his patent by an action at law. *Bacon v. Spottiswoods*, M. R. II. 53.

4. Although it is unusual to bring an injunction case to hearing without a previous motion to the court to grant the injunction, yet a plaintiff will not be precluded from seeking the injunction because he had not applied for it on interlocutory motion. *Id.*

5. *Legal Rights in.*—Where a plaintiff had obtained a verdict at law, establishing the validity of a patent, to set aside which verdict a rule nisi for a new trial had been granted, a motion for an injunction to restrain the defendant from further infringement of the patent, cannot be entertained until judgment shall be given at law. *Collard v. Allison*, L. Ch. IV. 22.

6. In an action by a patentee for an infraction of his patent, it is necessary for the plaintiff to prove the novelty of his invention. *Gillett v. Green*, N. P. IV. 222.

See LACHES, 1.

#### PAUPER.

See SETTLEMENT OF PAUPERS.

#### PEACE, ARTICLES OF.

Where articles of the peace are informal, the judges are empowered to alter them if they are exhibited in their own court, and after the exhibition, they have also the power to amend and alter a commitment. It is unnecessary for a *jurat* to be appended to the affidavit of each witness in cases of this description: a *jurat*, stating that the witnesses were severally sworn in court, is sufficient. *Reg. v. Dunn*, Q. B. IV. 220.

#### PEACE, CLERK OF.

See ATTORNIES, 2.

#### PEACE, OFFICER OF.

See CONSTABLE.

#### PENALTIES, ACTIONS FOR.

See ENTERTAINMENT, PLACE OF.—PLEADING, 4.

#### PENCIL, SIGNING IN.

See WILLS, 26.

#### PENSIONS.

Pensions granted by the *East India Company* to their officers, by resolution only and not under their corporate seal, are inalienable. The effect of such a resolution is, that it amounts to what jurists call an imperfect obligation; it is binding in *foro conscientie*, but not in a court of law. *Gibson v. E. I. Compy.* C. P. I. 189.

General principle of law that a corporation is not bound by a contract not being under their corporate seal, to which there are some exceptions in favour of the convenience of the company, such as the hiring of servants or the purchasing of goods of small amount. *Id.*

#### PENSIONS, WIDOWS'.

See MARRIAGE, 2.

#### PERPETUAL RENEWAL.

See RENEWAL, 1.

#### PERSONAL ACTIONS.

See COSTS.

#### PERSONAL CONFIDENCE.

See EXECUTORS, 13.

#### PERSONAL LIABILITIES.

See JOINT STOCK COMPANIES.—PILOT.—EXECUTORS.—TRUSTEES.—ATTORNIES.

#### PERSONAL SECURITY.

See EXECUTORS, 4.—TRUSTEES, 2.

#### PERSONALTY.

See DEVISE, 4.—SEPARATE USE, 6.

#### PETITION, DISMISSAL.

See BANKRUPTCY.—INSOLVENT DEBTORS, 6.

#### PEW.

A parishioner being entitled to a pew in a parish-church, having let his house, left the parish for a time; on his return he found the pew occupied by another family, and that his tenant had been restrained from using it. The matter was referred to a surrogate for his opinion and decision, and he held that the right of enjoyment of the pew was not forfeited. *Merton v. Churchwardens of St. Leonard's*, II. 378.

See RECTOR.

#### PILOTS.

A pilot is personally liable in damages, if by negligence and an improper exercise of his vocation, a ship, of which he has the charge, runs down another vessel. *Drew v. Knight*, N. P. III. 409.

#### PIRACY.

An injunction was applied for to restrain a bookseller from publishing a work called *The Dictionary of "Materia Medica and Practical Pharmacy,"* alleged to be a piracy from a book written many years before by the plaintiff, called the *"Manual of Pharmacy."* The defendant answered that the latter work had become entirely useless by the publication of a new edition of the *"London Pharmacopoeia,"* and that the first-mentioned work could not prejudice the sale of the copies on hand, which were quite unsaleable, whether his *"Dictionary"* was published or not. The court was thus asked to interfere by injunction on behalf of the unsaleable work to prevent the sale of a new work, the only objection to which was, that parts of it were the same as the one which had become unsaleable: held, that such an injunction would not be advantageous to either party; there ought to be an inquiry at law as to the quantity of matter taken. *Renshaw v. Brande*, V. C. II. 292.

See LACHES.

#### PLEA OF JUSTIFICATION.

See ASSAULT.

#### PLEAS, FRIVOLOUS.

See PLEADING, 3.

#### PLEADING.

1. *On Bills of Exchange.*—In an action by the indorsee of a bill of exchange against the indorser, the latter pleaded that the plaintiff had not before the bill became due paid the value thereof to the person who had indorsed it to him: plea allowed, but the court observed that, whenever the circumstances of the case warranted it, the court had power, in such cases, to order the plea to be taken off the file, and would exercise it. *Horner v. Kappell*, Q. B. I. 393.

2. *Declaration.*—That defendant made his bill of exchange directed to Messrs. —, by whom it was dishonoured on being presented for acceptance, whereupon it was protested for non-acceptance, of which premises the defendant had notice; that the said bill being still unpaid, was afterwards, on becoming due, presented to Messrs. — for payment, but they wholly declined paying it, and of which premises the said defendant then had due notice. In addition to this there was the usual count, upon an account stated, with a general allegation that the defendant, in con-



sideration, &c. promised the plaintiff to pay him the said several monies respectively, on request, with a general breach and special damage. Special demurrer assigning for causes that the declaration was double and uncertain, inasmuch as it alleged two distinct dishonours of the bill, either of which would alone give him a good cause of action. Demurrer Overruled, *Galway v. Rose*, Ex. III. 299.

3. In an action on a bill of exchange defendant pleaded that it had not been protested for non-payment, the court granted a rule to set the plea aside as frivolous. *Squires v. Edwards*, C. P. III. 41.

Where a plea is on the face of it bad, and manifestly pleaded for the mere purpose of delay, a judge at chambers has the power to set it aside. Per *Maule, J. Id.*

4. In actions for penalties.—In an action for penalties under the act, 1 & 2 Will. 4. c. 76. s. 67. for delivering sacks of coals wherein was a deficiency, the declaration alleged that the coals were sold to T, were delivered in Chancery Lane, "and within twenty-five miles of the General Post Office;" that the sacks were weighed and found deficient, by reason of which a penalty of 5*l.* per sack was incurred. Demurrer, that the declaration did not state that the coals were delivered "from" any ship, lighter, barge, craft, or warehouse in London or Westminster, or within twenty-five miles of the General Post Office. Allowed. *Friend v. Batterfield*, Q. B. IV. 142.

See ATTORNEYS, *ss.*—COVENANT.—BILL OF EXCHANGE, 8.—JOINT STOCK COMPANIES, 1.—LEASE AND RELEASE.—WAY, RIGHT OF.

#### PLEDGE.

See DETINUE.—FACTORS.—MORTGAGE.

#### POLICE CONSTABLE.

See REWARDS, 1, 2.

#### POLICY OF ASSURANCE, LIFE.

See COVENANT NOT TO GO OUT OF EUROPE.—COVENANT.—INSURANCE.

#### POOR.

See SETTLEMENT OF PAUPERS.

#### POOR LAW.

There is no power in this act enabling the Poor Law Commissioners to appoint collectors of the poor's rates of any union; they are to be appointed by the rate-payers. *Reg. v. Poor Law Commissioners*, Q. B. II. 55. See also *Id.* p. 56. and vol. III. p. 10.

See BASTARDY.—POOR RATE.

#### POOR RATE.

1. Stock in trade yielding a profit is liable to be assessed to the poor-rate. *Reg. v. Lumsdaine*, Q. B. II. 11. See Statute 3 & 4 Vic. c. 89. by which stock in trade is not to be rated; this act will expire on the 31st December, 1841.

2. It is not necessary, previous to bringing an action against a constable for an illegal distress for poor's rates, to give him notice of action, because he acted in obedience to a justice's warrant. *Lamont v. Southall*, N. P. II. 43.

3. *West India Dock Company*.—Construction of statute 6 & 7 W. 4. c. 96. *Middlesex Sess.* I. 110.

#### POPERY.

See ADVOWSON.—TOWNSHIP.

#### POSSESSION.

See VENDOR AND PURCHASER.—ASSAULT.—STOCK.—BANKRUPTCY.

#### POSSESSION, UNITY OF.

See EASEMENT.

#### POUNDAGE.

See SHERIFF, 12.

#### POWER OF APPOINTMENT.

See APPOINTMENT.—BANKRUPTCY, 31.

#### POWER OF ATTORNEY.

See BANKRUPTCY, 32.

#### PRACTICE.—COMMON LAW.

1. Arrest.—A barrister having been arrested on *meum process* on his return from attendance in the Court of Chancery, obtained a judge's order for his discharge; the sheriffs, however, had also a *ca. sa.* against him at the time, and refused his discharge; he brought an action of trespass against the sheriffs: held, that the sheriffs were bound to detain him on the *ca. sa.*; if they had discharged him they would have been liable to an action for escape. *Watson v. Carroll and another*, Ex. I. 235.

2. Judgment.—Where one of two defendants had suffered judgment by default, it is still competent for the other to move for judgment, as in case of a writ against the plaintiff for not proceeding to trial. *Stewart v. Rogers and another*, Ex. I. 186. 205.

3. New Trial.—A party entering a cause in the new trial motion paper, is bound to give the opposite party notice of that fact, and if such notice is not given, a judgment, signed on the morning of the fifth day of term will be regular. *Dee d. Duncan v. Edwards*, B. C. I. 237.

The point was new, and the question had been in some doubt. *Id.*

4. Proof at Trial.—In trover against assignees to recover the value of property deposited with a bankrupt (an auctioneer) for sale, and which remaining in his custody until the bankruptcy, was sold by the assignees with his other effects: Defendant pleaded, 1st, that the plaintiff was not possessed of the goods in question; and 2nd, not guilty. Under the first plea, it was held, that the defendants might show in evidence, that the party became a bankrupt in due course of law, that the assignees thereupon became possessed of the goods, by reason of the plaintiff having allowed them to remain under the order and disposition of the bankrupt until the fiat issued. *Law v. Belcher*, R. Nisi, I. 187.

See BANKRUPTCY, 10.

5. Service of Process.—Where the copy of a writ & summons served on defendant, stated the action to be "on the case promises." The court set aside the service, and all subsequent proceedings for irregularity. *Jones v. Haines*, Ex. I. 231.

6. Taxation of Costs.—An action was brought in a superior court for a sum above 20*l.*, the defendant pleaded a large set-off and paid 2*l.* into court; the matter was referred, and the plaintiff had awarded 10*l.* beyond the 2*l.* paid into court; the plaintiff became bankrupt, and it became necessary for the attorney to tax his costs in order to prove them under the fiat. The master thought the lower scale ought to be adopted, because the sum recovered was less than 20*l.*; held, that the rule was to tax between party and party; an attorney ought not to be allowed to subject his client to the payment of unnecessary extra costs, by bringing an action in a court where he knows he cannot recover full costs from his adversary; if the master saw the attorney had not been guilty of any neglect, in not inserting in the order of reference, a power to the arbitrator to certify for costs on the

larger scale, he may allow that scale. Referred back to the master for the purpose. *New Case. Waller v. Smith*, Ex. I. 408.

See PRACTICE—EQUITY, 11.

#### PRACTICE—EQUITY.

7. *Affidavit of Service abroad.*—An order had been made, that service of subpoena on a defendant at *Boulogne* should be deemed good service, and that service should be proved by affidavit before any person authorised to administer an oath, and which should be authenticated by the British consul there: the service was made, and the affidavit was made before the "deputy mayor of Boulogne;" the British consul certified that the latter person was "the deputy mayor," but the certificate did not shew that the deputy mayor was authorised to administer an oath. Order of service, and all subsequent proceedings upon it discharged. *Mackellar v. Mackellar*, V. C. I. 391.

7 a. *Bill.*—A plaintiff may dismiss his bill before argument upon payment of costs. *Curtis v. Lloyd*, I. 102.

8. *Answer.*—An original bill must be answered before an answer will be required to a cross bill. *Wheatley v. Whittaker*, M. R. I. 119.

9. *Arrest—Attachment.*—A plaintiff illegally holding a defendant in custody cannot legally detain him while in such custody by another writ at his own suit. *Hawkins v. Hall*, M. R. I. 263.

At *Common Law* the same plaintiff who illegally holds a defendant in custody, cannot legally charge him while in such custody with a declaration at his own suit. *Id. per Lord Langdale*.

10. *Feme Plaintiff.*—Where a wife claims beneficially under a settlement made upon her before marriage, she should file a bill by her next friend, and her husband should be made a defendant, her husband giving security for costs. *England v. Downes*, M. R. I. 327.—See SETTLEMENTS, 3.

11. *Injunction.*—After appearance to an injunction bill and before answer, the court will, in urgent cases of waste, issue an injunction. *Randall v. Commercial Railway Co.* V. C. I. 406.

12. *Injunction* will not be granted *ex parte* where the bill had been filed, but the defendant had not been served with subpoena. *Bulwer v. Thomas*, I. 102.

13. *Issues.*—Where facts alleged by the bill were denied by the answer and the case was involved in obscurity owing to the doubtful credit to which all parties were entitled; the court, as the only fair mode of arriving at truth, and of clearing the characters of the litigants, directed issues to try the facts by a jury. *Milner v. Singleton*, V. C. IV. 381.

14. *Laches.*—*New Rules.*—A plaintiff's bill was filed in October, 1836, and answered by a defendant in the December following. In June 1837, A moved to dismiss the bill, upon which the plaintiff undertook to speed the cause. But nothing farther was done until February, 1839, when the V. C. granted a commission to examine witnesses, which was contended to be irregular: held that one defendant had nothing to do with the other. Order of V. C. discharged. *Hoscar v. Prince*, L. C. II. 7.

15. *Orders of Course.*—An order to amend a bill after an injunction has been granted, is an order "of course." *Wiggins v. Lord*. See query? M. R. I. 379.

The practice is in an uncertain state, and ought to become the subject of a general order. *Id. per Lord Langdale*.

16. *Order for hearing causes.*—3d General Order, 5th May, 1837.—Where a cause in which an order

on the merits had been made by the V. C. was set down by one of several defendants for hearing before the Master of the Rolls, and five days afterwards by another defendant for hearing before the V. C. an order upon the merits had been made in the cause by the V. C.: held, that the entry of the cause at the Rolls was irregular, and that it could only be heard before the V. C. *Sandys v. Long*, M. R. II. 24.

17. *Order on the merits.*—An order for removing a guardian *ad litem*, and appointing another, is an order upon the merits. *Id.*

18. *Parties.*—Where necessary parties to a suit are not before the court it will order the cause to stand over, in order that they may be made parties. After which the plaintiff must bring them before the court, or shew that he had used his best endeavours to do so. *Willatts v. Busby*, M. R. I. 360.

19. The proper parties to a bill for relief in Equity with regard to *tithes* demised by the rector, are the rector and his lessee where the demise is by parol; and the lessee only when the demise is by deed. *Foot v. Besant*, Ex. Eq. I. 361.

20. *Service of Orders.*—See IV. 379.—Where the defendant, a naval officer, was abroad, the court refused to allow the service of an order to be substituted by being made on his clerk in court. *Ward v. Arch*, V. C. II. 24.

See ADMINISTRATION.—AFFIDAVIT.—ALIVE.—ANSWER TO BILL.—ATTORNEYS.—BANKRUPTCY.—BILL, AMENDING.—BILL IN CHANCERY.—CAPIAS.—COGNOVIT.—COPYHOLDS, 1.—COSTS.—CREDITOR'S BILL.—DEBT.—DECLARATION.—DISCOVERY, BILL OF.—DISTINGUISH.—EJECTMENT.—EXCEPTIONS.—EVIDENCE.—FIERI FACIAS.—INFANTS, 3.—INJUNCTION.—INQUIRIES.—JUDGE'S ORDER.—JUDGE'S SUMMONS.—LACHES, 2.—LEASE AND RELEASE.—NEW TRIAL.—OUTLAWRY.—PLEADING.—RULE TO COMPUTE.—SHERIFF.—SUBPENA.—SUMMONS, WRIT OF.—TAXATION OF COSTS.—WRITS.

#### PREScription.

Construction of 2 & 3 W. 4. c. 71. s. 2. for shortening the time of, in certain cases. *Only v. Gardiner and others*, I. 90.

The enjoyment of an easement under that statute, must be continuous and uninterrupted for the full period of twenty years next before the suit adversely to all the world, and such an enjoyment is invalidated by a unity of possession during any portion of the twenty years. *Id.*

There are but three modes in which a right on the part of the public to a way over a river can be established. 1st. by Act of Parliament; 2d. by prescription, to support which a jury must be satisfied that the right has existed from time immemorial. 3d. by proof of a dedication on the part of the owner of the river to the public. No particular time during which the public has been allowed to enjoy the right, is necessary to be shewn to establish a dedication. *Anon. Q. B. Per Lord Denman*, I. 366.

See DEDICATION.—EASEMENT.—RECTOR.—WAY.

#### PRESENTATION.

See ADVOWSON.

A, an insurance broker, was applied to by G to insure the ship, M, for 10,000*l.* which he refused to do until G brought an authority from B, the captain of the ship. B having given the required authority, A then effected the insurance and paid premiums amounting to 800*l.* which on G's becoming insolvent he sought to recover of B, alleging that he was the

person for whom the insurance was effected, and that G was his agent only. At the trial of an action by A against B for the premiums, the jury found that G was the party credited by A, that G had been paid, or allowed for the insurance in an account with B, and that A would have been paid had not G become insolvent. B had a verdict. *Auchterlony v. Owen*, N. P. I. 279.

See AGENT. — CONTRACTS BY AGENTS. — CONTRACTS, VOID, 2. — HUSBAND AND WIFE, 2 c. — STOCKBROKERS.

#### PRINCIPAL AND SURETY.

See EVIDENCE, 1. — SURETY.

#### PRISONERS.

See ESCAPE. — INSOLVENT DEBTORS. — MAGISTRATES. — ATTORNEYS, *ff.* — DEBT, ACT FOR ABOLISHING IMPRISONMENT FOR.

#### PRIVILEGE.

See ATTORNEYS, 4. — BANKERS, 2. — LIBEL, 3. — PRACTICE, 1. — SERGANTS. — SHERIFF.

#### PROBATE.

See LEX LOCI DOMICILII, 1.

#### PROCESS, SERVICE OF.

A defendant denying himself to a process, sworn as being the defendant, and refusing to take the copy of the writ of summons tendered him which was left in the streets at the door of the defendant: held, not to be any service, but the affidavit to set aside the proceedings for irregularity, must state that the defendant had not any other notice of the institution of legal proceedings. *Tickler v. Jones*, Ex. I. 106.

See LUNATICS, 5. — PRACTICE, 5. — RULE TO COMPUTE.

#### PROCHIEIN AMY.

See INFANTS, 3. — TRUSTEES, 5.

#### PRO CONFESSO TAKING ISSUES.

See ISSUE, 3.

#### PROCTOR.

See ATTORNEYS, *i. i.*

#### PRODUCTION OF CESTUIS QUE VIE.

See CESTUIS QUE VIE.

#### PROFERT.

See LEASE AND RELEASE.

#### PROMISSORY NOTES.

1. A promissory note cannot be re-issued after the debt for which it was originally given has been satisfied. *Bartram v. Caddy*, Q. B. I. 104.

2. A agreed to lend B a sum of money upon a promissory note, payable three months after date at the rate of 10½ per cent. interest, with an understanding that the note should be renewed if desired by the drawer every three months for a period not exceeding eighteen months. The notes were occasionally overdue between the times of their expiration and renewal: held, (reversing a decision of the Court of Review, which had held otherwise, II. 12.), that the transaction was protected by the stat. 3 and 4 W. 4. c. 98, allowing unrestricted interest on three months' bills, and was not against the usury laws. *Exp. Terwest, in re Poynder*, L. Ch. III. 21.

3. M gave R a note of hand in the following form:—"Twelve months after date I promise to pay Messrs. R F and Co. the sum of 500*l.*, to be held by them as a collateral security for any monies now owing to them by Mr. J M, which they may be unable to recover in realizing the security now held:" held, that the note in question was not a promissory note, but must be taken as a conditional promise. *Robinson v. May*, Q. B. III. 103.

4. A notice thus—"This is to inform you, that

the bill I took of you for 15*l.* 2*s.* 6*d.* is not taken up and 4*s.* 6*d.* expences, and the money I must pay immediately," is not a good notice of dishonour to the maker of a promissory note. *Messenger v. Southey*, C. P. IV. 44.

See BANKERS, 3. — BANKRUPTCY, 13. — BELLS or EXCHANGE, 7. — EVIDENCE, 1. — RULE TO COMPUTE, 2. — STAMPS, 2.

#### PROOF OF DEBTS.

See BANKRUPTCY.

#### PROOF OF TENDER.

See BILL OF EXCHANGE, 5.

#### PROSECUTION.

See MALICIOUS PROSECUTION.

#### PROTESTANT.

See ADVOWSON. — TOMBSTONE.

#### PUBLIC OFFICER.

See JOINT STOCK COMPANIES.

#### PURCHASE BY ATTORNEY.

See ATTORNEYS, *b. b.*

#### PURCHASE BY EXECUTORS.

See EXECUTORS, 9.

#### PURCHASE-MONEY.

See VENDOR AND PURCHASER.

#### PURCHASER.

See VENDOR AND PURCHASER.

#### QUALIFICATION.

See JUSTICE OF THE PEACE, 1.

#### QUARE IMPEDIT.

See ADVOWSON.

#### QUEEN, THE, LADY OF A MANOR.

See COPYHOLDS.

#### QUI TAM.

See JUSTICE OF THE PEACE, 1.

#### RAILWAY COMPANIES.

See JOINT STOCK COMPANIES. — INQUIRY. — NOTICE. — VENDOR AND PURCHASER.

#### REAL ESTATE.

See DEVISE.

#### REAL ESTATE, LIABILITY TO SIMPLE CONTRACT DEBTS.

See FUNERAL EXPENCES. — LUNATIC, 3. — VENDOR AND PURCHASER.

#### RECEIVER.

See CREDITOR'S BILL. — JOINT STOCK COMPANIES, 9.

#### RECTOR.

Where a new church is built under the authority of an act of Parliament in substitution of an ancient parish church, the common law will entitle the rector to claim the chief seat in the chancel, and whether he be the endowed or the spiritual rector only, unless some other person can prescribe for such seat for himself by reason of immemorial enjoyment. Rights of this nature are adjudicated upon by the Ecclesiastical Court, which in its ordinary authority can protect and enforce such rights. *Spry v. Flood*, Eccles. Court. III. 137.

Whether a rector has a common law right to any pew at all. *Qu. ? Per Dr. Lushington. Id.*  
See ANNUITY, 1. — CHURCHWARDEN, 3, 4.

REGISTER OF JUDGMENTS,  
Under 1 & 2 Vic. c. 110. Form of, *h. 351.*

**REGISTER OF MARRIAGE.***See* MARRIAGE, 7.**REGISTER OF BAPTISM**

Is no evidence of birth. *Woods v. Woods*, IV. 300.  
Cons. C. per *Dr. Lushington*.

**REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.**

An indictment is maintainable against a defendant under the 6 & 7 W. 4. c. 86. for refusing to give the particulars of the birth of a child to the registrar of the district. *Reg. v. Price*, IV. 68.

**RELEASE.***See* LEASE AND RELEASE.—EVIDENCE, 2.**RELIEF, BAR TO.***See* SETTLEMENT, 3.—VENDOR AND PURCHASER, 6.**REMAND.***See* DEBT, ACT FOR ABOLISHING IMPRISONMENT FOR.—INSOLVENT DEBTORS, 19.**REMAINDER.***See* DEVISE, 3.**REMOTENESS OF GIFT.***See* LIMITATION, 2.—BEQUEST, 4.**RENEWALS.**

1. A covenant for perpetual renewal will not be implied in a lease for lives, in which it was declared, that upon the renewing or inserting of any life or lives a certain sum should be paid by the lessee, his heirs or assigns, from the mere circumstance of there having been several renewals to the parties claiming under the original lease: reversing a decree of the L. C. of Ireland. *Smith v. Nangle*, D. P. (on appeal), IV. 105.

2. Unless reasonable doubts are entertained on disputed facts, an issue to be tried by a court of law will not be directed. *Id.*

**RENT.***See* LANDLORD AND TENANT.—LESSOR AND LESSEE.**RENT-CHARGE.***See* CESTUI QUE VIE.**RENUNCIATION.***See* BEQUEST, 2.**REPAIR.***See* CHARTER PARTY.—LESSOR AND LESSEE.**REPLEVIN.**

In an action upon a replevin bond which the defendant had obtained from one of the sheriffs of London separately, which was demurred to on the ground that he had singly no jurisdiction to grant it: held, that the shrievalty of London is different from that of Middlesex, for the same two persons who are the sheriffs of the former constitute the office of sheriff of the latter; the declaration was therefore sufficient, and the plaintiff had judgment. *Thomson v. Farden*, C. P. IV. 109.

**REPLICATION, AMENDING AFTER.***See* BILL AMENDING, 1.—BILL OF EXCHANGE, 8.**REPLY, RIGHT TO.***See* LARCENY.**REQUESTS, COURT OF.**

A person having a legitimate demand on another may reduce the amount thereof sufficiently to enable him to sue for that reduced amount in a court of requests; and the judges of such court may adjudicate thereupon, although aware of such reduction. *Smith v. Guy and Others*, N. P. IV. 286.

**RESIDUARY BEQUEST.***See* BEQUEST, 2.—LIMITATION.**RESIDUARY DEVISEE.***See* DEVISE, 4.**RESTRAINT OF TRADE.***See* TRADE.**REVERSIONARY INTEREST, PURCHASE OF.***See* VENDOR AND PURCHASER, 10.**REVOCATION OF WILL.***See* WILL, 2, 3, 24.**REWARD.**

1. The plaintiff, a police officer, sought to recover a sum of money, which defendant had advertised as a reward to be paid to any person who should give him information, leading to the discovery of felons who had stolen his property. The plaintiff gave that information, but the defendant refused to pay him the reward: the defendant demurred to the declaration on the ground that the promise was contrary to the policy of the law, and therefore one that the court would not enforce.—Demurrer overruled. *England v. Davison*, Q. B. IV. 25.

Unless the Court clearly sees that an engagement is contrary to public policy, it will not prevent its being carried into effect. *Id.*

2. Where a reward is offered for information leading to the detection of felons, that person is entitled to the definition "first information," who was the first to communicate a fact which ultimately turned out to be material for a conviction. But such person will not be entitled to the reward, if the information was received by him from a third person, who in giving the information to the former only, made him a channel of conveying it to the parties offering the reward. *Eve v. Rumbold*, Ex. IV. 28.

**RIGHTS IN THE SOIL.***See* SOIL.**RIGHTS OF WAY.***See* DEDICATION.—WAY.—PRESCRIPTION.**RIVER.***See* WAY.—PRESCRIPTION.**ROADS.***See* JOINT STOCK COMPANIES, tit. 7.**ROMAN CATHOLIC.***See* ADVOWSON.—TOMBSTONE.**RULE TO COMPUTE.**

1. At the expiration of a stated time allowed by a plaintiff to a defendant, wherein to pay the debt and costs, the latter made default. A rule nisi to compute was obtained, on proceeding to the service whereof, it was discovered the defendant had left the country four days before. A copy of the rule was left with a female servant at his late place of abode, and another copy was stuck up at the master's office: held a bad service, unless it was a part of the rule nisi that such service should be deemed good. *Neilson v. Sles*, C. P. III. 86.

2. Service of a rule nisi to compute on one of two defendants, joint makers of a promissory note, will entitle the plaintiff to make his rule absolute as against them both. *Bennett v. Beckett*, Ex. III. 88.

3. There is no necessity to serve them both if they are jointly liable. *Id.* per *Lord Abinger*.

*See* SCIRE FACIAS.**RULES OF LAW,**

By which Cases imputing weakness and incapacity in testators are to be decided. I. 345.

**SALE, CONDITIONS OF.***See* VENDOR AND PURCHASER.

## SCIRE FACIAS.

A *scire facias* will not lie upon an interlocutory judgment. Before issuing a *scire facias* a plaintiff must give a term's notice to proceed, by taking out a rule nisi, and obtaining a rule to compute. *Benn v. Greatwood*, C. P. I. 73.

See JOINT STOCK COMPANIES, 30.—WARRANT OF ATTORNEY, 5.

## SCOTLAND, LAW OF.

See INTROMISSION.—LEX LOCI REI SITÆ, 1.—MARRIAGE, 2.

## SCRIP CERTIFICATES.

See JOINT STOCK COMPANIES.

## SEIZURE, ILLEGAL.

See SHERIFF, 10, 11.

## SEPARATE USE.

A devised to trustees upon trust for his wife for life, remainder, as to part of the devise, to A B and her heirs, and as to other part, to M A T, "so and in such manner that she should not anticipate, charge, sell or dispose of her life estate, and that no husband might have any control over her, nor should she be liable to his debts, and her receipts should be good discharges." The testator died in Oct. 1820: M A T was then unmarried. On the 23d April, 1827, M A T married. On the 25th Oct. 1826, A B made her will and devised to trustees upon trust to receive the rents and pay them to M A T for her life, "so as she should not sell or dispose of her life interest, or raise money thereon by mortgage or otherwise, and so as the rents should not be subject to but be exclusive of the control or interference of any husband, nor be liable to his debts, and her receipt only to be a good discharge." In Oct. 1827, A B died. In Jan. 1830, the wife of the testator died, and his devise took effect in possession. In 1832, M A T and her husband granted an annuity, secured upon the devise made by both wills, and payments were made up to Jan. 1834. In Jan. 1835, the husband of M A T took the benefit of the Insolvent Debtors' Act, and his wife refused to pay the annuity. The annuitant filed a bill, claiming to be entitled to his annuity, by reason that as to the devise by the testator, M A T, at his death, was unmarried, and the limitation to her separate use was not effectual, the restraint against anticipation was void, because the devise was not accompanied with a gift over on an attempt to alienate: held, that in the Court of Equity, a married woman had, for more than a century past, been considered capable of possessing property for her own use, independent of her husband, as a *feme sole*. The property might be created by contract before the marriage, or by gift from the husband or any stranger, and the court will treat the husband as a trustee. Property given to the separate use of a woman, without power of anticipation, may, under the authority of the court, be enjoyed by her as her separate estate during coverture, and that in respect of such estate she may be considered as a *feme sole*. The words "independent of her husband" mean that the marital power of the husband shall not be permitted to contravene the donor's intention. That as to the estate of A, devised in trust for M A T, the annuitant had acquired no right over it by virtue of the security executed to him by M A T, and her husband, but as to the estate of A B, the annuitant was entitled to his annuity. *Tullett v. Armstrong*, M. R. I. 21.

See *Ashton v. M'Dougall*, M. R. I. 295. *Green v. Campbell*, M. R. I. 247. *Nedby v. Nedby*, L. C. I. 66. 184., and *Newlands v. Holmes*, III. 184. 216. 361. These four last-named cases were decided before the law was finally settled, by the L. C. in *Tullett v. Armstrong*.

On Appeal.—The jurisdiction which the court has

assumed in similar cases justifies it in extending it to the protection of the separate estate, with its qualifications and restrictions attached to it throughout the subsequent coverture, and in vesting such jurisdiction upon the broadest foundations. This the interests of society require. Decree of M. R. affirmed, *per Lord Cottenham*, III. 216.

See the Letter of the Editor of "THE LEGAL GUIDE" to LORD COTTENHAM, I. 225; also his Review of the Judgment of the M. R. *Id.* 22; see also II. 309.

THE LAW AS NOW SETTLED extends to this, that where property is given or settled to the separate use of an unmarried woman, with a restraint against alienation, and she is unmarried when the gift takes effect, and during her coverture she does not dispose of it, then, upon her subsequent marriage the restriction will come into operation, and she may enjoy the property, as her separate estate, against her husband; but her power of disposal will cease during the coverture. *Tullett v. Armstrong*, *Scarborough v. Borman*, L. C. III. 216.

2. A bequest to a *feme covert* "or her assigns for life, for her and their own absolute use and benefit," does not constitute a gift to her separate use. *Eyngt v. Christy*, M. R. IV. 344.

See AGREEMENT.—HUSBAND AND WIFE.

3. Personal property, viz., furniture and other household effects, purchased and settled upon a woman, before marriage, to her separate use, is not liable to be seized under a *fi. fa.* issued against her husband. But goods purchased with the wife's money, after the marriage, become the property of the husband, and are liable to be taken in execution by his creditors, in the absence of any evidence to prove an agency for the trustees of the wife. *Corn v. Byers*, Ex. N. P. IV. 60. Ex. V. 124.

## SEPARATION.

See HUSBAND AND WIFE, 10.

## SEQUESTRATION.

See JUSTICE OF THE PEACE, 1.

## SERGEANTS'-AT-LAW—PRIVILEGE.

The sergeants-at-law, by the constitution of the court of *Common Pleas*, and, consequently, by the law, hold and enjoy the sole peculiar and exclusive privilege of practising, pleading, and audience in that court. C. P. III. 283. 396.

They cannot be deprived of this privilege by a warrant from the crown, under the sign manual, or by any other power short of an act of parliament. *Id.*

## SERVANT.

See MASTER AND SERVANT.

## SETTLEMENT ON MARRIAGE.

1. Where a marriage settlement (as admitted by all parties) was framed contrary to the intention of the parties, the court will alter and render it conformable to that intention. *Keymer v. Perring*, L. C. III. 377.

2. By an ultimate limitation in marriage articles *personal estate* was limited to such persons as under the statute of distributions would have become entitled to the personal estate of Mrs. M., "in case she had died intestate and unmarried." Mrs. M. died leaving children, her husband surviving and eight children. She also left a brother and sister, who claimed the fund: held, that the word "unmarried" meant "discovered," that the children were next of kin to their mother within the meaning of this limitation, and that they were the only parties entitled to the fund, overruling a decree of the Vice-Chancellor, who held that the children of Mrs. M. were not, under the limitation in the settlement, her next of kin, as

to be entitled to the funds, but that they belonged to the persons who would have been entitled under the statute of distributions to the personal estate of Mrs. M at the time of her decease, in case she had died intestate, and without having been married. The court has held in many cases, that "unmarried" means "never being married." *Maugham v. Vincent*, L. C. IV. 138.

3. A widow, in contemplation of a second marriage, made a settlement of all her property upon the children of her first marriage, which had been left her by her first husband, which by her directions was prepared and executed without the intended husband's knowledge. After the marriage, the husband took possession of part of the property as owner, and on his becoming acquainted with the settlement, shortly afterwards, stated a case to counsel as to the possibility of effecting a revocation of it; but he took no steps to do so, and the wife continued to deal with the property according to the powers conferred upon her by the settlement: held, that the settlement was not fraudulent and void as against the marital rights of the husband, because there was no evidence of a treaty of marriage when the settlement was executed, or that it was concealed from the intended husband, and that after he had discovered it, which was soon after his marriage, he had filed no bill, nor taken any steps to impeach the settlement; therefore the children of the first marriage were entitled to call for the execution of the trusts of that settlement, and that the husband's title to equitable relief was barred by acquiescence. *England v. Down*, M. R. IV. 152.

4. *Executory*.—Where a settlor directs trustees at a future time to convey lands so far as the law would permit in strict settlement, and the court sees a plain intention that no more was directed to be done, it will give effect to such intention. *Banks v. Ld. Despen- cer*, V. C. IV. 398.

See HUSBAND AND WIFE.—LEX LOCI REI SITÆ, 2.

#### SETTLEMENT, VOLUNTARY.

1. Where parties set up and rely upon a voluntary settlement obtained from parties far advanced in age, proof by them is necessary, (if the validity of such deed is impugned,) that it was properly executed, and not obtained by fraud. Relief can only be obtained in equity by shewing some equitable fraud, which cannot be made known by a court of law. *Bittell v. Turnley*, M. R. I. 326.

2. A, by deed, dated 14th February, 1818, in consideration of 100*l.* paid to him by B, covenanted to maintain, clothe, educate, apprentice, and bring up B's son (the plaintiff) in a suitable and proper manner, as if he were his own son, and that the heirs and executors of A should convey and assign his real and personal estate, of which he should die possessed after the death of his wife to B's son absolutely, if A should have no child of his own, but if he should have such child or children, then to such child or children and B's son equally. The plaintiff was brought up in ignorance of this provision, and was brought up, maintained, educated, and clothed by his father. A died, in 1827, without issue, and made a will without noticing the deed providing for B's son. The executors inserted advertisements in the London papers for claims, but none came in, and they distributed A's estate: held, that the presumption was that the deed had been abandoned, as the covenant had not been performed, nor was it clear that the consideration of 100*l.* had been *bond fide* paid. If the claim were valid, the executors of A were personally liable. *Hill v. Gomme*, M. R. II. 328. affirmed, by the L. C. on appeal, III. 230.

#### SETTLEMENT OF PAUPERS.

As to which of two parishes a pauper belongs, where the boundary line between them runs across the room in which the pauper had slept. *Quære? St. Clement's Danes v. St. Giles in the Fields*, IV. 285.

#### SHAREHOLDERS.

See PRACTICE, 10.—PERSONAL RESPONSIBILITY. JOINT STOCK COMPANIES.

#### SHERIFF.

1. *Attachment against*.—Where a defendant was outlawed in a bailable action before the statute 1 & 2 Vict. c. 110. an attachment was granted against the sheriff upon his refusal to accept the defendant's bail when in custody under a *capias utlagatum*. *Gibbs v. Grigg*, Q. B. III. 26.

2. *Duties of*.—A sheriff's officer is not justified in arresting a party without producing his warrant at the time of the arrest, and if he insists upon doing so he is liable to an action for damages. *Evans v. Sloman*, Sher. C. III. 122.

An action was brought against the printers of the House of Commons, for an alleged publication of certain papers by order or under the authority of that House. The defendants suffered judgment by default, and a writ of enquiry was issued commanding the sheriffs of Middlesex to execute it on a certain day. The sheriff received notice of certain resolutions of the House of Commons "that to bring or assist in bringing an action against their printer for such publication, would be a breach of the privileges of the House," and that in the event of the sheriff promoting or carrying on such proceedings, they would become amenable to the authority of the House of Commons. A motion was made by the sheriff for a rule on the plaintiff to shew cause why the execution of the writ of enquiry should not be stayed until the further order of the court: held, that there were not sufficient grounds for the court to interfere. *Stockdale v. Hanard*, Q. B. III. 41.

3. *Liabilities*.—In a penal action under the 32 G. 2. c. 28. ss. 1. 12. against the sheriff by reason that, as the officer was proceeding with the plaintiff to prison within twenty-four hours after the arrest, the plaintiff in order to avoid going to the prison, submits to be taken to a public house in order that he might arrange with his creditor. The jury found that the plaintiff was taken to the public house without his free and voluntary consent: held, that a consent so obtained, (that is, that the plaintiff finding himself about to be forcibly carried to gaol submits to be taken to a public house to arrange with his creditor) was not free and voluntary within the statute. It is not necessary to shew the warrant, to prove the arrest by the defendant. *Barsham v. Bullock*, N. P. I. 328.

4. A writ of *ca. sa.* was obtained on the 14th June to arrest a debtor, upon receiving which the sheriff issued a warrant to one of his bailiffs, who on one occasion got sight of the debtor, but he being on horse-back managed to ride off—upon which the bailiff relinquished the pursuit. The debtor subsequently frequented markets and other places of notoriety, and if ordinary diligence had been used, might have been captured, but the officer neglected to take any steps towards doing so. This the jury considered to be sufficient negligence to charge the sheriff with the debt. *Pugh v. Kerr*, N. P. II. 123. See also *Id.* 295.

5. A writ of *ca. sa.* was placed in the hands of a sheriff's officer, and after a considerable time, on the sheriffs being ruled to return the writ, he returned that the defendant was not to be found in his bailiwick. It was, however, proved that he was seen therein frequently in the course of several months. In an action

against the sheriff for negligence, the jury found for the plaintiff. *Stewart v. Carroll*, N. P. III. 381.

6. A sheriff is liable to be sued for damages for false imprisonment, where his officer, after arresting a person under a mistake, refused to release him on being apprised thereof. *Carter v. Evans*, Coroner's Court, IV. 190.

7. If a sheriff's officer, after making a seizure of effects, which he believed belonged to the party against whom he had a writ of execution, refuses to listen to explanations, that they are the property of other persons, or neglects to avail himself of proffered information on the subject, he will be held liable in damages for the injury sustained. *Robinson v. Evans*, Coroner's Court, III. 191.

8. Although, in an action against a sheriff for an illegal seizure of plaintiff's effects, no special damage be proved, yet the fact of a bailiff being in possession, and that circumstance becoming known in the neighbourhood, constitutes a sufficient injury to support the action. *Id.*

9. *Poundage*.—A sheriff has no right to poundage where the defendant tenders the amount of debt and costs to the officer on the presentation of the warrant. *Colls v. Cooke*, Q. B. IV. 171.

See BAILMENTS, 1.—PRACTICE, 1.—PALACE COURT.—REFLEVIN.

#### SHIPS.

See INSURANCE, 3.

#### SHIPS' STORES.

Ships "provisions" do not fall within the *nomen generale* "ships' stores," but must be paid for beyond the price agreed to be given for the "ship and stores," when the latter is sold under that description only. *Arrowsmith v. Johnson*, Ex. I. 75.

#### SHIPPING.

1. In an action brought by the owner of a vessel against the owner of a *steam tug*, in which the former complained that through the carelessness and negligence of the defendant's servants, they had so managed and conducted the *steam-tug*, that it dragged the plaintiff's vessel against another ship, and the owners had been obliged to make compensation to the master of the latter ship: the judge (*Tindal, C. J.*) thought it resolved itself very much into the question, whether those on board the vessel belonging to the plaintiffs had a *bond fide* belief that those in the *steam-tug* would obey the order of the pilot? The plaintiffs had a verdict. *Cummings v. Griffiths*, N. P. IV. 172.

2. The broker, through whose instrumentality the owners of a ship obtain a freight, is entitled to be paid his brokerage, although the charter-party was executed at the house of another broker. *Burnett v. Burch*, N. P. IV. 173.

3. If a ship is described to a vendee as being "sea-worthy," she ought to be so for "all purposes" generally, whatever her cargo might be; and in an action on a policy of assurance, it is a question for the jury to say, whether the evidence has proved that at the time the ship sailed she was in a fitting state to go to sea with the cargo she then contained, and on the particular voyage. *Castle v. Irving*, N. P. IV. 234.

See BANKRUPTCY, d (1).—CHARTER PARTY.—CONTRACTS, VOID, 1.—INSURANCE, 3.—PILOTS.—PLEADING, 4.—PRINCIPAL AND AGENT.—WARRANTY.

#### SHOPKEEPERS.

1. Shopkeepers are liable to damages for an injury sustained by a passenger along a public street, occasioned by the shutter apertures in the foot-pavement being left open in a negligent manner. See *Peacock v. Trimmell*, N. P. IV. 168.

2. A put a vicious poney, which had run away

once before on the same day, into a cart, with which he ran away again, and coming in contact with some goods exposed for sale in the town of P, the cart was overturned and A sustained some injury, for which he sued the shopkeeper. By the judge's direction, a verdict was returned for the defendant, which, on motion for a new trial, the court refused to disturb. *Marriott v. Stourley*, C. P. IV. 345.

Two things must concur to support such an action, viz. an obstruction by default of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

#### SHOW-BOARD.

See TRADESMEN.

#### SOIL, RIGHTS IN THE.

An injunction is maintainable to restrain a party from sinking or boring a well upon his own premises, through the lower soil of which a mineral spring ran, which was enjoyed by another person upon different premises; but the party so restrained will be permitted to proceed in the boring in such a manner as not thereby to divert or obstruct the mineral-waters from flowing into their original direction. *The Corporation of Bath v. Pinch*, V. C. I. 342.

#### SOLICITOR.

See ATTORNEYS.

#### SPECIAL DAMAGE.

See SHERIFF, 11.

#### SPECIAL JURER.

See JURORS AND JURIES, 2.

#### SPECIFIC LEGACY.

See LEGACY, 2.

#### SPECIFIC PERFORMANCE.

See CONTRACTS, ILLEGAL.—LESSOR AND LESSEE, 2, 3, 4, 5.—PATENT, 1.—VENDOR AND PURCHASER.

#### STAMP.

1. Discontinued. See BILLS OF EXCHANGE, 1.
2. The payee of a promissory note cannot recover on it when given on a stamp die called in by the commissioners. *Hale v. Lyne*, N. P. I. 295.
3. An I O U, without an address, does not require a stamp. *Curtis v. Richards*, C. P. IV. 414.

See EVIDENCE, 3, 4, 7, 8.

#### STATUTES, CASES UPON.

- 14 Eliz. c. 30. (Justices of the peace). See JUSTICE OF THE PEACE, 1.
- 43 Eliz. c. 6. (Costs). See COSTS, 8.
- 7 Jac. 1. c. 5. (Double costs). See COSTS, 4.
- 29 Car. 2. (Frauds). See FRAUDS, STATUTE OF.
- 4 Geo. 2. c. 28. (Forfeiture). See LESSOR AND LESSEE, 7.
- 7 Geo. 2. c. 8. (Stock-jobbing Act). See STOCK.
- 22 Geo. 2. c. 45. (Clerk of the peace). See ATTORNEYS, 2.
- 25 Geo. 2. c. 36. (Music, &c.). See ENTERTAINMENT.
- 32 Geo. 2. (Sheriff). See SHERIFF, 5.
- 14 Geo. 3. c. 78. (Building Act). See LESSOR AND LESSEE, 1.
- 37 Geo. 3. c. 90. (Attornies' certificates). See ATTORNEYS, p.
- 55 Geo. 3. c. 194. (Apothecaries.) See APOTHECARIES.
- 3 Geo. 4. c. 60. (Taxes). See LAND TAX.

#### ERRATA.

- Page 26. Joint Stock Companies Prefaced Table,—correct 7 and 8, thus :—
7. Injuries to Roads and Walls.
  8. Liabilities to Shareholders to calls upon their Scrip Shares.
  9. Personal Liabilities of Shareholders.
  10. Identity of Partnership.

- 4 Geo. 4. c. 91. (Marriages). See MARRIAGE, 5.  
 6 Geo. 4. c. 16. s. 72. (Bankrupts). See BANKRUPTCY, 10, x.—PRACTICE, 4.  
 — c. 92. (Factors). See FACTORS.  
 7 Geo. 4. c. 46. (Joint stock banks). See BANKRUPTCY, 21.—JOINT STOCK COMPANIES, 23, 25.  
 9 Geo. 4. c. 14. (Limitations). See ANNUITY, 2.—ATTORNEYS, &c.—CREDITORS, 2.  
 10 Geo. 4. c. 43. (Police). See POLICE CONSTABLES.  
 11 Geo. 4. & 1 W. 4. c. 36. (Practice). See EXECUTORS, 1.  
 — c. 60. (Trustees). See TRUSTEES, 1.  
 — c. 68. (Carriers). See CARRIERS.  
 — c. 70. (Writs of Error). See JURISDICTION.  
 1 & 2 W. 4. c. 76. (Coal Act). See PLEADING, 4.  
 2 & 3 W. 4. c. 71. (Prescription). See EASEMENT.—WAY.  
 3 & 4 W. 4. c. 74. (Fines, &c.). See HUSBAND AND WIFE, 4, a.  
 3 & 4 W. 4. c. 104. (Debts). See FUNERAL EXPENSES.—LUNATICS.  
 5 & 6 W. 4. c. 50. (Highways). See JUSTICE OF THE PEACE, 2.  
 — c. 76. (Corporations). See MUNICIPAL REFORM ACT.  
 1 Vic. c. 26. (Wills). See WILLS.  
 1 & 2 Vic. c. 110. (Abolition of arrest). See BANKRUPTCY, 6, 8, 20, 34.—COGNOVIT, 2.—DEBT ACT, &c.—INSOLVENT DEBTORS.—OUTLAWRY, 1.—SHERIFF, 1.—WARRANT OF ATTORNEY, 3.  
 2 & 3 Vic. c. 54. (Infants). HUSBAND AND WIFE, 5, a.—INFANTS, 1.

STAYING CERTIFICATE.

See BANKRUPTCY, 27, 28.

STAYING EXECUTION.

See SHERIFF, 4.

STAYING PROCEEDINGS.

The judges have no compulsory jurisdiction on summons and order to order proceedings to be stayed on payment of debt and costs within a given time, or in default that final judgment shall be signed, except either where the party is already under terms to plead, or with the consent of the opposite side. *Reynolds v. Sherwood*, Ex. III. 412.

See INSOLVENT DEBTORS, 13.—JOINT AND SEVERAL ACTIONS.—JUDGES' ORDER, 2.—JUDGES' SUMMONS.

STEAM BOAT COMPANIES.

See JOINT STOCK COMPANIES, 16.

STEAM TUG.

See SHIPPING, 1.

STEWARD.

See MANDAMUS, 2.

STOCK.

*Indebitatus assumpsit* to recover 4,531l., as the value of 5,000l. stock, which the plaintiff had sold and caused to be transferred to the defendant, (the purchaser and not the broker), and for which the plaintiff had not received value from the broker. The defendant pleaded that the stock had been transferred by virtue of a contract for sale to the defendant since the passing of the Stock Jobbing Act, 7 Geo. 2. c. 8. s. 8, in consideration of 4,531l. to be paid to the plaintiff, and that at the time of making such contract the plaintiff was not actually possessed of or entitled unto in his own right, or in his own name, or in the name of a trustee, to the use of the stock so con-

tracted to be sold, or any share in the same stock, by means whereof the contract became null and void. The plaintiff put in a general demurrer: held, that the plea was no answer to the action, and that the contract was not within the 7 Geo. 2. c. 8. s. 8, and the plaintiff had judgment. *Mortimer v. M'Allen*, Ex. III. 248, 311. IV. 280.

Though the rules of the Stock Exchange may bind its members *inter se*, yet they do not affect the community at large, and its members must be governed by the general law of the realm. *Id.* III. 311.

It is a question for the jury to say, whether the stock was sold on the credit of the broker, or that of the purchaser by whom he was employed, notwithstanding the brokers usually hold each other liable. *Id.*

STOCK, CHARGE ON.

See DEBT ACT, &c. 4, b.

STOPPAGE OF LIGHTS.

See LIGHTS.

STORES.

See SHIP STORES.

STRICT SETTLEMENT.

See SETTLEMENT, 4.

STRIKING OFF THE ROLLS.

See ATTORNEYS, m.

STUBBING.

See LANDLORD AND TENANT, 7.

SUBPENA.

1. *Disobeying*.—Where a witness who had been subpoenaed on the trial of a cause which was withdrawn about a quarter of an hour previous to his appearance on account of his absence, the Court granted a rule nisi to show cause why he should not pay the costs of the day, or why in case of his refusal to do so an attachment should not issue against him. *Ginger v. Peach*, C. P. III. 104.

2. In an action against a party for disobeying a *subpoena duces tecum*: held, that an action is maintainable against an absent witness, though he might not have been called upon for his *subpoena*, if it were proved that he had absented himself in such a way that even if he were called to appear in court he could not possibly do so. It is sufficient evidence to support the action that the plaintiff was obliged to withdraw the record in consequence of the absence of the witness. *Lamont v. Crook*, Ex. IV. 109.

3. One partner is not liable for damages for not attending as witness on a trial when the *subpoena* was served upon another partner, who explained to the person serving it that he was not the person proper to be served. *Samuel v. Davis*, N. P. I. 104. Q. B. N. P.

4. If witnesses neglect to appear when a trial is called on, it is the duty of the counsel to withdraw the record, and if that is done entirely through a witness's neglect, he will be liable for the expences. It is not necessary first to swear the jury. Per Lord DENMAN. See *Newton v. Harland*, C. P. Vol. V. page 13.

See WITNESS.

5. *To hear Judgment*.—The new rule (3rd Order, 21st December, 1833) respecting the service of subpoenas to hear judgment applies to both plaintiffs and defendants, and the affidavits required to be produced by a defendant verifying the service of subpoenas to hear judgment must be such as is required to be produced by a plaintiff. *Rigg v. Wall*, L. C. I. 86.

SUGAR BAKERS' WORKMEN.

See MASTER AND SERVANT, 3.



## SUGGESTIONS, ENTERING ON THE ROLL.

See JOINT STOCK COMPANIES, 29, 30.

## SUIT, CONDUCT OF.

The Court will give one of several plaintiffs the conduct of a suit where the co-plaintiffs conspire to delay it. *Miller v. Smith*, V. C. I. 118.

## SUMMONS AND ORDER.

See STAYING PROCEEDINGS.

## SUMMONS, WRIT OF.

1. *Informal*.—A writ of summons merely required the defendant to cause an appearance to be entered for him in the "Court of Exchequer." The defendant moved for a rule to set aside the service, on the ground of irregularity, because the writ did not say whether the defendant was to appear in the Court of Exchequer or in the "Exchequer of Pleas," whereby the defendant did not know where to make his appearance. Rule refused. *Salmond v. Rollin*, Ex. III. 186.

2. An omission of the letter "d" in the word "and," as given in the statute form, is immaterial. *Id.*

It depends upon the form given by the act of parliament, and that is "in our Court of ——" without stating any court; no precise form is therefore given by which to designate this court in particular, *per Parker, B. Id.*

3. Service upon a party at the house of the defendant, with a request that the copy of the writ might be delivered to him, is bad service. *Tickler v. Innes*, Ex. I. 106.

## SUMMONS, IRREGULAR SERVICE OF.

See ATTORNIES, 1.—DISTINGUISH.—PRACTICE, 5.—WRITS AND COPIES.

## SUPERSEDEAS.

See BANKRUPTCY, g, 26.

## SUPERSEDEAS OF EXECUTION.

See ERROR.

## SURETY.

A, induced by the belief that 2600*l.* was to be advanced to C and D, by S, consented to join with them in a promissory note to secure the repayment thereof to him: a portion only of that amount was really advanced, the remainder being retained by S for a private debt due by C. On the amount being unpaid, an action was brought against A, as the maker of the note for 2600*l.* to which he pleaded that the note had been signed by him as a surety for the repayment of a loan of 2600*l.* to be lent to C and D, but that part only of the money had been actually advanced, and that there had been such a concealment from A of the actual state of the transactions between C, and D, and S, as vitiated, and rendered void the instrument in question so far as A was concerned: held, that A was entitled to judgment upon this plea. *Stone v. Compton*, C. P. I. 72.

See BANKRUPTCY, 29\*.

## TAIL ESTATE.

See DEVISE, 1, 3.

## TAILORS.

See WOOLLEN MERCHANTS.

## TAXATION OF COSTS.

All applications for a review of taxation in causes heard in error must be made to the Court of Error, and not to the court whence the causes are taken. *Doe d. Harvey v. Francis*, Ex. I. 186.

See COSTS, 1.—ATTORNIES, 5.—PRACTICE, 6.

## TAXES.

See LAND TAX.

## TEETH, DEALER IN.

See BANKRUPTCY, b, 5.

## TENANT.

See LANDLORD AND TENANT.

## TENANT AT WILL.

See VENDOR AND PURCHASER, 7, 8.

## TENANT FOR LIFE IMPEACHABLE FOR WASTE.

Although he has a right to use such mines or pits as had been opened and used, yet he may not scope old abandoned pits, or work pits or mines which his testator had merely prepared to work. He has no right to take away the substance of the land. *Fine v. Vaughan*, R. C. IV. 23.

## TENANT IN COMMON.

See ADVOWSON.

## TENANT, JOINT.

Devise to trustees for M F for life, and after her decease to pay the interest and dividends unto and between E G and G G, during their respective and natural lives in equal shares: held, that the words "respectively in equal shares," when unconnected by other words in a will, should be taken to indicate the nature of the estate or interest bequeathed, and should constitute a tenancy in common, but when those words were combined with or followed by others, which would make a tenancy in common inconsistent with the manifest design, or the subsequent bequests of the testator, they might be taken to indicate not the nature but the proportion of the interest which each party was to take. In the present case E G and G G were held to be joint tenants for life of the interest and dividends. *Pearce v. Edmunds*, I. 139. Ex. Eq.

## TENDER.

See BILL OF EXCHANGE, 5.

## TIMBER.

See NURSERYMAN'S STOCK IN TRADE.

## TITLE.

See VENDOR AND PURCHASER.

## TITLE, PLEADING.

See LEASE AND RELEASE.

## TITHES. SUITS RE.

See PRACTICE, 19.

## TOMBSTONES, CATHOLIC INSCRIPTIONS UPON.

An inscription on a tombstone erected by the widow of a Roman Catholic in a Protestant churchyard—"Pray for the soul of Joseph Woolfrey," and "it is a holy and wholesome thought to pray for the dead," 2 Macab. xii. 46, is not *prima facie* to be taken in a Roman Catholic sense, and will not subject the widow to Ecclesiastical censure as far as regards the illegality of the inscription on the tombstone. *Brekes v. Woolfrey*, Archb. C. I. 109. 125. 140.

The erection of such a tombstone, without the consent of the incumbent, is an Ecclesiastical offence. *Id.*

## TOWN-CLERK.

See ATTORNIES, 2.

## TOWN COUNCIL.

See MUNICIPAL CORPORATION ACT.

## TRADE, CUSTOMS OF.

See AUCTIONEERS.—CONTRACTS BY AGENTS.

TRADE, CUSTOMS OF.

See MASTER AND SERVANT, 3.—WOOLLEN MERCHANTS.

TRADE, RESTRAINT OF.

1. A bond in restraint of trade without a sufficient consideration appearing on the face of it is void. *Hutton v. Parker*, Q. B. II. 137.

2. A bond by A "not to carry on himself or be employed in the business of a coal merchant during the space of nine months after he should leave B's service" is void at law. *Ward v. Byrne*, Ex. III. 55. See 3 WESTERN'S CONVEYANCING, 103.

TRADER.

See BANKRUPTCY, c.

TRADESMEN'S SHEW BOARDS.

If one tradesman places on his shew board, the name of another in conspicuous characters so as to deceive the public, and defraud that other tradesman who had the sole right to the name, an injunction will lie to restrain the exhibition of such shew board. *Newman v. Joseph*, V. C. I. 357.

TRANSFER.

An act authorizing the formation of a Joint Stock Company required all transfers of shares to be made by deed, under the hands and seals of both parties by "deed and conveyance," the plaintiff and defendant entered into a contract by letter for the sale and purchase of shares. At the time of the contract, the plaintiff was not proprietor of any shares, but he afterwards purchased shares through a broker in the form required by the company's act, which were in the name of R. W. P., and in the transfer from R. W. P. a blank was left for the name of the purchaser (the plaintiff); before the transfer was so made by R. W. P. in blank, he had not paid the calls upon the shares—no opinion was given by the court as to the latter objection, but as to the transfer made in blank: held, that such a transfer executed with a blank left for the name of the transferee which was to be inserted after it was executed was void at the common law. *Hebblewhite v. Mc Morine*, Ex. II. 122. N. P. Ex. IV. Ex. 360.

It is an attempt to make a deed negotiable like a bill of exchange which the law does not allow. *Id.*

TRANSFER, FRAUDULENT.

See BANK OF ENGLAND.—STOCK.

TRANSPORTATION.

See HABEUS CORPUS.

TRAVELLER, COMMERCIAL.

See FRAUDS.—STATUTE OF, 2.

TREES.

See NURSERYMAN'S STOCK IN TRADE.

TRESPASS.—JUSTIFICATION.

In an action of trespass by a lord of a manor against A, a victualler for having with other persons entered upon the common or waste of the manor and erected stalls and booths, and doing other acts of trespass without leave; the defendant pleaded a justification founded on custom, and alleged that it had always been usual to hold a fair on the common in question; that every victualler who resorted to the fair was privileged by ancient usage to enter upon the common the day before the fair for the purpose of erecting booths, &c. And on such authority possessed the right of remaining there until the fair was ended, paying therefore a rent or acknowledgment of 2d. if demanded: held, that the plea was an answer to the action. *Tyson v. Smith*, Ex. Ch. I. 174.

A custom is a usage which has obtained the force

of law, and it must therefore be certain in its character, reasonable in its nature, and must have existed from time beyond memory without any interruption. *Id. per Tindal*, C. J.

See all the conflicting cases and divisions upon the construction of all the Trustee Acts, 3, WESTERN'S CONVEYANCING, 167, 168, 208, 212.

See LANDLORD AND TENANT, 5, 6.—LESSOR AND LESSEE, 8.—WAY.—MUNICIPAL CORPORATION ACT, 2.—LEASE AND RELEASE.

TRIAL, SETTING DOWN FOR.

See COSTS, 3.

TRIAL, STAYING OF.

See NUISANCE, 2.

TROVER.

The assignees of a bankrupt by an action of trover can recover goods transferred or delivered by the bankrupt after the act of bankruptcy was committed. *Hall v. Rouse*, Ass. I. 141.

See BANKRUPTCY, 10.—COPYHOLDS, 2.—PLEADING, 5.—PRACTICE, 4.

TRUST, BREACH OF BY EXECUTORS.

See EXECUTORS.

TRUST FOR THE BENEFIT OF CREDITORS.

See CREDITORS, 2.

TRUSTEES.

1. *Sir E. Sugden's Trustee Act*, (11 G. 4. & 1 W. 4. c. 60. s. 8.) On a petition to appoint a person to convey a trust estate in the room of a trustee in whom it was legally vested, but who always repudiated the title, and refused to execute a conveyance, the order was made as prayed. *V. C. Expts. The Earl of Craven*, II. 183.

See all the conflicting cases and decisions upon the construction of all the trustee Acts, 3 WESTERN'S CONVEYANCING, 167, 168, 208, 212.

2. *Liability of*.—If trustees lend money upon personal security, the court will hold it as no security at all, and consider the money as actually remaining in the trustees' hands, and deal with them as if they had the money actually in their own pockets. *Dalton v. Hothouse*, V. C. I. 390.

3. *Non-liability of*.—The court will relieve trustees from liability, where the trust funds have been misapplied or placed on an insufficient security by the agency of the *cestui que trust*. *White v. Smith*, M. R. II. 71.

4. *Protection in case of difficulty*.—The trustees of a marriage settlement lent part of the trust fund to the husband, with the concurrence of the wife on a security, not warranted by the settlement: held, that the executors of the surviving trustee had a right to maintain a bill against the husband, and the other *cestui que trusts* for the restitution of the fund. Where persons undertake to be trustees, they are not entitled to act with caprice, but if they find the trust property involved in complicated questions, which they did not contemplate when they undertook the trusteeship, they have a right to come to the court for relief, and it will judge of the circumstances. *Greenwood v. Wakeford*, M. R. II. 372.

5. *Suits against*.—Where the next friend of a *cestui que trust*, who though of age was too incompetent to be trusted with her own affairs, filed a bill against her trustees for an account, to which they did not object, but were desirous of discharging themselves by a final decree upon the bill. The court observed that the appointment of a next friend would

## TURNPIKE ROADS—PURCHASER.

be a security for the trustees, and ordered the usual decree for an account. *Wilkinson v. Harwood*, L. C. III. 85.

A bequest to trustees and executors, "and the survivor and survivors of them, and the executors and administrators of such survivor," is not a personal confidence. *Id. Per Ld. Langdale.*

6. The court will not punish a trustee for defending himself, and a plaintiff who unadvisedly sues a trustee without effect will not be allowed to restrain such trustee from levying costs. *Murley v. Greenham*, L. C. I. 390.

See ANNUITY, 1. — EXECUTORS. — HUSBAND AND WIFE, 10. — LEGAL ESTATE. — MANDAMUS, 1.

## TURNPIKE ROADS.

See JOINT STOCK COMPANIES, 7.

## UNDERTAKERS,

Will not be allowed unreasonable charges. *Barter v. Jones*, IV. 27.

## UNITY OF PROFESSION.

See EASEMENT.

## UNMARRIED.

See CONSTRUCTION OF THE WORD. — SETTLEMENT, 2.

## USE AND OCCUPATION.

See LEGAL ESTATE.

## USES, STATUTE OF.

See LEASE AND RELEASE.

## USURY LAWS.

See BENEFIT LOAN SOCIETIES. — PROMISSORY NOTE, 2.

## VALUE RECEIVED.

See BILL OF EXCHANGE, 7.

## VARIANCE.

See DISTINGUISH, 1. — SETTLEMENT, 1.

## VENDOR AND PURCHASER.

1. *Abstract.*—An estate was sold subject to certain conditions of sale, one of which was that the vendor would deliver "an abstract" within twenty days, and that any objections thereto, which should not be made in writing within ten days after such delivery, should be considered as waived. Another condition was "that in case the purchaser should raise and insist upon objections not provided for by the conditions, and which the vendor should not be able or willing to remove, the vendor might rescind the contract on his repaying the deposit without interest or costs. An imperfect abstract was delivered on the 27th February, 1839, the purchaser delivered objections on the 9th March, which not being cleared up, he commenced an action to recover his deposit-money, interest and costs, an injunction to stay the proceedings was refused. *Tanner v. Smith*, L. C. on appeal, IV. 358.

2. *Limited interest of Vendor.*—*Abatement of Purchase-money.*—Where a vendor had only a limited interest in an estate, which he had contracted to sell, and was thereby incapable of performing the whole of the contract; the purchaser, if he chooses to accept less than the amount of his contract, is entitled to a conveyance of such part of the estate contracted to be sold as the vendor can make a good title to, and also to an abatement out of the purchase-money to compensate for the difference in value between the estate contracted for and that conveyed. *Graham v. Oliver*, M. R. IV. 168.

3. *Deposit money.*—*Re-sale.*—*Interpleader.*—*Fem-*

ployed H, an auctioneer, to sell some property, whereof C became the purchaser, and at the time of sale paid a deposit of 1341. to H. C failed to complete, and after a lapse of two years, F alleging that fact, again employed H to sell the property, which was then purchased by V, and he paid H a second deposit of 1281. It appeared that F had acted as the agent of T, who was the real owner of the property, and who on disputes taking place, sued H for both deposits, upon which he obtained a judge's order for C, V, and T to interplead, but on the hearing, the judge declined to interfere in the matter. H then caused notice to be given to the attorneys who appeared for the other parties at such hearing, that he intended to file a bill of interpleader and injunction against them, unless the matter was arranged. They replied to this notice, but took no steps to determine the right to the deposits. H then filed his bill, and obtained an injunction, restraining the vendor and purchasers from proceeding at law against him: held, that the right of the first purchaser to a specific performance must be disposed of before the claim to his deposit could be settled, and upon that depended the next question, whether the second purchaser was entitled to his deposit with a compensation for breach of contract; the court refused to determine any thing in the way of interpleader, until the question of specific performance was determined, but granted the injunction, and ordered H (the auctioneer) to have his costs of the action, and of the suit out of the fund in court (both deposits). *Hoggart v. Cutts and others*. M. R. IV. 230. See V. 391. on appeal, L. C.

4. *Interest.*—A purchaser cannot recover damages for loss of interest during the continuance of negotiations carried on after the day appointed for completing a contract, which is finally abandoned, without averring in his declaration a readiness to perform the contract, on his part after such day, or alleging that by a subsequent agreement, the contract had been enlarged to a reasonable time, within which a further breach of the contract had been committed. *Metcalf v. Fowler*, Ex. IV. 430.

5. *Laches.*—*Lapse of time, a bar to specific performance.*—In 1818, R agreed to purchase certain premises of S for 501. and paid 301. at the time, the contract was entered into. No legal assurance was made, S died in 1823, having devised the premises to his wife, who died in 1824, having also devised them. After her death, some negotiation took place respecting the estate. A draft conveyance was prepared, but nothing further done until 1834, when a bill for specific performance was filed by R against the executor of S, which was dismissed. *Rayner v. Green*, M. R. IV. 107.

6. *Possession, character of purchaser in, until purchase money paid.*—A agreed to purchase land of B, and paid a deposit, and agreed to pay the remainder of the purchase money on a given day, with interest thereon in the meantime, upon condition that he should take immediate possession: he entered accordingly and commenced building; but difficulties having arisen between the parties, and the purchase money not being paid at the time stipulated or the interest regularly, ejectment was brought by B, no notice to quit having been previously given, but possession was demanded by B: held, that this was only a tenancy at will which might be determined by demand of possession. *See d. Thomas v. Chamberlain*, Ex. I. 393.

7. *Possession, taken by a purchaser by mistake.*—Where the agent of a joint stock company took possession of land by mistake, and without showing any deliberate intention on the part of the company

to take such possession otherwise than in the ordinary way, and on discovering his error had immediately taken such steps as he considered to rectify it; a motion to pay purchase money into court was therefore under these circumstances refused. *Tomlinson v. Manchester and Birmingham Railway Company*, V. C. IV. 167.

8. The rule is, that where a purchaser deliberately takes possession, and is in the possession of land, he shall not be at liberty to retain such possession, and at the same time keep back the payment of the purchase money. *Id.* See also *Cattell v. Simons*, M. R. III. 407.

9. Real estate devised to trustees for sale, and the trustees were authorised to give effectual receipts for the purchase money, and the purchasers were not to see to its application, and the trustees were to stand possessed of the purchase money upon trust for six daughters, (English women,) some of whom married Frenchmen, resided in France and had children; an objection made to the title on the ground of their being aliens, was overruled. *De Houmelin v. Sheldon*, M. R. I. 42. *Id.* 218. L. C. II. 84. Judgment of M. R. affirmed, 6th Nov. 1839. MSS.

See *Addis v. Campbell*, II. 72. M. R. on Appeal, L. C. VI. 37.

See also ALIENS.—ATTORNEYS, *b. b.*—HUSBAND AND WIFE, 6.

#### VERDICT.

See COSTS, 8.—ACT FOR ABOLISHING IMPRISONMENT FOR DEBT, 2.—ISSUE, 2.

#### VERDICT, SETTING ASIDE.

See ATTORNEYS, *v.*

#### VESTING ORDER.

See DEBT ACT, FOR ABOLISHING IMPRISONMENT FOR.—INSOLVENT DEBTORS, 8.

#### VOID CONTRACTS.

See CONTRACTS.

#### VOID GIFTS.

See LIMITATIONS.—BEQUEST, 4.

#### VOLUNTARY AGREEMENT.

See AGREEMENT.

#### VOLUNTARY SETTLEMENT.

See SETTLEMENT, VOLUNTARY.

#### WARRANT OF ATTORNEY.

1. *Execution of, under 1 & 2 Vict. c. 110. s. 9. attested by plaintiff's attorney.*—Where a warrant of attorney was given as a collateral security with a mortgage for securing a sum of money, and the warrant of attorney was attested by the attorney then acting for the mortgagee, but who had been occasionally called upon to act for the mortgagor—the court set it aside, although the mortgagor declined to call in another professional adviser, when recommended by that attorney to do so, on the ground that he wished his affairs to be kept as private as possible; but the court refused to interfere by ordering the mortgage and securities to be given up, which was the subject of a Court of Equity. *Rising v. Dolphin*, B. C. III. 310.

2. *Execution of, attested by an Attorney acting for both parties.*—Where a warrant of attorney was attested by an attorney, who alone was present and attested its execution, but who had previously, and on the occasion of making the warrant of attorney, acted as the attorney for the plaintiff, to whom he made out his bill of costs for preparing the warrant of attorney: the Court held that the attorney must be taken to have acted as the attorney for the plaintiff, and not for the defendant; that wherever there was only one attorney present at such transactions, it

ought clearly to appear that he acted in no manner for the party to whom the security is given; and that the warrant of attorney was bad. *Saunderson v. Westley*, Ex. IV. 78.

3. *Nomination of attesting attorney by the plaintiff's attorney.*—It is not necessary for a party executing a warrant of attorney to originate and primarily suggest the name of an attorney to attest its execution; it is sufficient if he spontaneously adopts an attorney mentioned to him even by the plaintiff's attorney, and that attorney attests the execution as required by the act. *Taylor v. Nicholl*, Ex. III. 362. RULE ESTABLISHED.

4. A was indebted to B in a sum of money, for which A agreed to give his warrant of attorney. B instructed his attorney to prepare such an instrument, which he accordingly did, and called upon A to execute it, telling him that some professional person must be present on his executing the instrument, and said "I will send Mr. S. to attend on your behalf." Mr. S. attended accordingly, and explained the instrument to A, and asked him whether he wished him to attest it on his behalf, to which he replied in the affirmative. The Court held that the provisions of the act had not been complied with, and the warrant of attorney was set aside. *Gripper v. Barrow*, Ex. IV. 300.

To bring a case within the act, it must appear that the defendant understood that he had an option on the subject. If that were so, and the nomination or recommendation of a professional man by the plaintiff's attorney was confirmed or adopted subsequently by him, (as was the case in *Taylor v. Nicholls*, ante 3.), then the act would be substantially complied with. Per ALDERSON, B. *Id.* See *Bligh v. Brewer*, 1 C. M. & R. 650.

5. *Revival of Judgment on.*—A judgment was entered up against a defendant in pursuance of a warrant of attorney, but no execution was issued thereon until five years afterwards, and previous to its being done then the defendant signed an agreement in writing, "admitting the debt due, and consenting to the plaintiff's issuing execution without a writ of *scire facias*, although there might have been no execution within a year and a day." A fiat of bankruptcy issued against the debtor: held, that this being a simple agreement between a debtor and a creditor, involving no interests of third parties, it was sufficient to dispense with the necessity of a *scire facias*, there being no fraud shown on the part of the defendant. *Morris v. King*, Q. B. IV. 249.

See INSOLVENT DEBTORS, 9, *b.*—LEVY.

#### WARRANTY.

In an action against the builder of a barge for a breach of a warranty, that "it was fit for use at the time of sale," the jury was directed to decide "whether the barge was, at the time of delivery, fit for use, considering its nature and condition, or whether it was unfit, and that through the carelessness of the defendant in building it." *Shepherd v. Pybus*, IV. 171.

#### WASTE.

See TENANT FOR LIFE.—PRACTICE.—EQUITY, 11.

#### WATERS, MINERAL.

See SOIL, RIGHT IN.

#### WAY, RIGHT OF.

To an action of trespass the defendant pleaded a justification under 2 & 3 W. 4. c. 71. s. 2, and by two of his pleas set up a user for twenty years and forty years, the pleas were not made out by the evidence, which did not show a user for the last four or five years, and the plaintiff had a verdict which the

Court refused to set aside, observing that "user up to the day of action brought is not required, yet user up to a reasonable time must be shown, and certainly three or four years used cannot be presumed in order to support a plea of this kind. *Parker v. Mitchell*, C. P. IV. 108. See Vol. IV. 148. for an essay on the Prescription Act.

See DEDICATION.—PRESCRIPTION.

#### WELL.

See SOIL, RIGHTS IN.

WEST INDIA DOCK COMPANY.

See POOR RATES.

WIDOWS' PENSION.

See MARRIAGE, 2.

#### WIFE.

See HUSBAND AND WIFE.

WIFE'S ESTATE.

See ALIEN.—HUSBAND AND WIFE.

WILL, TENANT AT.

See VENDOR AND PURCHASER, 7.

#### WILLS.

1. *Acknowledgment of signature to.*—Where a testatrix prepared her own will, and acknowledged the signature thereto in the presence of two witnesses, but at different times and apart from each other, the acknowledgment was held insufficient under the stat. 1 Vict. c. 26. s. 9. *In re Bligh*, Pre. C. I. 7.

2. A will was executed in the presence of one witness, who attested that execution; subsequently the testator acknowledged his signature in the presence of three witnesses, who then attested it: held a sufficient acknowledgment. *In re Regan*, P. C. I. 7.

2\* A will was signed in the presence of one witness, and afterwards, on the same day, was acknowledged in the presence of such witness and in that of another person, and declared it to be her hand-writing: held to be a sufficient signature within the statute. *In re Wordington*, P. C. I. 362.

3. A testatrix wrote her will and signed it, but not in the presence of any witnesses. She afterwards sent for witnesses, and on their arrival she thus expressed herself, "I am very glad of it, thank God." She then requested them to witness the will, which they did in her and each other's presence: held a sufficient signature. *In re Warner*, Pre. C. I. 362.

4. *Erasures and obliterations.*—Where the deceased left a will attested by two witnesses, but without date, and in a bequest therein of a legacy of one thousand pounds, the word "one" was written upon an erasure. The court, on proof by the only witness residing in England, that the word "one" was in the testator's hand-writing, although he, the witness, could not state whether the alteration was made before or after execution, and by the person who found the will, that he noticed the alteration at the time of such finding: probate was decreed on the presumption that the alteration was made before signature. *In re Teesdale*, P. C. III. 364.

5. *Interlineations.*—In a codicil, whereby a testator bequeathed a legacy of 50l. to two servants, the words "each of" appeared to have been interlined, and the interlineation was unattested, and the time of its being made could not be ascertained. The interlineation being in the testator's handwriting: probate was decreed with the interlineation on the presumption that it was made before the codicil was executed. *In re Sheriffe*, P. C. IV. 251.

6. *Attestation in testator's absence.*—Where the deceased had made several wills, and on the day of his decease executed a codicil in the presence of two witnesses, who took the codicil into another room, and there, in the presence of each other, attested it in the

testator's absence: the court refused probate. *In re Newman*, P. C. I. 110.

7. Where a testator made a codicil, and having signed it in the presence of two witnesses, left the room, and the witnesses then attested the will in the testator's absence: the attestation was held insufficient. *In re Brown*, P. C. III. 342.

8. The person who prepared a will, after its signature by the testator, took it away, and, with another person who never saw the testator at all, signed the attestation clause: probate was refused. *In re Hillier*, Pre. C. IV. 94.

9. Where the witnesses to the execution of a will did not sign their names in the room where the deceased was, but carried it into an adjoining room separated by a passage, and there attested it. Although the doors were open, and the witnesses could hear the deceased breathe but could not see him. The court refused probate. *In re Ellis*, Pre. C. IV. 110.

10. *Attestation where a testator may not see the witnesses.*—A testator who was in bed and the curtains drawn on both sides and close at the foot, acknowledged and signed a will; the witnesses were in the bed-room, one of them attested it on a table in the room at the foot of the bed, the curtains remaining closed: held, upon the true construction of the act, that where a paper is executed by the deceased in the same room where the witnesses are who attest in this same room where the testator was at the time: held that they do attest in the presence of the testator, though he may actually see or could not see them sign, and probate was decreed. *Newton v. Clark*, Pre. C. III. 167. See cases there cited.

11. *Cancellation.*—Where a testator left a will from which he had cut out his signature, with an intention of making a new will, which failed of being carried into effect by the invalidity of the latter instrument: it was held that such cutting amounted to a cancellation under the recent act. *Hobbs v. Knight*, Pre. C. I. 6.

The act does not contain the words "cancelling and obliterating," but has substituted the words "otherwise destroying." *Id.*

12. *Dateless.*—A codicil, in the handwriting of the testator, but unattested and without date, will be presumed to have been made before the new act came into operation, unless such presumption is rebutted by other circumstances, and the court will in such cases suppose *prima facie*, that a will or codicil was made according to the laws in force at the time. *Re Pechell*, Pre. C. II. 189.

13. *Attorney, Drawer of, made Executor and Residuary Legatee.*—A will drawn by a solicitor who was made executor and residuary legatee after some small annuities were paid. The will was disputed by a niece of the testator on the ground that it was obtained by imposition from a weak and incapable testator: held, that the evidence was not sufficient to sustain the act, and probate was refused. *Denting v. Loveland*, P. C. I. 269—343.

If a person, whether he be an attorney or not, prepares a will whereby a legacy is bequeathed to himself, the vigilance and jealousy of the court is awakened, and the circumstance viewed with suspicion more or less, according to facts of the particular case. In some cases circumstances of this nature have no weighty importance attached to them, and the rule generally varies according to circumstances; for instance, the *quantum* of the legacy, and the proportion it bears to the property disposed of, and numerous other contingencies. But in no case will such circumstance amount to more than an inducement to the court to exercise vigilance and circum-

spection in its investigations, in order that probate may not be granted without full and entire satisfaction that the instrument expressed the testator's intentions. *Id.*

14. *Concealment of, from a Wife.*—Where the attesting witnesses to a will admitted in their depositions that means and contrivances were used to keep the wife of the testator ignorant of its execution, and in which they co-operated: held, that the witnesses had made themselves parties to concerted schemes and conspiracies to obtain the will by fraud, and on the evidence of such witnesses, refused to pronounce for the validity of the will. *Wintle v. Wintle*, Pre. C. I. 379.

15. *Execution, proof of due.*—Where a will on the face of it appeared to have been duly executed and attested by two witnesses, but from an affidavit (which, by a rule of the court, is required in cases where the attestation clause does not expressly declare that the testator signed the will in the presence of both the witnesses, who were present at the same time, and subscribed their names in the presence of the testator) it appeared that the instrument was not so executed, the court refused probate. *In re Ayling*, Pre. C. I. 48.

16. The court will not permit a witness to be re-examined in order to supply a deficiency in the proof of the execution of a will discovered after publication of evidence. *In re Richards*, P. C. III. 396.

17. *By executors after renunciation.*—An executor, being also a legatee, and having intermeddled with the effects, subsequently renounced and assigned his legacy: held, that he had sufficiently divested himself of his interest, so as to be a competent witness in a suit. *Mundy v. Slaughter*, Pre. C. I. 248. II. 30.

18. *Signature must be at the foot or end.*—A testator duly made and executed his will, but after the signature and attestation, was written an appointment of executors: held, that, this was not such a signing at the "foot or end" as required by the act, and probate was refused. *In re Howard*, Pre. C. II. 343.

19. The court refused probate in a case where the testator had written his will on two sides of a sheet of paper, but had with the witnesses signed and attested it on the first side only. *In re Millward*, Pre. C. I. 47.

20. *Signature in pencil.*—A will in the testator's own handwriting dated and signed in pencil was held to be admitted to probate, and not to be regarded as a deliberative paper only. *In re Roberts*, Pre. C. IV. 363.

21. *Signed by another person for a testator.*—A will signed by another person for a testator thus: "Signed on behalf of the testator and by his directions by me," and the testator acknowledged the signature in the presence of his wife and mother who attested the will: held, that the wife's interest under the will was void, and probate was decreed. *In re Clarke*, Pre. C. I. 316.

22. *Husband of legatee incompetent as witness.*—An attesting witness to a will, who subsequently marries one of the legatees, is an incompetent witness to prove the validity of that will. *M'Kensie v. Yeo*, Pre. C. IV. 223.

23. *Loss of.*—Where a will was lost by accident before probate had been obtained, the court granted probate of a copy until the original should be found. *In re Bramfield*, Pre. C. II. 393.

24. *"Mariner."*—The term "mariner" or seaman, in section 11 of the New Will Act, comprehends all persons in her majesty's navy—though superior officers of the ship—being at sea: probate was allowed of the unattested codicil of a purser of a man-of-war (a warrant officer) dying at sea. *In re Hayes*, Pre. C. II. 279.

25. *Soldiers.*—A surgeon of the East India Company's service on board one of her Majesty's ships in charge of recruits for the Queen's service is a "soldier" in actual military service within the meaning of the new Will Act. *In re Donaldson*, Pre. C. IV. 124.

26. *Obliterations, effect of.*—A will duly made and executed before the New Will Act came into operation, with unattested obliterations made since: held that the obliterations were of no effect, and probate was decreed as to the erasures in blank. *Roe v. Kent*, Pre. C. III. 311.

27. *Revocation.*—Where a deceased had duly made and executed his will, but subsequently his wife died, and he quarrelled with all his sons, and made various alterations in his will, cutting them off with a shilling. At his death the will was found with these obliterations and alterations, and with the names of the attesting witnesses erased: held, that the will was revoked, that the deceased died intestate. *Holly v. Munnings*, Pre. C. III. 88.

28. The drawing a pen through the testator's name and across the attesting clause is not a revocation under the new Will Act. *In re Stephens*, Pre. C. IV. 144.

29. *Suicides.*—A testator committed suicide the day after he made his will, and the coroner's jury returned a verdict of temporary insanity. Upon evidence that he was of sane mind, probate was decreed. *See in re Thompson*, Pre. C. IV. 61.

#### WILLS, CONSTRUCTION OF.

*See* CREDITORS, 2.—DEVISE.—LEGACY.—LIMITATION.

#### WITNESS.

*See* BANKRUPTCY, 2. 30.—DEPOSITIONS.—EVIDENCE.—SUSPENA.

#### WOOLLEN MERCHANTS.

A custom of clothiers or woollen merchants that a tailor retaining cloths left with him for inspection: beyond a month is considered to have accepted them, established. *East v. M'Gie*, N. P. II. 186.

#### WRIT, IRREGULAR, SERVICE OF.

*See* ATTORNEYS, 2.

#### WRIT OF CAPIAS.

*See* CAPIAS.

#### WRIT OF ERROR.

*See* ERROR.

#### WRIT OF ENQUIRY.

*See* SHERIFF, 4.

#### WRIT OF SUMMONS.

*See* SUMMONS.

#### WRITS AND COPIES.

Owing to a mistake, a writ of summons was tested on the 4th April, instead of the 4th May, the *præcipe* was properly dated on the latter day: held, that a judge at chambers had under the general rule of M. T. 3 W. 4. s. 10. power to order the writ to be amended by altering the teste to the 4th May. *Kirk v. Dolby*, Ex. IV. 122.

*See* PRACTICE, (EQUITY), 9.

#### WRITS, FORMS OF.

The forms of the writs adopted by the judges may be varied as circumstances require, therefore where a *ca. sa.* commanded an arrest not only for debt, but for interest thereon, although the writ did not literally follow the form prescribed, yet the court refused to set it aside for irregularity. — *v. Martin*, Ex. IV. 189.

When a party is allowed to levy interest as well as principal, the form of the writ may be altered, even if the judges had not themselves made any rule. *Per Parke, B.* *Id.*

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